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MORTGAGE.

THORNBROUGH *v.* BAKER.

1677. 1 Ch. Ca. 283 (*a*).

Executor of Mortgagee in Fee entitled to Money secured on Mortgage.

The executor, not the heir, of a mortgagee in fee, is entitled to the money secured by the mortgage.

Reasons of that doctrine.

THE plaintiff's bill being, that Lawrence Clifton, by indentures of lease and release between him and James Baker, bearing date the 20th and 21st of October, 1656, in consideration of 500*l.* paid to him by the said James Baker, did convey to the said James Baker and his heirs several lands in Stoak, in the county of Surrey; and by another indenture, executed at the same time between the same parties, it was agreed between them, that if the said Lawrence Clifton should, during his life, pay to the said James Baker, his heirs, executors, administrators, or assigns, 30*l.* yearly, at Lady-day and Michaelmas, or within thirty days after, by equal portions; and if the heirs of the said Lawrence should, within six months after the death of the said Lawrence, pay to the said James Baker, his heirs, executors, administrators, or assigns, the sum of 500*l.*, with interest since the paying the last 15*l.*, then the lease and release should cease and be void.

About one year after, the said Lawrence Clifton died, leaving the said Jane [the plaintiff's wife] his only daughter and heir. And by another indenture, bearing date the 25th of May, 1658, made between the now plaintiff and the said James Baker, the said James Baker did covenant with the plaintiff, that if they, or either of them, should

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(*a*) S. C., 3 Swanst. 628; nom. Thornborough *v.* Baker, and Freem. Ch. R. 143.

pay to the said James Baker, his heirs, executors, administrators, or assigns, the sum of 20*l.* only, on the 20th of October then next following, and the sum of 530*l.* on the 20th of October 1659, then the said indenture of lease and release should be void.

The said James Baker died about May, 1659, and the premises being forfeited, they descended to the said defendant John Baker, son and heir to the said James: and the defendant Sarah, the relict of the said James Baker, having administration of his estate granted to her, her husband John Nichols and she do pretend to the said mortgage; and the plaintiff, praying a reconveyance on payment of what was due, the defendant John Baker, by his answer confessing the mortgage and agreement aforesaid, and that the mortgage, being forfeited, descended upon him as heir to his father, and submitting to reconvey the premises on payment of principal, interest, and costs to him; the defendant and John Nichols and his wife confessing the said mortgage, and insisting, that the said Sarah was administratrix to her former husband and thereby entitled to the said mortgage-money and interest, although she hath other assets of her husband's estate, with a considerable overplus.

Sir HARBOTTLE GRIMSTON, M. R., upon the hearing of the cause the 11th of February, in the twenty-third year of his now Majesty's(*a*) reign, decreed that, *upon payment of principal, interest, and costs*, the defendant John Baker should reconvey the premises; and it was then farther ordered, that the party should attend the Right Honourable the Lord Keeper of the Great Seal of England for his Lordship's directions, whether the principal and interest should be paid to the defendant John Baker, the heir, or to the defendant Sarah, the relict and administratrix of the said James Baker; since which, the said principal and interest having been paid by the plaintiff [and his wife], and a reconveyance made unto them, but the question between the heir and the administratrix being not settled, Lord Keeper *Finch* (*b*), upon hearing and full debating of the matter, this present day, by counsel learned, as well for the heir as the administratrix, whether the said principal money and interest doth belong and ought to be paid to the heir or administratrix; and the

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(*a*) Charles 2nd.

(*b*) Afterwards Lord Chancellor and Earl of Nottingham.

Thornbrough v. Baker.

former precedents being produced, his Lordship, having been attended with the said cause and precedents, and having taken time to consider thereupon, did now declare, that the mortgage ought to go to the other defendant John Nichols and his wife, the administratrix of James Baker, and not to John Baker, son and heir of the said James Baker; because the reason of the common law in these cases ought, as near as may be, to be followed in equity. Now, by the common law, if the conditions or defeasance of a mortgage of inheritance be so penned, that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executrix, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeasance appoints the money to be paid either to heirs or executors disjunctively, there by the common law, if the mortgagor pay the money precisely at the day, he may elect to pay it either to the heirs or executors as he pleaseth; but where the precise day is past, and the mortgage forfeited, all election is gone in law; for in law there is no redemption. Then, when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heirs or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election, for then the mortgagor might defer the payment as long as he pleaseth, and at last, for a composition, by payment of the money to that hand which will use him best; much less can the Court elect or direct the payment where they please; for a power so arbitrary might be attended with much inconvenience throughout. Therefore [we ought] to have a certain rule in these cases, and a better cannot be chosen than to come as near unto the rule and reason of the common law as may be. Now, the law always gives the money to the executor, where no person is named; and where the election to pay to either heir or executor is gone and forfeited in law, 'tis all one in equity, as if either heir or executor were named, and then equity ought to follow the law, and give it to the executor; for, in natural justice and equity, the principal right of the mortgagee is to the money, and his right of the land is only as a security for the money; wherefore, when the security descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money, the land belongs to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee. And for this reason a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though it may seem hard that the heir should part [with] the land, and be decreed to make a reconveyance without having the money which comes in lieu of the land, yet it will not seem so to them who consider that the land was never more than a security, and that, after payment of the money, the law keeps a trust for the mortgagor, which the heir of the mortgagee is bound to execute; and his Lordship declared, that the right to a sum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore his Lordship did not think it material that the administratrix in this case had assets without this money: for assets, or not assets, is not the measure of justice to executor or administrator, but serves only as a pretence to favour the heir, who either ought to have the money, if there be no assets, or not to have it, though there be assets. And for the same reason his Lordship did not think it material that there wanted circumstances of a personal covenant from the mortgagor to pay the money; for though the case of the administratrix of the mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared that he had considered the various precedents in this case which had been urged, whereof not one did come to the very point, there being a great difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey upon repayment of the purchase-money (*a*); the other late precedents which made for the heir, being contrary to the more ancient precedents of this Court, and to some modern precedents also, which seemed to his Lordship of more weight, his Lordship being of opinion that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee in his lifetime, or by his last will, do otherwise declare and dispose of the same. Wherefore, and upon the whole matter, his Lordship, having fully weighed the precedents, and what was said on either side, doth order and decree, that the mortgage-money and interest shall be paid unto the said

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(*a*) See 1 Vern. 271, 412; 2 Ch. Ca. 49, 50, 51, 220; 2 Vent. 348, 351; 1 Ch. Ca. 98; 3 Ch. R. 187.

John Nichols and his wife, and kept by them; and that what security hath been given by either of them concerning the disposing of the said money and interest, or the abiding the order of this Court as to the payment of the said money and interest, be delivered up to them and cancelled.

CASBORNE *v.* SCARFE.

1737. 1 Atk. 603.

Nature of Equity of Redemption—Is an Estate in Land.

> A., a feme sole, seised in fee of a freehold estate, mortgages it, and afterwards intermarries with B. A. dies, and the mortgage is not redeemed during the coverture. This is, notwithstanding, such a seisin in the wife as entitles the husband to be tenant by the curtesy of the mortgaged premises; for in a Court of equity the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.

The father of the plaintiffs (Elizabeth and Mary Casborne) devised to Anne, his daughter, the plaintiffs' eldest sister, all his estate, freehold and copyhold, in fee, charged with 200*l.* apiece to the plaintiffs. Anne, after her father's death, possessed the several estates, and afterwards intermarried with the defendant Inglis, and soon after died, leaving issue a son, who died an infant and without issue; upon whose death the plaintiffs, as heirs-at-law both to the infant and their sister, became entitled to the real estate. Anne Inglis, before her marriage, mortgaged part of the freehold premises to the defendant Scarfe, for 900*l.* The bill is brought against the mortgagee and the husband for an account, and for the direction of the Court.

The defendant Alexander Inglis insisted that, having had issue by his wife, he was entitled to an estate for life, as tenant by the curtesy, in his late wife's freehold premises, subject to the mortgage of the defendant Scarfe.

On the 5th of May, 1735, Sir *Joseph Jekyll*, M. R., on hearing the cause, was of opinion the defendant Inglis was not entitled to a tenancy by the curtesy in the estate comprised in the mortgage.

The defendant appealed from this decree to Lord Chancellor *Hardwicke*, and the cause came on before his Lordship on the 28th of January and 4th of March, 1737.

For the plaintiffs it was insisted, the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage. It was compared to the case of a proviso for a re-entry in a conveyance and no re-entry ever made, and to a condition broken, and no advantage ever taken thereof; that the wife was never seised in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and was in receipt of the rents and profits; so that the mortgagor had merely a right of action, or a suit in a Court of equity, in order that the estate might be reconveyed to her upon complying with the terms in the mortgage; that it was the *laches* of the husband he did not pay off the mortgage money, which would have re-vested the estate in the wife; but, not having done that, there is no more reason that he should be a tenant by the curtesy here, than that he should have the benefit of a seisin in law in the wife, which he cannot have, for there must be an actual seisin; for the words of Lord Coke, in his comment upon the 35th section of Littleton, are—*A man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion, or a remainder, expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.* It was likewise said, if it be considered as an interest, it is merely a contingent one, as it is uncertain whether the mortgagor will ever take back the estate again, for it was entirely at her election; and supposing it to be mortgaged to the value, though she had a right to redeem, yet she was under no obligation to do it; and it does not appear in this case the wife ever intended it; and if the law should cast the estate on the husband, he, by never paying the interest during his life, might load the inheritance in such a manner that it would never be of any benefit to the heir.

On the other hand it was insisted that the husband's paying off the mortgage would have been buying what the law gives him as a tenant by the curtesy; that, though at law a mortgage in fee is a revocation of a will, yet in a Court of equity it is otherwise; and here a mortgagor is considered as having still the ownership of the estate, which is only a pledge or security for the money of the mortgagee, without making any alteration in the property, for the estate retains all its former qualities as any other not in mortgage.

That the argument *ab inconvenienti* falls to the ground, for, as a tenant for life, he will be obliged to keep down the interest during life, so that there is no danger of his injuring the inheritance. That there is a difference between a tenant by the curtesy and a tenant in dower, *with regard to a trust;* for there may be a tenancy by the curtesy of a trust, though a woman is not endowable of it; but what were the grounds of this distinction he would not take upon him to say; for as, both by the decrees of this Court and in the House of Lords, it has been so determined without giving any reasons, he would not presume to offer any (*a*).

* * * * * *

That a mortgage in fee is no more than a charge upon the land; and that, in the case of *Tabor* v. *Grover* (*b*), it was held a mortgage in fee (though two descents cast, and though more was due upon it than the value, and though the mortgagor by his answer said he would not redeem) should go to the executor, and not to the heir of the mortgagee, the equity of redemption not being foreclosed or released. The several cases following were likewise cited by the defendant's counsel: *Hall* v. *Dench* (*c*), *Amhurst* v. *Dowling* (*d*), *Strode* v. *Lady Russel* (*e*), *Lady Williams* v. *Wray* (*f*), and *Pawlett and the Attorney-General* (*g*).

After the point had been argued on both sides, the Lord Chancellor declared his surprise that this matter, as it seemed a case which must frequently happen, should never have been brought before the Court till now; and as it was a question of great consequence and general concern, said that he should take time to give his opinion.

On the 25th of March, 1738, the cause stood for judgment.

Lord Chancellor Hardwicke.—This question depends on two considerations:

First, what sort of interest an equity of redemption is considered to be in this Court.

(*a*) 2 Vern. 585 and 680.

(*b*) 2 Vern. 367.

(*c*) 1 Vern. 329.

(*d*) 2 Vern. 401.

(*e*) 2 Vern. 621, 625.

(*f*) 1 P. W. 137; Pr. Ch. 151; 8 Co. 96.

(*g*) Hard. 467, 469.

Secondly, what is requisite to entitle the husband to be tenant by the curtesy.

First, an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

By a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed (*a*); and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate, and after makes a mortgage in fee; though that is a total revocation in law, yet in this Court it is a revocation *pro tanto* only.

It is certain the mortgagee is not barely a trustee to the mortgagor; but to some purposes, *videlicet*, with regard to the inheritance, he certainly is, till a foreclosure.

Secondly, at common law, four things are necessary to entitle the husband to the tenancy by the curtesy, *marriage, issue, death of the wife, seisin in fact.* In this case the three first concur, but it is objected, that here is no seisin whatever of the legal estate in the wife in the consideration of the law. But that is not the present question; the true question is, if there was such seisin or possession of the equitable estate in the wife, as in this Court is considered as equivalent to an actual seisin of a freehold estate at common law, and I am of opinion there was.

Actual possession, clothed with the receipt of the rents and profits, is the highest instance of an equitable seisin, both of which there was in this case, and that a husband shall be tenant by the curtesy

(*a*) Strode *v.* Russel, 2 Vern. 625.

Casborne v. Scarfe.

of the equitable estate of the wife has been often determined, as in *Sweetapple* v. *Bindon* (*a*), which was a much stronger case than this; for in that case there was neither seisin nor land; and in *Greenhill* v. *G.* (*b*) it was held that lands articled for only will pass by a will.

The principal objections are two:

First, *laches* and neglect in the husband, by not paying off the mortgage.

Secondly, that the rule ought to be equal between dower and curtesy, and that dower cannot be of a trust estate.

As to the first, it is not similar to the cases of *laches* in the husband, viz. as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and it holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is necessarily attended with many delays.

The second objection proves too much, if anything, and entirely fails by the precedents of this Court. If any innovations were to be made, I am of opinion the nearest way to right would be to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant by the curtesy of it; and there can be no inconvenience to the heir-at-law, for he would have the same remedy in this Court, to make a tenant by the curtesy keep down the interest, as against any other tenant for life. For these reasons I am of opinion the defendant is entitled to be tenant by the curtesy; and the decree at the Rolls, as to this part, must be reversed.

See notes to this case, *infra*, p. 37, *et seq.*

(*a*) 2 Vern. 536.

(*b*) 2 Vern. 680.

HOWARD *v.* HARRIS.

1683. 1 Vern. 190 (*a*).

Restrictions on Redemption of Mortgage Discountenanced in Equity. Mortgage cannot be made Irredeemable.

No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor or upon failure of issue male of his body.

Mr. Howard settles a jointure on plaintiff, his lady, before marriage, which, proving defective, and not of value according to the marriage agreement, he therefore afterwards makes her an additional jointure of other lands; and afterwards, Mr. Howard, in 1673, makes a mortgage to the defendant Harris, for securing 1,000*l.* with interest, in which (amongst others) part of the lands belonging to the additional jointure was comprised; and in the mortgage there is a special clause of redemption, viz. that if Mr. Howard, *or the heirs males of his body*, should in June, 1686, pay the principal sum of 1,000*l.* and 60*l.* per annum interest in the meantime, then Mr. Howard, or *the heirs males of his body*, might re-enter; and Mr. Howard covenants *that no one but he or the heirs males of his body should be admitted to redeem this mortgage*, and likewise covenants to pay the 1,000*l.* on the —— day of —— in the year 1686, and 60*l.* per annum interest in the meantime, by half-yearly payments, from the date of the mortgage.

Mr. Howard dies without issue.

The plaintiff being a jointress of part of the mortgaged lands, and so entitled to redeem the whole, in 1677 exhibits her bill to redeem this mortgage.

The defendant, by answer, insists the lands are now become irredeemable.

This cause was heard before the Lord Chancellor *Nottingham*, and

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(*a*) S. C., 1 Eq. Ca. Abr. 312, pl. 11, 2 Ch. Ca. 147.

now, upon the defendant's petition, came to be reheard before the Lord Keeper *North* (*a*), and was by them both decreed for the plaintiff.

For the plaintiff it was insisted,

1st. That restrictions of redemption in mortgages have been always discountenanced in this Court, and it would be a thing of mischievous consequence, should they prevail; for then it would become a common practice and a trade amongst the scriveners, so to fetter the mortgagors as to make it impracticable for them to redeem according to the precise letter of the agreement; and the plaintiff's counsel insisted, that there was no more in this case against a redemption than there was in every mortgage. It is true, here is an express covenant, that none but Mr. Howard, or the heirs males of his body, should redeem; and in every mortgage there is a proviso, that, in case the money be not paid by such a day, the mortgagee shall hold the land discharged: and not only so, but there is likewise an express covenant for further assurance; so that, in every mortgage, the agreement of the parties upon the face of the deed seems to be, that a mortgage shall not be redeemable after forfeiture.

2ndly. It was argued, that it was a maxim here, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable, than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and by the same reason, equity will let a man loose from his agreement, and will, against his agreement, admit him to redeem a mortgage.

3rdly. It is another standing rule, that a mortgage cannot be a mortgage of one side only (*b*). And here it is plain, Mr. Harris may make it a mortgage; for he has a covenant for the repayment of his mortgage-money. And for precedents were cited the case of *Kilvington* v. *Gardiner*, who was to redeem at any time in his lifetime, and *Sir Robert Jason's* case (*c*).

For the defendant it was insisted, that this express agreement of the parties ought to be pursued; and they pretended the same was

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(*a*) Afterwards Earl of Guildford.

(*b*) Exton *v.* Greaves, 1 Vern. 138.

(*c*) Jason *v.* Eyres, 2 Ch. Ca. 33.

Howard v. Harris.

made upon good consideration, viz. that the defendant Harris had formerly purchased these very lands from Sir Robert Howard, father of the plaintiff's husband, who pretended himself to be seised in fee; but this land was afterwards evicted, upon pretence that Sir Robert was only tenant for life; and the reason of this special clause of redemption was, that, in case Mr. Howard should have issue male, the estate might remain in the family; but if he had none, it should be left to the defendant, as something towards a compensation for the loss in his purchase, and Mr. Harris was to submit to the loss, and not to question Mr. Howard's title. But as to this they had not a word of it in proof, saving only, that the defendant had made such a purchase, but not that this was the consideration of the agreement; and it likewise appeared that Mr. Howard claimed by an ancient settlement from the Lord Suffolk, and not by any settlement made by his father, Sir Robert.

Then it was insisted, that this additional jointure was voluntary, and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered, he was a purchaser for no more than his mortgage-money; and one that comes in by a voluntary conveyance may redeem a mortgage; and if the additional jointure was voluntary, so likewise was the agreement that none but Mr. Howard, or the heirs males of his body should redeem; and that was subsequent to the additional jointure.

And it was further urged, that the mortgaged estate is a reversion after lives only, and is at present but 7*l.* per annum; and that Mr. Harris did actually borrow the mortgage-money to lend on this reversion; and it could not be presumed he would have so done, unless it had been in consideration that this mortgage had been made in a special manner redeemable.

But it was answered that possibly the defendant might design such a catching bargain of this mortgage; but that was a sort of circumvention, and the worst part of the case.

Lord Keeper North (*a*), after long debate, decreed the mortgage should be redeemed; the rather, for that the defendant had a covenant for repayment of his mortgage-moneys (*b*); but said, if the case had been, that a man had borrowed money of his brother,

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(*a*) Afterwards Earl of Guildford.

(*b*) The omission of the covenant is immaterial; see 1 P. W. 271; 2 Atk. 496; King *v.* K., 3 P. W. 358.

and had agreed to make him a mortgage, and that, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity (*a*).

But then, for the defendant, the mortgagee, it was insisted, that this mortgage having been made ten years since, and of a reversion, where 7*l.* per annum rent was only reserved; in this case, the defendant ought to have interest upon interest, otherwise he would be a great loser in this case.

But, as to that, it was answered, that the plaintiff's bill to redeem was filed so long since as 1677, and that the defendant had by answer opposed the redemption: and, therefore, from that time, he had no pretence to an allowance of interest for his damages, and it was never known in this Court that interest upon interest was at any time allowed in any case.

But the Lord Keeper was clear of opinion, that, as to so much interest as was reserved in the body of the deed, that should be reckoned principal (*b*); for, it being ascertained by the deed, an action of debt would lie for it; and therefore it was reasonable that there should be damages given for the non-payment of that money. And whereas it was urged, that this had never been practised, and that there was not any such precedent in the Court; and that, if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security; which would be to change the law and practice in this Court, and make all mortgagors pay interest upon interest.

But the Lord Keeper said, he was clear in that distinction between debt and damages; and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts; and accordingly decreed, that, after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a year, for which the defendant might have sued at law and recovered damages.

See notes to this case, *infra*, p. 18, *et seq.*

(*a*) That is to say, that it might be supported as a family arrangement. See Stapilton *v.* S., and note, vol. i., p. 234.

(*b*) Sed vide Thornhill *v.* Evans, 2 Atk. 330.

Thornbrough v. Baker, &c.

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1. The Right to Redeem.

(a) Generally. (b) Once a Mortgage, always a Mortgage. (c) Clog on the Equity of Redemption. (d) Collateral Advantages to Mortgagee.

(a) Generally.

The ancient form of mortgage was by conveyance to the mortgagee defeasible on condition subsequent, the condition being the repayment by the mortgagor of the money lent on a certain day at a certain place. On the failure of the mortgagor to repay in strict accordance with the condition, the mortgagee's estate became absolute, and the mortgagor's interest was extinguished. Thus Littleton says (*a*): "If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may re-enter, &c., in this case the feoffee is called tenant in morgage, which is as much to say in French as mortgage, and in Latine *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not, and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c."

(*a*) Co. Litt., s. 332.

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This form of mortgage described by Littleton was superseded by the present form, the essential elements of which are: (α) a conveyance of the legal estate in the property mortgaged, (β) a covenant for payment of the sum advanced on a day named with interest thereon, and (γ) a proviso for reconveyance of the legal estate on repayment being made in accordance with the covenant.

Under this form the mortgagor has a legal right to redeem on performance of (β), but if he fails his interest at law in the mortgaged property is extinguished.

The Courts of equity, however, regarded a mortgage as essentially a security for the payment of a debt or the discharge of some other obligation (*a*); and accordingly, disregarding the legal form, gave the mortgagor the right to redeem, though at law the estate of the mortgagee had become absolute (*b*).

The right of redemption being thus established contrary to the agreement as expressed in the mortgage, it became necessary to guard against the restriction or limitation of that right by any arrangement between the parties made *at the date of the mortgage*. The attitude taken up by the Courts of equity is thus expressed by Lord *Macnaghten* in *Noakes & Co.* v. *Rice* (*c*):—"Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security." The main principle thus stated by Lord *Macnaghten* is expressed compendiously in the maxim, "Once a mortgage, always a mortgage"; the "necessary consequence" or "corollary" is thus expressed by Lord *Davey* (*d*): "Once a mortgage, always a mortgage, and nothing but a mortgage." This corollary is more commonly expressed by the saying, "There must be no clog upon the equity of redemption."

(*a*) Per *Lindley*, M. R., Santley *v.* Wilde (1899) 2 Ch. 474.

(*b*) For early instances, see Langford *v.* Barnard, Tothill, 134; Emmanuel College *v.* Evans, 1 Ch. R. 18.

(*c*) (1902) A. C. 24, at p. 30.

(*d*) Noakes & Co. *v.* Rice, supra, at p. 33; and see per Lord *Davey* in Bradley *v.* Carritt, (1903) A. C. 266.

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During the period that the fundamental principles relating to the equity of redemption were enunciated, statutes against usury were in force fixing maximum rates of interest upon loans (*a*). The Court of Chancery had, therefore, not only to preserve the full right of the mortgagor to redeem, but also to prevent the evasion of the usury laws by collateral agreements which would make the total remuneration of the mortgagee exceed the legal rate of interest.

The repeal of the usury laws has led to a relaxation of these rules, and "a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable according to the general principles of equity, and provided that it does not offend against the third doctrine" (*b*) (*i.e.*, the rule against the clog).

(b) Once a Mortgage, always a Mortgage.

It must, in the first place be observed, that the principle so expressed does not affect the validity of an agreement or arrangement made between the mortgagor and the mortgagee *subsequently to, and independently of*, the mortgage, though that agreement may modify, limit, or extinguish the right of redemption. There is no rule of equity which prevents a mortgagee from purchasing or accepting a release of the equity of redemption from the mortgagor (*c*), though such an agreement may be voidable if oppressive or unfair. In *Reeve* v. *Lisle* (*d*) a separate independent agreement made subsequently to a mortgage of a ship gave the mortgagee the

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(*a*) The latest of these, the statute 12 Anne, stat. 2, c. 16, prohibited the reservation of interest at a higher rate than 5 per cent. This was repealed by 17 & 18 Vict. c. 90, which took effect on August 10th, 1854.

(*b*) Per Lord *Davey*, Noakes & Co. *v.* Rice, supra, p. 33.

(*c*) Ensworth *v.* Griffiths, 5 Bro. P. C. 184; 15 Vin. Abr. 468; Gossip *v.* Wright, 32 L. J. Ch. 648, affirmed in House of Lords, 17 W. R. 1137; cf. Vernon *v.* Bethell, 2 Eden, 110 (where the agreement was not independent), and see Knight *v.* Marjoribanks, 2 Mac. & G. 10.

(*d*) (1902) 1 Ch. 53, p. 70 (C. A.); (1902) A. C. 461. At the hearing *Buckley*, J., held that, in fact, the mortgage and the agreement were one transaction, but that in law, as the option had to be exercised before the *legal* right to redeem could arise, no question of clogging could exist. The C. A. and the House of Lords held that the transactions were separate. The C. A., *Vaughan Williams*, *Romer*, *Cozens-Hardy*, L. JJ., dissented from the legal proposition laid down by *Buckley*, J.

option, exerciseable within five years, of entering into partnership with the mortgagor on certain terms, and provided that on the option being exercised the mortgagee should release the mortgagor from liability to pay the sum lent, and should transfer the ship to the partnership. It was held that the option was valid and enforceable. On the other hand, the operation of the principle is well illustrated in *Samuel* v. *Jarrah &c. Co.* (*a*), where a company borrowed on the security of its debenture stock, and in the mortgage itself gave the mortgagee the option, exerciseable within twelve months, of purchasing the stock at 40 per cent. The mortgagee sought to exercise the option during the continuance of the loan, but it was held that the option was void.

The chief difficulty in applying the general principle as above stated in Lord *Macnaghten's* words (*b*) lies in determining the true nature of the transaction between the parties; when once the Court is satisfied that the transaction was in essence a mortgage, then its form is immaterial, and the principle is strictly applied (*c*). It is plain from the nature of the case that no exhaustive enumeration of agreements falling within the principle can be made; only some of the more important instances can be given by way of illustration. The leading case *Howard* v. *Harris* (supra) shews that the right to redeem cannot be limited to the mortgagor and certain defined persons representing him, *e.g.*, the heirs male of his body, thereby attempting to cut down the number of persons entitled to redeem. The right, again, cannot be limited to the life of the mortgagor (*d*) or some other time.

So in *Salt* v. *Northampton* (*e*) a transaction between B., a tenant for life in remainder, and certain lenders of moneys, contained an agreement whereby certain policies to be effected upon the life of B. against the life of A., the tenant for life in possession, were, in the event of B. predeceasing A., to belong to the lenders. B. predeceased A. The Court, holding that the transaction was in reality a mortgage, decided that the agreement, which in effect limited the right of redemption to the life of B., was invalid, and that B.'s representatives were entitled to redeem. An agreement, at the date of the

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(*a*) (1904) A. C. 323.

(*b*) Supra, p. 16.

(*c*) Salt *v.* Marquis of Northampton (1892) A. C. 1; and see Goodman *v.* Grierson, 2 Ball & B. 274; 12 R. R. 82 (transaction held to be conditional sale).

(*d*) Spurgeon *v.* Collier, 1 Eden. 55; Manlove *v.* Bale, 2 Vern. 84; Newcomb *v.* Bonham, 1 Vern. 7, 214.

(*e*) Supra.

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mortgage, to sell to the mortgagee at a fixed price if the mortgage money is not paid, is clearly invalid (*a*), as is also an option to purchase taken by the mortgagee in the mortgage deed (*b*).

To the general principle there is one clear real exception. A mortgage deed may contain a provision that the property mortgaged shall not be redeemed for a fixed period of time, such as five or seven years (*c*). It is not clear how far this exception extends. It was recently held inoperative to prevent the mortgagor from redeeming where he was precluded from redeeming for twenty-eight years from the date of the mortgage, but no restriction of time was placed on the mortgagee's right to require payment (*d*). There are also certain apparent exceptions which on examination are not inconsistent with the general principle. In certain old cases, transactions in form mortgages were held to be in the nature of settlements, and restrictions on the right of redemption held valid (*e*).

Again, "a security can only be redeemed where the party redeeming is able to do the thing intended to be secured," and so where the object of the mortgage is to secure the performance of some obligation of indefinite duration, such as the payment of an annuity for life, or "is to indemnify against contingent charges or for any other object not capable of immediate pecuniary valuation," redemption is impossible (*f*).

It is obvious that the ordinary principle is inapplicable to cases of this character (*g*). Cases where the sum of money actually advanced is less than that secured by the deed are dealt with below under "Collateral Advantages," and do not appear to conflict with this principle.

(*a*) *Re* Edward's Estate, 11 Ir. Ch. R. 367; and see Price *v.* Perrie, Freem. Ch. R. 258; Willett *v.* Winnell, 1 Vern. 488; Bowen *v.* Edwards, 1 Ch. R. 222.

(*b*) Samuel *v.* Jarrah &c. Co., supra.

(*c*) Per *Jessel*, M. R., Teevan *v.* Smith, 20 C. D. at p. 729, approved by *Romer*, J., in Biggs *v.* Hoddinott, (1898) 2 Ch. at p. 311. See also per Lord *Macnaghten* in Bradley *v.* Carritt, (1903) A. C. at p. 259.

(*d*) Morgan *v.* Jeffreys, (1910) 1 Ch. 620.

(*e*) King *v.* Bromley, 2 Eq. Cas. Abr. 595; Newcomb *v.* Bonham, 1 Vern. 7, 214; but see Jason *v.* Eyres, 2 Ch. Cas. 33; Freem. Ch. R. 69; Wolston *v.* Aston, Hard. 511.

(*f*) See per Lord *Cranworth*, Fleming *v.* Self, 3 De G. M. & G. at p. 1024.

(*g*) Cf. the decision of the Court of Appeal in Santley *v.* Wilde, (1899) 2 Ch. 474. If that decision is to be supported it must be on some such ground as that stated by Lord *Cranworth*; see note (*f*), supra

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(c) Clog on the Equity of Redemption.

No covenant or provision in a contract of mortgage, (*a*) which imposes any liability upon the mortgagor, either by limiting the user of the mortgaged premises, or by rendering him personally liable in damages, remains operative so that any liability under it can arise by reason of any act or omission of the mortgagor occurring after payment of the principal moneys due under the mortgage, together with interest, costs, and any bonus which has been properly stipulated for and has become payable. It is immaterial whether the fetter or clog operates directly by preventing the mortgagor after redemption from dealing freely with the subject-matter of the mortgage, or indirectly by exposing him after redemption to an action for damages for breach of some covenant.

This statement, it is submitted, represents the result of the decisions of the House of Lords in *Noakes & Co.* v. *Rice* (*b*) and *Bradley* v. *Carritt* (*c*). In *Noakes & Co.* v. *Rice* a mortgage of a lease of a publichouse contained a covenant purporting to bind the mortgagor, and all those deriving title under him during the continuance of the term, from using or selling on the mortgaged premises any malt liquors save such as should be purchased from the mortgagees. It was held that the mortgagor on repayment of the loan was entitled to a reconveyance of the mortgaged property free from any liability under the covenant (*d*).

Here the covenant was regarded by the Courts below as "an equity attached to the property" within the principle of *Tulk* v. *Moxhay* (*e*), and accordingly invalid, since the property itself would be bound after redemption. Lord *Macnaghten* (*f*) and Lord *Davey* (*g*), whilst holding the covenant unenforceable, expressly dissented from the view that the covenant in question could be operative under the principle of *Tulk* v. *Moxhay* (*e*).

In *Bradley* v. *Carritt* (supra), X., a shareholder in a tea company, mortgaged his shares to a tea broker. The mortgage contained a

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(*a*) As to stipulations or provisions in subsequent independent instruments, see Reeve *v.* Lisle, (1902) A. C. 461, and Maxwell *v.* Tipping, (1903) 1 Ir. R. 499.

(*b*) (1902) A. C. 24.

(*c*) (1903) A. C. 266; and see Morgan *v.* Jeffreys, (1910) 1 Ch. 620.

(*d*) Cf. White *v.* City of London Brewery Co., 39 C. D. 559; 42 C. D. 237 (C. A.), for the position of brewer mortgagees in possession letting the mortgaged premises with a "tie" upon their lessee.

(*e*) 2 Ph. 774; cf. John Brothers Abergarw Brewery Co. *v.* Holmes, (1900) 1 Ch. 188.

(*f*) Noakes & Co. *v.* Rice, (1902) A. C. at p. 32.

(*g*) Ibid. at p. 35.

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covenant which (*inter alia*) provided, in the event of the company's teas being sold otherwise than through Y., that X. should pay Y. the amount of the commission he would have earned if the teas had been sold through him. X. paid off the mortgage; the company afterwards ceased to sell through Y., who thereupon brought an action against X. It was held by the House of Lords (supra), reversing the Court of Appeal (*a*), that the agreement was not operative after redemption, and that the action could not be maintained. Here the liability under the covenant could not have affected any transferee of the shares acquiring from X. after redemption, but none the less the covenant was held not to be binding after redemption.

So also in *Browne* v. *Ryan* (*b*) the mortgagor of land, to secure an advance, by an independent deed made at the time of the mortgage, agreed to sell his land within twelve months, to give the sale to the mortgagee (an auctioneer), at 5 per cent. commission, and, if the sale were made otherwise than through the mortgagee, to pay him 5 per cent. on the purchase-money. The mortgagor paid the advance before the day of redemption named in the deed, took a reconveyance, and more than twelve months after the date of the mortgage sold the property through a third person. The mortgagee brought an action for the amount of his commission. The Court of Appeal held that the action failed; the agreement was unenforceable for two reasons: it purported (1) to bind the mortgagor to convert the land into money whether he redeemed or not, so depriving him of his property, and (2) to impose a liability in damages upon him for an act done after redemption.

On the other hand, if a covenant similar to the covenant in question in *Noakes & Co.* v. *Rice* (*c*) is confined in its operation *to the duration of the security*, its validity is unimpeachable, and it will be enforceable at any time before redemption (*d*).

It is submitted that after the decisions in *Noakes & Co.* v. *Rice* supra, and *Bradley* v. *Carritt*, supra, the decision of the Court of Appeal in *Santley* v. *Wilde* (*e*) can no longer be regarded as good law. In that case W., in 1895, agreed to advance 2,000*l.* to S. to enable her to obtain the unexpired residue (nine years) of the lease of a

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(*a*) (1901) 2 K. B. 550.

(*b*) (1901) 2 Ir. R. 653.

(*c*) Supra.

(*d*) Biggs *v.* Hoddinott, (1898) 2 Ch. 307, approved in Noakes & Co. *v.* Rice, supra.

(*e*) (1899) 2 Ch. 474; and see this case discussed in Noakes & Co. *v.* Rice, supra; Bradley *v.* Carritt, supra; Browne *v.* Ryan, (1901) 2 Ir. R. 653.

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theatre, upon the terms that S. should execute a legal mortgage of the lease, when obtained, containing a covenant for repayment of the loan by instalments with interest, and a covenant for payment by S. of one third of the profit rental of the theatre *after payment of the interest during the residue of the term.* The lease was obtained and a mortgage executed which, *inter alia,* contained a proviso making the mortgaged property redeemable on payment of the 2,000*l.* and interest, and also a covenant by S. to pay W. one-third of the profit rental during the whole of the residue of the term, although all principal moneys and interest had been paid. In 1897, after W. had required payment of the mortgage moneys, S. tendered the balance then due and demanded a reconveyance. The Court of Appeal reversing *Byrne,* J. (*a*), held the covenant valid and S. bound thereby for the residue of the term. The ground of the decision is stated in the following passage from Lord *Lindley's* speech in *Bradley* v. *Carritt* (*b*): "The Court of Appeal held that upon the true construction of the contract the property mortgaged, which was a theatre held for a short term of years, was made a security (1) for money borrowed and interest, and (2) for the performance of an agreement entitling the mortgagee to a share of profits earned by the mortgagor during the lease, even although the loan might have been repaid with interest. The Court of Appeal, over which I then presided, considered that the security for both of these was valid." The Court in effect, *on the facts,* declined to regard the second obligation as collateral or ancillary to the obligation to repay the loan, and treated it as a separate independent obligation secured by the mortgage on terms of equality with the loan. Such a construction, as was subsequently pointed out, rendered the proviso for redemption nugatory; it could only be exercised at the termination of the lease, when there would be nothing to redeem (*c*). It is submitted that the construction given to the contract by the Court of Appeal was inconsistent with the long-established tradition of Courts of equity in construing contracts of mortgage, and cannot be supported.

The English equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of mortgage debentures to secure a loan, and will be enforced by the English Courts against a contracting party in the jurisdiction,

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(*a*) (1899) 2 Ch. 474.

(*b*) (1903) A. C. at p. 278.

(*c*) Per *Cozens-Hardy,* J., in Rice *v.* Noakes & Co., (1900) 1 Ch. 218.

although the floating security to be created by the debentures comprises foreign land, situate in a state in which the clog doctrine is possibly not recognised (*a*).

(d) Collateral Advantages to Mortgagee.

In *Jennings* v. *Ward* (*b*) W. lent N. 10,000*l.* at 6 per cent. on mortgage of land. By a separate deed executed at the same time as the mortgage N. covenanted, if W. should so require, to convey ground rents to him to the value of 16,000*l.* at the rate of twenty years' purchase. On N.'s representatives seeking to redeem, W. insisted on the covenant. Sir J. *Trevor*, M. R., decreed redemption on the payment of principal, interest and costs, and set the covenant aside as unconscionable. The Master of the Rolls is reported to have said: "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by agreement."

This extremely wide statement, clearly not necessary for the decision of the case, became current in text-books, and was in varying forms repeated in many decisions down to and in recent times (*c*). It was, of course, clear that any stipulation which infringed either of the principles before discussed, or which was unconscionable or oppressive, or which amounted to an attempt to evade the usury laws, was invalid. Until those laws were repealed the question whether any general rule in the terms stated by Sir J. *Trevor* really existed could hardly arise; with the repeal of those laws in 1854 by 17 & 18 Vict. c. 90 the clear question of the general validity or invalidity of such stipulations was open for decision.

The general rule laid down in *Jennings* v. *Ward* (supra) was stated in several decisions after 1854 to be still in existence, though in none of those cases was the general rule necessary for the actual decision. The question was exhaustively discussed in *Biggs* v. *Hoddinott* (supra), and the Court of Appeal, affirming the judgment of *Romer*, J., held that the general rule was not, and

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(*a*) British S. Africa Co. *v.* De Beers Consolidated, &c., (1910) 1 Ch. 354, (1910) 2 Ch. 502; reversed on the facts in the House of Lords (1911) W. N., p. 245.

(*b*) 2 Vern. 520.

(*c*) Per *Romilly*, M. R., in Broad *v.* Selfe, 11 W. R. 1036 (see below, p. 27); *Re* Edwards' Estate, 11 Ir. Ch. R. 367; Field *v.* Hopkins, 44 C. D. 524, at p. 530; per *Kay*, J., in James *v.* Kerr, 40 C. D. 449 (see below, p. 27); per *Kekewich*, J., in Eyre *v.* Wynn-Mackenzie, (1894) 1 Ch., at p. 227; Chapple *v.* Mahon, 5 Ir. R. Eq. 225 (an unconscionable transaction between solicitor and client, and a clog on the equity of redemption).

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never had been, law. In earlier cases certain "collateral agreements" invalid under the law before 1854 had been held valid (*a*), but until *Biggs* v. *Hoddinott* (supra) it was doubtful whether they ought not to be regarded merely as exceptions to the general rule in *Jennings* v. *Ward*. As the law now stands a collateral agreement not unconscionable or oppressive and not infringing either of the rules above discussed appears to be valid, and the cases referred to in note (*a*) are not to be regarded as in any way exceptions, but as illustrating the principle laid down in *Biggs* v. *Hoddinott*. In any event it appears clear that the rule invalidating "collateral advantages" generally, can have no application to stipulations contained in an agreement subsequent to, and independent of the mortgage (*b*).

Some of the more important cases are discussed below under the heads "Interest," "Bonus," "Commission."

Interest.—An agreement stipulating for a higher rate of interest on the mortgagee's making default in punctual payment of the rate agreed upon is unquestionably invalid (*c*) as being *nomine poenae*, though an agreement reducing the rate on punctual payment is clearly good. It was always lawful by a subsequent agreement to agree that interest then accrued due should be converted into principal (*d*). It was also held lawful to have a mortgage to secure an account which, according to the usual custom of trade, was periodically settled on the footing of compound interest (*e*). But while the usury laws were in force, in any other case a stipulation at the time of the loan for compound interest was invalid (*f*). These older cases indicate

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(*a*) See per Lord *Davey* in Noakes & Co. *v.* Rice, (1902) A. C. at p. 33; Clarkson *v.* Henderson, 14 C. D. 348 (compound interest); Mainland *v.* Upjohn, 41 C. D. 126 (bonus), approved in Biggs *v.* Hoddinott, supra.

(*b*) Maxwell *v.* Tipping, (1903) 1 Ir. R. 498 (subsequent agreement making the mortgagee the agent of the mortgagor and empowering him to charge agency fees).

(*c*) Holles *v.* Wyse, 2 Vern. 239; Strode *v.* Parker, 2 Vern. 316; Wallingford *v.* Mutual Society, 5 A. C. 685, at p. 702; and see notes to Peachey *v.* Somerset and Sloman *v.* Walter, infra. See as to validity of a *subsequent* independent agreement increasing the rate of interest, but not charging the increased interest on the land, Maxwell *v.* Tipping, (1903) 1 Ir. R. 498.

(*d*) Ossulston *v.* Yarmouth, 2 Salk. 449; Chambers *v.* Goldwin, 9 V. 271 Thornhill *v.* Evans, 2 Atk. 330.

(*e*) Rufford *v.* Bishop, 5 Russ. 346; Crosskill *v.* Bower, 32 B. 86.

(*f*) Mitford *v.* Featherstonhaugh, 2 V. 449; Sir Thomas Meer's Case, Cas. t. Talbot, cited in Chambers *v.* Goldwin, supra; Page *v.* Brown, 7 Cl. & Fin. 437; and see Broadway *v.* Morecroft, Mosely, 247.

that stipulations for compound interest were only illegal on account of the usury laws as tending to usury. Lord *Eldon*, in *Chambers* v. *Goldwin* (*a*), said they were not permitted as tending to usury, though not usury (*b*).

Since the Act 17 & 18 Vict. c. 90, stipulations for compound interest are valid (*c*), and precedents of such stipulations are contained in modern conveyancing forms (*d*). This is the general rule, but the stipulation will be invalid if oppressive in the circumstances of the case (*e*).

Fines secured by covenant in a building society mortgage form part of the principal in taking the account in a foreclosure action, and are payable with interest (*f*).

Bonus.—In certain modern cases it has been held that a contract to pay a bonus, or larger sum than that advanced, was under the circumstances valid. Thus, in *Mainland* v. *Upjohn* (*g*), it was decided that where advances have been made by a mortgagee upon security of a speculative character, such as a building estate, the Court will, in taking the account in a redemption action, allow to the mortgagee sums actually deducted by him for commission or bonus at the time of making the advances, provided the deductions were made as part of the mortgage contract, under a bargain deliberately entered into by the parties while on equal terms and knowing perfectly well what they were doing, and without any improper pressure, unfair dealing, or undue influence on the part of the mortgagee. The Court treated the transaction as amounting to the payment of the whole amount of the advance to the mortgagor, and the return of a certain part of it to the mortgagee as a consideration for the accommodation (*h*). So in an earlier case,

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(*a*) 9 V. 271.

(*b*) And see Blackburn *v.* Warwick, 2 Y. & C. Ex. 92, per *Alderson*, B., at p. 99, and Moss *v.* Bainbridge, 6 De G. M. & G. 292, at pp. 310, 311; and see Fisher on Mortgages, 1910 edit., p. 919; Davidson, 1881 edit., vol. ii., pt. 2, p. 360; Beddowes on Mortgages, p. 126.

(*c*) See, e.g., Clarkson *v.* Henderson, 14 C. D. 348; Mainland *v.* Upjohn, 41 C. D. 126.

(*d*) See, e.g., Key & Elphinstone, 9th edit., vol. ii., p. 123.

(*e*) Eyre *v.* Hughes, 2 C. D. 148 (mortgage to solicitor; stipulation for commission and compound interest).

(*f*) Provident Permanent Building Society *v.* Greenhill, 9 C. D. 122; and see Blackford *v.* Davis, L. R. 4 Ch. 304.

(*g*) 41 C. D. 126, approved in Biggs *v.* Hoddinott, (1898) 2 Ch. 307.

(*h*) See as to this view of the transaction the comment of *Chitty*, L. J., on Potter *v.* Edwards, infra, in Biggs *v.* Hoddinott, (1898) 2 Ch. at p. 322; cf. Eyre *v.* Wynn-Mackenzie, (1894) 1 Ch. 227.

also subsequent to the repeal of the usury laws, it was held that an agreement was good for payment of 1,000*l.* in consideration of an advance of 700*l.* (*a*). A mortgage to secure the repayment of the principal moneys by instalments, on certain specified dates, contained a provision that if the borrower did not pay each instalment punctually he would pay 1 per cent. "commission" on what he ought to have paid until he did pay. It was held that this was not a provision for a penalty, and that it was valid (*b*).

Commission, etc.—In taking accounts between a mortgagee and a mortgagor, the mortgagee in possession is not under the general law of mortgage entitled to any allowance for *personal trouble* in receiving rents, or in managing or selling the property, or for any labour of his own in connection with the mortgage transaction (*c*). To this general rule a statutory exception in favour of solicitor mortgagees has been created by the Mortgagees' Legal Costs Act, 1895 (*d*).

Before the repeal of the Usury laws it was clear that this general rule could not be modified in favour of the mortgagee by an express agreement contained in the mortgage contract. Thus in 1804 Lord *Eldon*, in *Chambers* v. *Goldwin* (*e*), says: "A mortgagee cannot stipulate to be receiver of the rents and profits with a commission; this Court considers it as tending to usury and oppression and a *collateral advantage*." Such a contract was, as Lord *Eldon* then pointed out, held usurious in the King's Bench in *Scott* v. *Brest* (*f*). This rule was greatly relaxed in mortgages of West Indian estates; mortgagees were at first allowed to stipulate in those mortgages for the consignment of the produce of those estates to themselves to be sold for a commission, and subsequently to charge for expenses of management when in possession (*g*).

(*a*) Potter *v.* Edwards, 26 L. J. Ch. 468; 5 W. R. 407.

(*b*) General Credit, &c. Co. *v.* Glegg, 22 C. D. 549, distinguishing Holles *v.* Wyse, 2 Vern. 287.

(*c*) See, e.g., Matthison *v.* Clarke, 3 Drew. 3 (commission on sale); Furber *v.* Cobb, 18 Q. B. D. 494, per *Fry*, L. J., at p. 509 (commission on sale); and see *Re* Wallis, 25 Q. B. D. 176; *Re* Doody, (1893) 1 Ch. 129; Eyre *v.* Wynn-Mackenzie, (1894) 1 Ch. 218; which were cases on solicitor mortgagees' profit costs before the Mortgagees' Legal Costs Act, 1895, and Cheese *v.* Keen, (1908) 1 Ch. 245.

(*d*) See note "Mortgages to Solicitors," infra, p. 28.

(*e*) 9 V. at pp. 271, 272; see Bonithon *v.* Hockmore, 1 Vern. 315; French *v.* Baron, 2 Atk. 120; Comyns *v.* C., Ir. R. 5 Eq. 583.

(*f*) 2 T. R. 238.

(*g*) See the cases on West Indian mortgages reviewed by *Brougham*, C., in Leeth *v.* Irvine, 1 My. & K. 277.

Casborne v. Scarfe—Howard v. Harris.

Whether a fair and reasonable provision modifying the operation of the general rule disallowing remuneration for the mortgagee's personal labour and trouble is now invalid may well be doubted. In *Barrett* v. *Hartley* (1866) (*a*), *Stuart*, V.-C., disallowed a bonus claimed for expenses of management by a mortgagee under an alleged agreement. In so doing he does not appear to have proceeded on any general rule invalidating every agreement giving a mortgagee a collateral advantage, but upon the fiduciary character of the creditor in the circumstances of that transaction, and the pressure put upon the debtor (*b*). In *Broad* v. *Selfe* (*c*) S., in consideration of an advance of 200*l.* by B. (an auctioneer), authorised him to sell certain property, to repay himself the 200*l.* with interest at 5 per cent., together with 5 per cent. on the amount realised. It was also provided that, if S. repaid B. the advance with interest, S. was to pay B. 5 per cent. on the value of the property whether it were sold or not. S. revoked the authority to sell, and the premises were not sold. B. brought a foreclosure action and claimed 400*l.* as commission. The claim was disallowed by *Romilly*, M. R., on the principle that the Court would not permit a person under the colour of a mortgage to obtain a collateral advantage not belonging to or appurtenant to the contract of mortgage. The M. R. also said that, though the principle in its origin probably had reference to the usury laws, it went beyond them and was not affected by their repeal. It is to be noted that, as pointed out by *Romer*, J., in *Biggs* v. *Hoddinott* (*d*), the case was one of accounts, of the right to redeem, and of the clog upon the equity of redemption. In *James* v. *Kerr* (*e*), *Kay*, J., expressed his concurrence in *Romilly*, M. R.'s statement as to the independent character and continuance in its full extent of the old rule despite the repeal of the usury laws. In that case, however, the claim to a bonus which was disallowed arose in a mortgage transaction between a solicitor and an impoverished client. The mortgage was tainted with champerty, and was voidable for undue influence. The statements made by the learned judge as to the continuance of the old rule were plainly not necessary for his decision.

(*a*) 2 Eq. 789.

(*b*) Quære whether it were not the V.-C.'s opinion that the repeal of the usury laws had abrogated the rule invalidating a fair collateral stipulation; see 2 Eq. at p. 795.

(*c*) 11 W. R. 1036.

(*d*) (1898) 2 Ch. at p. 317.

(*e*) 40 C. D. 449, at p. 460; see also Field *v.* Hopkins, 44 C. D. 530.

2. Mortgages to Solicitors and Conveyancing Act, 1881, s. 56.

Mortgages to solicitors by their clients are subject to certain special rules in equity. A solicitor taking a security or conveyance from his own client cannot rely on any statement in the instrument as to the amount advanced or paid by him to the client, but must prove it by independent evidence (*a*). If the transaction be impeached on the ground of unfairness, then the burden is thrown upon the solicitor of proving that he took no advantage of his position (*b*). If the mortgage contains any special or unusual provisions, the solicitor must fully explain to the mortgagor his position under the instrument. In *Cockburn* v. *Edwards* (*c*), *Jessel*, M. R., said with respect to a mortgage to a solicitor by his client, that when there were any special provisions, the solicitor "was bound to take care that his client had the same protection as if he had employed an independent solicitor. A solicitor who lends money on mortgage to his client on any but strictly usual terms would be wise if he always required the intervention of another solicitor (*d*). If that is not done, he must preserve evidence that the circumstances were explained to the client" (*e*). In this case the power of sale was absolute, the usual qualifying clause being absent, and it was held by the Court of Appeal affirming *Fry*, J., that the omission of this clause was a breach of duty, and the solicitor-mortgagee not being able to prove that he had explained it to the mortgagor, was held liable in damages for an improper sale. In *Pooley's Trustee* v. *Whetham* (*f*), *Pearson*, J., and the Court of Appeal, while recognising the rule in *Cockburn* v. *Edwards*, held that it was not applicable, as the transaction was not an ordinary mortgage, but an arrangement for giving terms to the client. See further on this subject, note (*g*).

(*a*) Per *Stirling*, L. J., in Bateman *v.* Hunt, (1904) 2 K. B. at p. 538, citing Lewis *v.* Morgan, 5 Price, 42; Gresley *v.* Mousley, 3 De G. F. & J. 433.

(*b*) See as to the general equitable rules applicable to transactions between solicitor and client Vol. I., pp. 286, 287.

(*c*) 18 C. D. at p. 455; and see Cradock *v.* Rogers, (1885) W. N. 134; 53 L. J. Ch. 968; 51 L. T. 191; Lyddon *v.* Moss, 5 Jur. (N. S.) 637; 7 W. R. 433.

(*d*) As to the duties of such separate solicitors, see Powell *v.* P., (1900) 1 Ch. 243; Wright *v.* Carter, (1903) 1 Ch. 27.

(*e*) As to reopening settled accounts of solicitor-mortgagee, see Cheese *v.* Keen, (1908) 1 Ch. 245; Blagrave *v.* Routh, 8 De G. M. & G. 620.

(*f*) 33 C. D. 111; and see Cradock *v.* Rogers, supra.

(*g*) *Re* Unsworth, 2 Dr. & Sm. 337; 12 L. T. 49; King *v.* Savery, 1 Sm.

Casborne v. Scarfe—Howard v. Harris.

Costs of Solicitor-Mortgagee.—As to a solicitor-mortgagee charging costs. First, under express agreement in the mortgage deed.

In *Jones* v. *Linton* (*a*), decided before the Mortgagees' Legal Costs Act, 1895 (*b*), but after the Attorneys' and Solicitors' Act, 1870, *Bacon*, V.-C., allowed an agreement for a solicitor-mortgagee to take profit costs, saying that it was a hard bargain, but proved to have been explained to the mortgagor. In *Re Roberts* (*c*), decided in 1890, *Kay*, J., held that an agreement to charge for business done did not authorise the solicitor to charge for the preparation of the mortgage deed by himself, on the ground that having done the work himself there were no costs existing to be charged. This decision was referred to with approval by *Lopes*, L. J., in *Re Wallis* (*d*), in which, however, the point as to an agreement did not arise. In *Field* v. *Hopkins* (*e*), *Kay*, J., held that a provision that a solicitor-mortgagee should charge profit costs was void, as obnoxious to the rule against collateral advantages clogging the equity of redemption. The decision was affirmed by the Court of Appeal, but only on the ground that the clause in question did not cover the costs claimed. *Field* v. *Hopkins* was approved by *Kekewich*, J., in *Eyre* v. *Wynn-Mackenzie* (*f*), which was affirmed by the Court of Appeal on a different point, viz., that a provision for payment "of all moneys to be advanced or become owing" was not wide enough to cover moneys to become owing for costs. Apart from special agreement as to costs, it has been held that a solicitor-mortgagee could not claim profit costs (*g*). The decision did not proceed on the ground of unfairness, as the solicitor-mortgagee's partner might take the whole of the profit costs, if he was to receive them exclusively, or in the absence of any agreement to that effect with his partner might take such share as was proportionate to his share in the business (*h*).

The decisions or dicta of *Kay*, J., and *Kekewich*, J., in *Field* v. *Hopkins* and *Eyre* v. *Wynn-Mackenzie*, supra, may be material hereafter in case of any right reserved by a solicitor-mortgagee to

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& G. 271; Cowdry *v.* Day, 1 Giff. 316; *Re* Champion, (1893) 1 Ch. 101; Ward *v.* Sharp, 53 L. J. Ch. 313.

(*a*) 44 L. T. 601; and see *Re* Donaldson, 27 C. D. 544.

(*b*) 58 & 59 Vict. c. 25.

(*c*) 43 C. D. 52.

(*d*) 25 Q. B. D. 176.

(*e*) 44 C. D. 524.

(*f*) (1894) 1 Ch. 218; (C. A.) (1896) 1 Ch. 135.

(*g*) See *Re* Wallis, 25 Q. B. D. 176.

(*h*) See *Re* Doody, (1893) 1 Ch. 130, *Re* Rollit & Sons, (1893) W. N. 195, and Clark *v.* Carlon, 30 L. J. Ch. 639, 7 Jur. (N. S.) 441.

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charge costs other than "usual professional charges and remuneration," but questions as to these "charges and remuneration" are set at rest by the Mortgagees' Legal Costs Act, 1895 (*a*), which authorises a solicitor-mortgagee to charge "usual professional charges and remuneration with reference to the mortgage," and to charge these against the security, and applies to mortgages and business before the Act. The Act is, therefore, retrospective, but an attempt on account of it to get leave to appeal from a judgment made before it came into operation was unsuccessful (*b*).

It was held in cases not within the Act that the exception established as to a solicitor-trustee in *Cradock* v. *Piper* (*c*), that he might charge profit costs for acting as solicitor in actual litigation, did not apply to a solicitor-mortgagee (*d*).

As to the question what costs a solicitor-mortgagee is entitled to charge against a mortgagor in the absence of special agreement, and subject to the alterations made by the Mortgagees' Legal Costs Act, 1895, see *Re Doody* (*e*).

Effect of receipt clause in deed or indorsed.—Formerly the fact that a solicitor was in possession of a mortgage deed executed by the mortgagor, with signed receipt in the body thereof or indorsed, did not authorise the solicitor to receive the money (*f*); an express authority to pay to the solicitor was necessary. As against third parties, however, the person has been held bound who has executed, and handed a deed so executed to solicitors, and enabled them thereby to mortgage the property fraudulently to persons without notice (*g*).

Now, by sect. 56 of the Conveyancing Act, 1881, payment to a solicitor (*h*) *producing* such a deed with a receipt for consideration

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(*a*) 58 & 59 Vict. c. 25.

(*b*) Eyre *v.* Wynn-Mackenzie, (1896) 1 Ch. 135; cf. Day *v.* Kelland, (1900) 2 Ch. 745.

(*c*) 1 Mac. & G. 664.

(*d*) Sclater *v.* Cottam, 5 W. R. 744, 3 Jur. (N. S.) 630; *Re* Roberts, supra; *Re* Wallis, supra; Stone *v.* Lickorish, (1891) 2 Ch. 364.

(*e*) (1893) 1 Ch. 130.

(*f*) Viney *v.* Chaplin, 2 De G. & J. 468; *Ex p.* Swinbanks, 11 C. D. 525; and see Withington *v.* Tate, L. R. 4 Ch. 288.

(*g*) Gordon *v.* James, 30 C. D. 249; and see *Re* Vernon, Ewens & Co., 32 C. D. 166; National, &c. Bank of England *v.* Jackson, 33 C. D. 6; and see old cases where deeds were treated as wholly void when obtained by fraud, Vorley *v.* Cooke, 1 Gif. 230; Ogilvie *v.* Jeaffreson, 2 Gif. 353; but see *contra* Onward Building Society *v.* Smithson, (1893) 1 Ch. 1, and cases there cited; and Hunter *v.* Walters, L. R. 7 Ch. 75, 84, 1 Ch. Ca. 217; Lloyds Bank *v.* Bullock, (1896) 2 Ch. 192; and *Re* Lord Southampton's Estate, 16 C. D. 178; cf. Dixon *v.* Winch, (1900) 1 Ch. 736.

(*h*) Day *v.* Woolwich Equitable

money (*a*) or other consideration in the body thereof or indorsed thereon and signed by the person entitled to give a receipt for that consideration is an authorised payment to the solicitor. The section applies only to payments after the Act. It was held not to apply to the case of trustee-vendors unless they had power to authorise payment to their solicitors (*b*). But now, by the Trustee Act, 1893, s. 17, sub-s. 1, replacing the Trustee Act, 1888, s. 2, sub-s. 1, a trustee may appoint a solicitor to receive money under a deed containing such receipt.

Quaere whether trustees dividing a trust fund are authorised by the Conveyancing Act, 1881, s. 56, to pay a share to a solicitor producing a deed of release.

3 Sales with Option of Repurchase distinguished from Mortgages.

The validity of a sale with a contemporaneous agreement giving the vendor an option of repurchase is recognised by Lord *Nottingham* in the principal case of *Thornbrough* v. *Baker* (p. 1, supra). And not only was the validity of such a sale recognised, but the person taking such option was not assisted by equity. The general rule that an option must be strictly followed was held applicable, and if it were not exercised in accordance with the terms of the bargain, the donee lost the benefit of the option (*c*).

A difficulty often arises in distinguishing between a mortgage and a sale with power to repurchase (*d*). The question in each case is, What is the meaning of the transaction? (*e*) and a conveyance in form absolute would be held a mortgage if the intention were that

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Society, 40 C. D. 491; *Re* Hetling and Merton, (1893) 3 Ch. 269; King *v.* Smith, (1900) 2 Ch. 425.

(*a*) *Quaere* whether payment by cheque is within the section. See Blumberg *v.* Life Interests, &c. Corporation, (1897) 1 Ch. 171, affirmed on facts (1898) 1 Ch. 27.

(*b*) *Re* Bellamy and Met. Board of Works, 24 C. D. 387; *Re* Flower and Met. Board of Works, 27 C. D. 592.

(*c*) Mellor *v.* Lees, 2 Atk. 494; Barrell *v.* Sabine, 1 Vern. 268; Davis *v.* Thomas, 1 R. & M. 506; Perry *v.* Meddowcroft, 4 B. 197; Gossip *v.* Wright, 1 W. R. 632 (V.-C. K.); 9 Jur. (N. S.) 592; Joy *v.* Birch, 4 Cl. & Fin. 58; 10 Bli. (N. S.) 241; Alderson *v.* White, 2 De G. & J. 97; Williams *v.* Owen, 5 My. & C. 303, reversing 10 Si. 396; and see Cotterell *v.* Purchase, Cas. t. Talbot, 61; Brooke *v.* Garrod, 3 K. & J. 608, 2 De G. & J. 62; Ward *v.* Wolverhampton Waterworks Co., 13 Eq. 243.

(*d*) Waters *v.* Mynn, 14 Jur. 341; Ogden *v.* Battams, 1 Jur. (N. S.) 791; Fee *v.* Cobine, 11 Ir. R. Eq. 406.

(*e*) Alderson *v.* White, supra; Shaw *v.* Jeffery, 13 Moo. P. C. 432.

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it should be a security for a loan (*a*). So a conveyance has been held to be a mortgage notwithstanding the Statute of Frauds, on the ground of a verbal agreement which would make it fraudulent to insist that the property was not redeemable (*b*).

A deed in form a settlement, providing that on payment of a sum the limitations were to cease, has been held a security and redeemable after the date specified (*c*).

So also, where the intention was that the estate should be a security for money, an absolute conveyance will be converted into a mortgage (*d*), even in the absence of a proviso for redemption (*e*).

And the payment of interest will be evidence of such an intention (*f*).

Where difficulty arises in determining whether a conveyance is intended to be a mortgage or not, extrinsic evidence will be admitted to shew, that, what appears on the face of it to be an absolute conveyance, was intended to be a conveyance by way of mortgage only (*g*).

It has been decided that a security taken in the old form of a trust for sale without a proviso for redemption, is a mere mortgage (*h*).

The tendency of the Courts in the eighteenth century is stated by Lord *Hardwicke*, in *Longuet* v. *Scawen* (*i*), as follows: "The Court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same time and concomitant with the grant." And his Lordship, while admitting the distinction

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(*a*) Douglas *v.* Culverwell, 4 De G. F. & J. 20; and see Barnhart *v.* Greenshields, 9 Moo. P. C. 18; Holmes *v.* Mathews, ibid., 413.

(*b*) Lincoln *v.* Wright, 4 De G. & J. 16; Irnham *v.* Child, 1 Bro. Ch. 92; Cripps *v.* Jee, 4 Bro. Ch. 471; and see comments of *Stirling*, J., in *Re* Duke of Marlborough, (1894) 2 Ch. 133, and cases there cited, and Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196.

(*c*) Frederick *v.* Aynscombe, 1 Atk. 392, 2 Eq. Ca. Abr. 594; Earl of Winchelsea *v.* Wentworth, 1 Vern. 402; Earl of Winchelsea *v.* Norcliffe, ibid., 430.

(*d*) Douglas *v.* Culverwell, 4 De G. F. & J. 20, varying 3 Gif. 251. And see Barnhart *v.* Greenshields, 9 Moo. P. C. C. 18; Holmes *v.* Mathews, ibid. 413.

(*e*) Bell *v.* Carter, 17 B. 11.

(*f*) Allenby *v.* Dalton, 5 L. J. K. B. 312—314.

(*g*) Barton *v.* Bank of New South Wales, 15 A. C. 379; Maas *v.* Pepper, (1905) A. C. 102; Lincoln *v.* Wright, 4 De G. & J. 16; *Re* Duke of Marlborough, (1894) 2 Ch. 133, and the cases there cited and discussed; cf. Haigh *v.* Kaye, L. R. 7 Ch. 469; and see the cases cited infra on the mortgage of chattels and the Bills of Sale Act, 1882.

(*h*) Bell *v.* Carter, 17 B. 11; Locking *v.* Parker, L. R. 8 Ch. 30; *Re* Alison, 11 C. D. 284.

(*i*) 1 V. 404; Floyer *v.* Sherard, Amb. 18; but see Cotterell *v.* Purchase, Cas. t. Talbot, 61.

"in the nature of the transaction between a power of redeeming and of repurchasing," adds that, " where the stipulation for the liberty of repurchasing is a part of the same transaction, the Court goes very unwillingly into that distinction, and endeavours, if possible, to bring them to be cases of redemption."

The construction in favour of redemption will be more readily adopted where the deed, so as to allow time to find the money, contains stipulations to the effect that the grantor may repurchase on giving notice, provided that he repays the original purchase money, with arrears of interest thereon, and a half-year's interest in addition (*a*).

For a case where there was a personal covenant for payment of the annuity, upon which, in the event of any omission, an action might have been *immediately* brought, while there would have been no *present* remedy against the property, see *Bulwer* v. *Astley* (*b*), in which case Lord *Lyndhurst* sums up the different provisions which had been held to indicate that the transaction was a security.

The absence from the deed of a covenant to repay the money is not conclusive to shew the transaction is not a mortgage, for such covenant is not essential to the existence of a mortgage, all Welsh mortgages being without the covenant, as well as most copyhold mortgages (*c*).

The modern attitude of the Courts is expressed by Lord *Cranworth* in *Alderson* v. *White* (*d*), " The rule of law on this subject is one dictated by common sense ; that *primâ facie* an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an actual conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." This is quoted with approval in *Manchester, Sheffield, &c. Ry. Co.* v. *North-Central Wagon Co.* (*e*), where Lord *Macnaghten* says, " In all these cases the question is what was the real intention of the parties."

(*a*) Lawley *v.* Hooper, 3 Atk. 278 ; see this case commented upon by *Lindley*, L. J., in Secretary of State for India *v.* British Empire, &c. Co., 67 L. T. 434, at p. 439 ; Verner *v.* Winstanley, 2 Sch. & L. 393 ; Bulwer *v.* Astley, 1 Ph. 422 ; Preston *v.* Neele, 12 C. D. 767.

(*b*) 1 Ph. 422 ; see Kenny *v.* Lynch, 2 Jo. & Lat. 330.

(*c*) Lawley *v.* Hooper, supra ; Longuet *v.* Scawen, supra ; see the decrees for redemption set out in these cases.

(*d*) 2 De G. & J. 105.

(*e*) 13 A. C. at p. 568.

Thornbrough v. Baker.

In *Secretary of State for India* v. *British Empire, &c. Co.* (*a*), there was a covenant by A. for payment of an annuity after his father's death during his own life, and a conveyance of reversionary interests by way of security for the annuity. By clause 4, A. was empowered to repurchase the annuity and obtain a reconveyance of the property. A. assigned his rights to B. It was held that the deed was a mortgage, and redeemable, and that the right of repurchase was assignable to B. *Lindley*, L.J., says (*b*): "It is the grant of an annuity in consideration of a sum of cash. That annuity is charged upon certain property. Pausing here for a moment, I doubt whether in these modern days there would have been any right to redeem that at all. In Lord *Hardwicke's* time, as I explained during the argument, it would have been redeemable, and redeemable on the terms of paying 2,000*l.*, and interest at 4 or 5 per cent. That is plain from the case of *Lawley* v. *Hooper* (*c*), which will be found commented upon by *Bacon*, V.-C., in *Preston* v. *Neele* (*d*). I will not pledge myself to it, but I suspect that the time for that very rough and ready mode of dealing with charges on annuities is somewhat antiquated. And I doubt, therefore, whether, if it were not for clause 4, there would be any method of freeing this property from the annuity" (*e*).

The effect of an agreement for sale with right of repurchase in the case of chattels or of a sale of furniture with a contemporaneous hire and purchase agreement has been frequently before the Courts in modern times in consequence of the provisions of sect. 8 of the Bills of Sale Act, 1882 (*f*), which enacts that unless the conditions therein specified are satisfied, every "bill of sale to which that Act applies," *i.e.*, given as security, shall be void in respect of the personal chattels comprised therein.

In such cases a *bonâ fide* sale with an option of repurchase is good, but the substance and not the form of the transaction must be regarded whether it be carried out by one document or two, and whether it be in form a sale or not. If in substance a mortgage, it will be treated as such. Space does not allow of all the cases being discussed. An analysis of those before 1890 is contained in the judgment of *Cave*, J., in *Beckett* v. *Tower Assets Co.* (*g*). His judgment was overruled by the Court of Appeal on the facts, but his

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(*a*) 67 L. T. 434.

(*b*) Ibid., at p. 439.

(*c*) 3 Atk. 278.

(*d*) 12 C. D. 760; 40 L. T. 303.

(*e*) And see Shaw *v.* Jeffery, 13 Moo. P. C. 432; O'Reilly *v.* O'Donoghue, 10 Ir. R. Eq. 73.

(*f*) 45 & 46 Vict. c. 43.

(*g*) (1891) 1 Q. B. 1; Ibid. 638 (C. A.).

statement of the law is recognised as valuable. One of the leading cases on the subject is *Ex parte Odell* (*a*), depending on the Bills of Sale Act, 1854. There a receipt was given by W., as for the absolute sale of furniture to C., and there was a contemporaneous agreement for hire and purchase in the usual form, letting the furniture to W., with a provision that on payment of the instalments the property in it should vest in W. It was held, on these facts, that the two documents were a mortgage and required registration under the Bills of Sale Act, 1854. In *Beckett* v. *Tower Assets Co.*, supra, a similar case depending on the Bills of Sale Acts, 1878 and 1882, a similar decision was given by the Court of Appeal that the document, though in form a sale with an agreement for hire, in fact and substance constituted a mortgage and was void as not being registered (*b*).

On the other hand, in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (*c*), it was decided that the transaction was a *bonâ fide* sale and did not require registration. *Yorkshire Railway Wagon Co.* v. *Maclure* (*d*) was a somewhat similar case, but there there was an agreement for hire only, and not for hire and purchase.

Annuities and Policies of Assurance.

The laws against usury were, and the rules against restrictions on the right of redemption were and are now evaded by sales of annuities with option of repurchase (*e*)—common in the case of life tenants,—or by conveyances, absolute in form, of the interest or estate of the grantor—common in the case of reversionary interests in real or personal estate.

In using the word "evading," it must be remembered that the Courts look at the real nature of the transaction, and if though in form it is a sale, it is in substance a mortgage, it will be treated as a mortgage; but the rules could be and were evaded by agreements in substance different from a mortgage. This meaning of the words "evading the rules" is explained by *Lindley*, L. J., in *Yorkshire*

(*a*) 10 C. D. 76.

(*b*) See, too, *Re* Watson, 25 Q. B. D. 27; Madell *v.* Thomas, (1891) 1 Q. B. 231; Mellor's Trustee *v.* Maas & Co., (1902) 1 K. B. 137, (1903) 1 K. B. 226; Maas *v.* Pepper, (1905) A. C. 102; Stammers *v.* Margrett, 21 T. L. R. 342.

(*c*) 13 A. C. 554.

(*d*) 21 C. D. 318; and see United Forty Pound Loan Club *v.* Bexton, (1891) 1 Q. B. 28 (n.).

(*e*) See, e.g., Floyer *v.* Lavington, 1 P. W. 268; Joy *v.* Birch, 10 Bligh (N. S.), 241.

Railway Wagon Co. v. *Maclure* (*a*), where a sale of wagons with a contemporaneous agreement for hire and purchase by the vendor was disputed, as being in substance an agreement for security, but was held to be a *bonâ fide* sale. Lord *Bramwell* makes the same explanation in *Salt* v. *Northampton* (*b*), supra, where he says, "The rules of equity may be evaded, but must not be infringed."

It is obvious that the mere fact that the grantee of an annuity for a life chose for his own protection and out of his own moneys to insure the life, would not give the grantor of the annuity any interest in the policy. Whilst the usury laws were in force, it was a common practice for life tenants and others desirous of raising money to grant the lender an annuity for the life of the grantor in satisfaction of the advance and interest thereon. The deed of grant usually contained a stipulation that the grantor should do what might be necessary to enable the grantee to insure the grantor's life. Where insurance was so provided for, the amount of the premium was usually included in the calculation of the annuity, and it was also common form to provide, if the premiums payable under the policy should be increased by the grantor going abroad, that then the amount of the annuity should be proportionately increased. The annuity payable under the grant was in effect determined on the basis, that the payment of the annuity during the life of the grantor would return to the grantee the principal moneys advanced together with interest and the amount expended in premiums (*c*). The grant usually reserved to the grantor the power to repurchase the annuity.

It is clear that in effect the policy was provided by moneys furnished by the grantor, but as, under the usual provisions of such deeds, it was entirely within the discretion of the grantee either to maintain the policy or abandon it and become his own insurer, the Court of Chancery treated the premiums as though they were moneys paid out of the pocket of the grantee of the annuity. In consequence, in a long series of decisions (*d*), it was uniformly

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(*a*) 21 C. D. 318; and see Secretary of State for India *v.* British Empire, &c., 67 L. T. 434.

(*b*) (1892) A. C. 21.

(*c*) See the system explained per *Bacon*, V.-C., in Preston *v.* Neele, 12 C. D. 767, and per *Lindley*, L. J., in Secretary of State for India *v.* British Empire, &c., supra.

(*d*) Gottlieb *v.* Cranch, 4 De G. M. & G. 440; Bashford *v.* Cann, 33 B. 109; Knox *v.* Turner, L. R. 5 Ch. 515; Preston *v.* Neele, 12 C. D. 760; and see Secretary of State for India *v.* British Empire, &c., 67 L. T. 434.

held (*a*) that, in the absence of special circumstances, neither the grantor nor his estate had any interest in the policy or policy moneys, whether the option of repurchase was or was not exercised by the grantor.

This rule, however, only applied where the relation of the parties was simply that of grantor and grantee of an annuity, and where the grantor was in no way either directly or indirectly chargeable with the upkeep of the policy. Thus where it was clear that the relation of the parties under the transaction was in essence that of creditor and debtor, that the policy was effected by the creditor as a security or indemnity, and that the debtor was by agreement, express or implied, charged with the payment of the premiums, the Court gave the debtor the full equitable rights of a mortgagor in the policy and policy moneys (*b*).

Stuart, V.-C., states the principle governing this latter group of cases in the following terms: "Where the relation of debtor and creditor subsists, and the true construction of the instruments and the evidence of the real nature of the transaction shews that the policy of assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security, he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays his debt, which it was directly or indirectly at his expense effected to secure. This is an application of the maxim, *Qui sentit onus sentire debet et commodum* (*c*).

4. Nature of Equity of Redemption.

As to the nature of an equity of redemption.—In an early case, it was said that an equity of redemption was a mere *right*; and that a right to a bill in equity ought not to be entailed, and was not such an inheritance as could be entailed by the statute *De donis* (*d*). In the principal case of *Casborne* v. *Scarfe* (supra) Lord *Hardwicke* held that the husband was tenant by the curtesy, as an equity of redemption was an *estate* in the land. "For," said his Lordship,

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(*a*) See *Bacon*, V.-C.'s explanation of Lawley *v.* Hooper, 3 Atk. 280, in Preston *v.* Neele, 12 C. D. 767.

(*b*) Lea *v.* Hinton, 5 De G. M. & G. 823; Drysdale *v.* Piggott, 8 De G. M. & G. 546; Courtenay *v.* Wright, 2 Giff. 337.

(*c*) Supra, Courtenay *v.* Wright, 2 Giff. at p. 351.

(*d*) Roscarrick *v.* Barton, 1 Ch. Ca. 217.

"it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an *estate* whereof there may be a seisin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered personal assets. * * * * The interest in the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate, and afterwards makes a mortgage in fee. Though this is a total revocation in law, yet in this Court it is a revocation *pro tanto* only." This passage is quoted with approval by Lord *Selborne* in *Heath* v. *Pugh* (*a*), as shewing that on a foreclosure the mortgagee obtained a fresh title, "vesting the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer," so that the Statute of Limitations would then only run from the date of the decree. And see observations of Lord *Blackburn* in *Jennings* v. *Jordan* (*b*) as to the difference between the modern and original conception of the equity of redemption, and his suggestion that the effect of the old conception of its being a personal right may still be traced in modern doctrines, such as tacking.

The entail of an equity of redemption may now be barred under the Fines and Recoveries Act (*c*).

Previous to the Dower Act, 3 & 4 Will. 4, c. 105, women were not dowable of an equity of redemption; but this was because they were not entitled to dower of equitable estates (*d*).

As to the law of Escheat with regard to mortgaged estates before the Intestates' Estates Act, 1884 (*e*), see note to *A.-G.* v. *Sands* (*f*).

Sect. 4 of the last-mentioned Act enacts that "from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or

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(*a*) 6 Q. B. D. 360; see also Blake *v.* Foster, 2 Ball & B., at pp. 402, 403.

(*b*) 6 A. C. 698.

(*c*) 3 & 4 Will. 4, c. 74.

(*d*) Dixon *v.* Saville, 1 Bro. Ch. 326. See Leading Cases R. P., 4th ed., pp. 115, 116.

(*e*) 47 & 48 Vict. c. 71.

(*f*) Leading Cases R. P., 4th ed., pp. 211 et seq.

interest above mentioned were a legal estate in corporeal hereditaments" (*a*).

The person entitled to the equity of redemption being considered as the owner of the land, he may not only devise or settle, but in other respects deal with it as land. He may, for instance, mortgage it; but all incumbrancers subsequent to the first, if he have the legal estate, having merely equitable claims, will, according to the maxim *Qui prior est tempore potior est jure*, be entitled to satisfaction out of the estate, according to priority, though an equitable incumbrancer, where the legal estate is outstanding, or in a former mortgagee, may, if he advanced his money without notice of a former incumbrance, obtain priority by getting in the legal estate, or taking a conveyance from the legal mortgagee; in which last case he may tack his own to the legal mortgage, and thus obtain priority over all intermediate incumbrances (*b*).

So, likewise, upon the principle, that the person entitled to the equity of redemption is considered as the owner of the land, on his death intestate the descent of the equity of redemption will be governed either by the general law of the land, or the *lex loci*, according to the tenure of the legal estate. Thus, it has been held, where borough English lands were mortgaged, that the equity of redemption descended to the youngest son, to whom the lands would descend, and in a mortgage of gavelkind lands, the equity of redemption would descend in the same manner as the lands (*c*).

A mortgagor in possession of customary freeholds is not so "seised" thereof that on his death the lord of the manor is entitled to claim his best beast as a heriot, pursuant to the custom of the manor (*d*).

The mortgagor of an advowson has a right to nominate to the living on a vacancy; and the mortgagee will be obliged to accept the nominee, even, it seems, although there was a covenant in the mortgage, that the mortgagee should present on every avoidance (*e*).

In the principal case of *Thornbrough* v. *Baker* (supra), Lord

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(*a*) See *Re* Wood, (1896) 2 Ch. 596; Challis, Real Property, 3rd ed., pp. 38 et seq.

(*b*) See Marsh *v.* Lee, and Basset *v.* Nosworthy, post, and notes to those cases, and observations of Lord *Blackburn* in Jennings *v.* Jordan, 6 A. C. p. 714.

(*c*) Fawcet *v.* Lowther, 2 Ves. Sen. at p. 304.

(*d*) Copestake *v.* Hoper, (1908) 2 Ch. 10 (C. A.). See this case commented upon, Carson, R. P. Statutes, 2nd ed., p. 520; Challis, Real Property (1911), p. 416.

(*e*) Jory *v.* Cox, Pr. Ch. 71; Amhurst *v.* Dowling, 2 Vern. 401; Galley *v.* Selby, Stra. 403; and see Mackensie *v.* Robinson, 3 Atk. 559, overruling Gardiner *v.* Griffith, 2 P. W. 403.

Nottingham decided a point, ever since firmly established, that although, in the case of a mortgage in fee, the heir must reconvey, on payment of the mortgage-money and interest, the executor, and not the heir, of the mortgagee will be entitled to the money. There is, however, as Lord *Nottingham* there laid down, an important distinction, resulting from the difference between a mortgage and an absolute conveyance with a collateral agreement for a repurchase; as, in the latter case, if the purchaser dies, and the person who conveyed to him exercises his option to repurchase, on repayment of the purchase-money, the heir, and not the executor, of the purchaser will, it seems, be entitled to the money, whereas, in case it had been a mortgage, the money would have belonged to the executors (*a*). This, however, seems to be contrary to the cases where there is an option of purchase under a lease (*b*).

Where real estate, the equity of redemption of which was barred by the Statute of Limitations, was sold by the Court in an administration suit, it was held that after payment of principal, interest and costs to the personal representative of the mortgagee, and the costs of all parties to the suit as between solicitor and client, the balance belonged to the heir-at-law of the mortgagee, and not to the devisees, to whom he had devised his residuary estate except estates vested in him as mortgagee or trustee (*c*).

Formerly inconvenience was occasioned where the legal interest in trust or mortgage estates became by descent or devise vested in a person not *sui juris*, as an infant, married woman or lunatic, and difficulties also arose in determining what words were sufficient to pass trust and mortgage estates, and whether the trusteeship passed to the devisees of trust estates (*d*).

When a mortgage is paid off, that is to say, the principal, interest and costs, the mortgaged estate may either be reconveyed to the mortgagor or his representatives, or it may be transferred or assigned by the mortgagee either with or without the concurrence of the mortgagor.

Where a mortgagor is entitled to redeem, he may by virtue of the Conveyancing and Law of Property Act, 1881 (*e*), require the

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(*a*) See Saint John *v.* Wareham, cited 3 Swans. 631.

(*b*) See *Re* Isaacs, (1894) 3 Ch. 506.

(*c*) *Re* Woodhead (1884) W. N. 174.

(*d*) See now as to the devolution of mortgaged estates on death of sole mortgagee, Conveyancing, &c. Act, 1881, s. 30, and as to copyholds the Copyholds Act, 1887, s. 45.

(*e*) 44 & 45 Vict. c. 41.

mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt, and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee is, by virtue of the Act, bound to assign and convey accordingly, sect. 15 (1). This section does not apply in the case of a mortgagee being or having been in possession (*a*). Ibid. (2). It applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary. Ibid. (3).

If there were successive mortgagees of the same estate, the mortgagor could not require the first mortgagee to assign the debt and property to a nominee of his own, under the last-mentioned section (*b*), without the consent of the puisne mortgagee (*c*). The "mortgagor entitled to redeem" in that section means a mortgagor or person claiming under the mortgagor, who has a right to require a reconveyance from the mortgagee, and no other person can take advantage of that section (*d*). A lien of a company on shares for a debt due from the holder has been held to be a charge within sect. 2, sub-sect. 6, of the Conveyancing Act, 1881. The debtor was accordingly entitled to the benefit of sect. 15, supra (*e*).

It has also been held that a tenant for life of mortgaged premises who has failed to keep down the interest, and has obtained the usual order permitting him to redeem, is not of right entitled under that section to require the mortgagee to transfer the mortgage (*f*).

However, by sect. 12 of the Conveyancing Act, 1882 (*g*), it is enacted "that the right of the mortgagor, under sect. 15 of the Conveyancing Act, 1881, to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer" (*h*).

(*a*) As to this restriction see Hood and Challis, Conveyancing Acts, &c., 7th ed., p. 73.

(*b*) 44 & 45 Vict. c. 41, s. 15.

(*c*) Teevan *v.* Smith, 20 C. D. 724.

(*d*) Ibid.

(*e*) Everitt *v.* Automatic Weighing Machine Co., (1892) 3 Ch. 506.

(*f*) Alderson *v.* Elgey, 26 C. D. 567.

(*g*) 45 & 46 Vict. c. 39.

(*h*) This section makes no provision as to the time within which a requisi-

5. Assignment of Mortgages.

A mortgage may be assigned at any time by the mortgagee alone, but the assignee should always obtain the concurrence of the mortgagor; for as a mortgage debt is a chose in action the transferee of a mortgage takes, as any other assignee of a chose in action, subject to the account between mortgagee and mortgagor, notwithstanding that he gets the legal estate (*a*), and he takes subject to all equities affecting the chose in action in the hands of the mortgagee (*b*).

In some cases, however, the transferee may get a better title than the transferor, *e.g.* the mortgagor may be bound by estoppel by an incorrect acknowledgment of receipt which would not have been binding between mortgagor and mortgagee but which enabled the mortgagee to commit a fraud (*c*). "It makes no difference whether that acknowledgment is made before the Conveyancing Act on a conveyance of land by the receipt clause in the body of the deed and the endorsed memorandum, or since the Act by the former only, or in a statutory transfer by the statement in the statutory form that the money has been paid" (*d*). Also a company having power to issue legally transferable debentures cannot set up any irregularity against a *boná fide* transferee without notice (*e*).

Where a mortgage is transferred, and the transferee fails to give notice of the transfer to the mortgagor, payments subsequently made by him to the original mortgagee are valid as against the transferee (*f*).

Where a mortgage is assigned without the privity or consent of

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tion by a subsequent incumbrancer can be nullified by a later requisition by a prior incumbrancer; see Smithett *v.* Hesketh, 44 C. D. 161.

(*a*) See Mangles *v.* Dixon, 3 H. L. Cas. 702, pp. 736, 737.

(*b*) Cockell *v.* Taylor, 15 B. 103, 117; Smith *v.* Parkes, 16 B. 115. The cases Judd *v.* Green, 45 L. J. Ch. 108, and Nant-y-Glo Ironworks *v.* Tamplin, 35 L. T. 125, are, it is submitted, inconsistent with principle and are not law; and see notes to Ryall *v.* Rowles, ante, vol. 1, p. 104, and particularly pp. 140, 141, and 142-7, and compare Dixon *v.* Winch, (1900) 1 Ch. 736.

(*c*) Bickerton *v.* Walker, 31 C. D. 151; Bateman *v.* Hunt, (1904) 2 K. B. 530; Rimmer *v.* Webster, (1902) 2 Ch. 163 (statutory transfer of mortgage); and see Rice *v.* R., 2 Drew. 73; Hunter *v.* Walters, L. R. 7 Ch. 75; Kettlewell *v.* Watson, 21 C. D. 685, 26 C. D. 501; King *v.* Smith, (1900) 2 Ch. 425; and per *Stirling*, J., in *Re* Wyatt, (1892) 1 Ch. 188; and Dixon *v.* Winch, (1900) 1 Ch. 736.

(*d*) Per *Farwell*, J., in Rimmer *v.* Webster, supra, at p. 174. See s. 55 Conveyancing Act, 1881.

(*e*) *Re* Romford Canal Co., 24 C. D. 85; and see Davies *v.* Bolton, (1894) 3 Ch. 684; Robinson *v.* Montgomeryshire Brewery, (1896) 2 Ch. 841; cf. *Re* Natal Investment Co., L. R. 3 Ch. 355.

(*f*) Matthews *v.* Wallwyn, 4 V. 126.

Casborne v. Scarfe—Howard v. Harris.

the mortgagor, the assignee, who takes it only upon the same terms as the mortgagee, cannot add to what is due, settle the account, or turn interest into principal (*a*).

But Lord *Hardwicke* says "the general rule is where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest" (*b*).

Interest, however, cannot, even with the consent of the mortgagor, be turned into principal as against subsequent incumbrancers of whom there is notice (*c*).

Moreover, it is laid down that "if a mortgagee *in possession* assigns over his mortgage without the assent of the mortgagor, the mortgagee is bound to answer the profits both before and *after* the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent" (*d*).

When the interest has been regularly paid, and the mortgagor has never been called on to discharge the principal, the costs of a transfer, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him (*e*).

By the assignment of the mortgage the debt necessarily passes as incident to it (*f*); the mortgage debt is, however, ordinarily assigned, upon a transfer of a mortgage; but as it is a *chose in action*, the assignment thereof formerly did not pass it at law, and a power of attorney was generally given by the mortgagee to the transferee to receive it, but under the Judicature Act, the debt is now assignable at law, and if the terms of the section are complied with the assignee may sue in his own name (*g*).

And see Williams *v.* Sorrell, 4 V. 389; Norrish *v.* Marshall, 5 Madd. 475; Stocks *v.* Dobson, 4 De G. M. & G. 11; *Re* Lord Southampton's Estate, 16 C. D. 178; Dixon *v.* Winch, (1900) 1 Ch. 736; Turner *v.* Smith, (1901) 1 Ch. 213.

(*a*) Earl of Macclesfield *v.* Fitton, 1 Vern. 169; Ashenhurst *v.* James, 3 Atk. 271; Matthews *v.* Wallwyn, 4 V. 128.

(*b*) Ashenhurst *v.* James, 3 Atk. 271; see Agnew *v.* King, (1902) 1 Ir. R. 471.

(*c*) Digby *v.* Craggs, Amb. 611, 2 Eden, 200; Montague *v.* Ratcliffe, Amb. 612 (n.); and see Walker *v.* Jones, L. R. 1 P. C. 50.

(*d*) Venables *v.* Foyle, 1 Ch. Ca. 2; and see National Bank of Australasia *v.* United &c. Co., 4 A. C. 391; Hall *v.* Heward, 32 C. D. 430, and *Re* Prytherch, 42 C. D. 590; and Conveyancing Act, 1881, s. 15, ss. 2.

(*e*) *Re* Radcliffe, 22 B. 201.

(*f*) Jones *v.* Gibbons, 9 V. 411.

(*g*) Judicature Act, 1873, s. 25,

Thornbrough v. Baker.

On the assignment of an equity of redemption, the cases cited below (*a*) shew that though the assignee does not become personally liable to the mortgagee, he is by implication bound to indemnify the mortgagor. This liability may be excluded by the terms of the assignment (*b*), and *semble* (*c*), does not arise on the assignment of an equity of redemption in a contingent interest until the assignee becomes entitled in possession.

Section 21, sub-sect. 2, and sect. 22 of the Conveyancing, &c. Act, 1881, add to the statutory power of sale the common form in use for protection of purchasers in cases of sales by mortgagees and receipts by them. "Mortgagee" by the interpretation clauses includes a person deriving title through an original mortgagee. A purchaser without notice taking under the exercise of a power of sale is protected by the ordinary proviso in the deed now implied by the Act (*d*). The provision in sect. 21, sub-sect. 2, does not apply until the conveyance has been obtained, and so it does not preclude a person who has contracted to purchase from a mortgagee purporting to sell under his statutory power of sale from inquiring whether the vendor was in a position to exercise the power, nor from proving *aliunde*, in answer to an action for specific performance, that the power was improperly exercised (*e*). In *Bailey* v. *Barnes* (*f*), X., who was the purchaser of an equitable interest in land, derived his title through a sale improperly made by the transferees of a first legal mortgage. The sale was set aside. X. had, when he purchased, no notice of any irregularity in the sale, and, having got in the legal estate, he was held entitled to the property as against the persons who had become entitled to the original equity of redemption. But a purchaser is not protected when he had notice that the sale was not in accordance with the power, *e.g.*, as to notice

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ss. 6; Bateman *v.* Hunt, (1904) 2 K. B. 530; Annual Practice (1911), vol. 2, pp. 652-657, &c.; and see note to Ryall *v.* Rowles, ante, vol. 1, p. 150.

(*a*) *Re* Errington, (1894) 1 Q. B. 11; Waring *v.* Ward, 7 V. 332; Bridgman *v.* Daw, 40 W. R. 253; and see Dodson *v.* Downey, (1901) 2 Ch. 620, where the principle laid down by Lord *Eldon* in Waring *v.* Ward was applied to the sale of a share in a partnership.

(*b*) Mills *v.* United Counties Bank, Ltd., (1911) 1 Ch. 669; (1911) W. N., p. 212 (C. A.).

(*c*) Per *Eve*, J., (1911) 1 Ch. at p. 676.

(*d*) Dicker *v.* Angerstein, 3 C. D. 600; Saunders *v.* Kent, (1885) W. N. 147.

(*e*) Life Interest, &c. Corporation *v.* Hand in Hand, &c., (1898) 2 Ch. 230, distinguishing Dicker *v.* Angerstein, supra; and see King *v.* Smith, (1900) 2 Ch. 425; Bateman *v.* Hunt, (1904) 2 K. B. 530.

(*f*) (1894) 1 Ch. 25.

required (*a*), unless the mortgagor and the other mortgagees waive the notice (*b*).

Under sect. 55 of the Conveyancing Act, 1881, either a receipt in the body of a deed or a receipt endorsed on the deed is sufficient evidence in favour of a purchaser without notice. In *Lloyds Bank* v. *Bullock* (*c*), a trustee for sale under a will, in exercise of his power, sold an equity of redemption; the conveyance contained a receipt for the purchase-money, which in fact was not paid. The deed was deposited by way of equitable mortgage with the plaintiffs. It was held that the equity of the plaintiffs was better than the equity of the beneficiaries under the will, the sale having been made in exercise of the trust for sale, and sect. 55 applying. In *Capell* v. *Winter* (*d*), a trustee for sale under a will, in breach of trust, mortgaged a part of the trust premises to X., who took with knowledge of the breach of trust. The mortgage was made in consideration of moneys previously advanced to the trustee, and the deed was in the form of a conveyance containing the usual receipt for the purchase-money. X. deposited the deed with Y. as security for moneys advanced. Y. had no notice of the breach of trust or non-payment of the purchase-money. It was held that the equities of the beneficiaries under the will and the equities of Y. were equal, and that accordingly the prior equity of the beneficiaries prevailed. The beneficiaries here were not relying on the vendor's lien of their trustee as against Y., as in *Lloyds Bank* v. *Bullock* (supra), but upon their right to have the land sold and the proceeds of sale distributed.

Notice of Assignments.—Apart from the question what notice is necessary in a mortgage of a chose in action, in every case, not only of a transfer of a mortgage, but of an original equitable mortgage, whether subsequent to a legal mortgage or to any equitable interest, notice should be given to the prior mortgagee or other holders of the legal estate. Otherwise the equitable mortgage may be defeated by a conveyance of the legal estate for value without notice, either on a sale or to a puisne mortgagee, or by further advances by the first mortgagee without notice (*e*).

It is settled that the rule in *Dearle* v. *Hall* (*f*), as to priority

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(*a*) Selwyn *v.* Garfit, 38 C. D. 273.

(*b*) *Re* Thompson & Holt, 44 C. D. 492.

(*c*) (1896) 2 Ch. 192.

(*d*) (1907) 2 Ch. 376. In this case *Parker*, J., points out that Rice *v.* R., 2 Drew. 73, and Lloyds Bank *v.* Bullock, supra, were not cases of estoppel, but of conflicting equities.

(*e*) See notes to Marsh *v.* Lee, infra.

(*f*) 3 Russ. 1. See as to this subject

between successive assignees of choses in action, does not apply to mortgages of estates in land, legal or equitable (*a*), of freehold or leasehold (*b*); also, that apart from any mortgage of land, the doctrine does apply to all assignments of debts. *Grant*, M. R., pointed out, in *Jones* v. *Gibbons* (*c*), that a mortgage of land consists partly of the estate in the land, partly of the debt; that, so far as it conveys the estate, it is absolute the moment it is made. He said (*d*): "Undoubtedly it is not necessary to give notice to the mortgagor that the mortgage has been assigned in order to make it valid and effectual. . . . Therefore, by the assignment of the mortgage, the debt necessarily passes as incident to it, and it is clear that to constitute a valid assignment notice to the mortgagor is not necessary," and he held the title of an assignee who had not given notice to the mortgagor good as against the assignees in bankruptcy of the mortgagor.

In *Re Richards* (*e*), a solicitor had represented to his client that he had invested for him money on a specified mortgage, but in fact the mortgage was one previously taken by the solicitor in his own name. The solicitor thus became trustee for the client of the specified mortgage, and deposited the deeds by way of equitable sub-mortgage with his bankers to secure his own overdraft, the bankers taking without notice of the equity of the client. The bankers gave notice to the mortgagor before the client. *Stirling*, J., held that the principle of the decision of *Jones* v. *Gibbons* (supra) applied, that notice to the mortgagor was not necessary to perfect the security of the client, and that the bankers were not entitled to any priority by reason that their notice to the mortgagor was prior to that given on behalf of the client.

Consideration of the cases suggests the doubt whether it would not have been better, in order to prevent fraud, if, when the point was open, Sir *Wm. Grant* had decided, in *Jones* v. *Gibbons* (supra), the other way, and if equity judges, in making rules, had applied the doctrine of notice to all equitable interests in land. Now, among the other risks of taking a second mortgage, it is impossible to say how many mortgages may have been previously made.

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notes to Ryall *v.* Rowles, ante, vol. 1, pp. 121, et seq.

(*a*) See, e.g., Taylor *v.* London and County Banking Co., (1901) 2 Ch. 231, and cases cited on p. 139, vol. 1, ante.

(*b*) Wiltshire *v.* Rabbitts, 14 Si. 76; Union Bank of London *v.* Kent, 39 C. D. 238; Taylor *v.* London and County Banking Co., supra.

(*c*) 9 V. 407; see Taylor *v.* London and County Banking Co., supra.

(*d*) At p. 410; and see *Ex p.* McKay, 1 M. D. & D. 550; *Ex p.* Barnett, 1 De G. 194 (bankruptcy cases).

(*e*) 45 C. D. 589; cf. Hopkins *v.* Hemsworth, (1898) 2 Ch. 347.

In *Union Bank of London* v. *Kent* (*a*), there was a mortgage of an agreement for a lease, and in consequence of the mortgagee's not giving notice to the lessor he granted the leases to the mortgagor, who fraudulently deposited them by way of equitable mortgage with a subsequent mortgagee. It was held that, as the doctrine of notice did not apply, the mortgagee of the agreement had priority over the subsequent mortgagee of the leases.

The doctrine of notice giving priority does, however, apply to an interest in the proceeds of real estate directed to be converted (*b*) :—

To a portion to be raised out of real estate by sale, mortgage or otherwise (*c*) ;

To a share in trust moneys vested in trustees and secured on a mortgage of land ; see *Daniel* v. *Freeman* (*d*), where the Court held that the assignee's interest was money and not an interest in land ;

To a legacy charged on real estate (*e*) ;

To all assignments of interests in moneys or investments vested in trustees and choses in action (*f*).

6. Purchase of Mortgage for less than is due.

Where a stranger gets an assignment of a mortgage for less than is due he will be entitled, at any rate as against the mortgagor and his heirs, to the whole sum due upon the mortgage (*g*).

In *Williams* v. *Springfield* (*h*), it was said by *Jeffreys*, L. C., that "where there are subsequent incumbrancers or creditors, a man who buys in a prior incumbrance shall be allowed only what he paid" (*i*). The doctrine has been much narrowed since, and is now only applicable to purchases of incumbrances made by persons in some fiduciary position, or by the heir-at-law or executor of the mortgagor in whom the mortgaged property has vested, together with other assets of the deceased mortgagor liable for the payment of his debts (*k*). An incumbrancer or other creditor

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(*a*) 39 C. D. 242.

(*b*) *Re* Wyatt, (1892) 1 Ch. 188; Foster *v.* Cockerell, 3 Cl. & Fin. 456, 476; Lee *v.* Howlett, 2 K. & J. 531.

(*c*) *Re* Hughes, 2 H. & M. 89.

(*d*) 11 Ir. R. Eq. 233.

(*e*) Arden *v.* A., 29 C. D. 702.

(*f*) Ante, vol. 1, pp. 120, et seq., and what is generally referred to as the rule in Dearle *v.* Hall, 3 Russ. 1.

(*g*) Phillips *v.* Vaughan, 1 Vern. 336; Williams *v.* Springfield, 1 Vern. 476, even if he takes by gift, Anon., 1 Salk. 155.

(*h*) 1 Vern. 476.

(*i*) See Long *v.* Clopton, 1 Vern. 464; Gilbert's Lex Præt. 282, 283.

(*k*) Braithwaite *v.* B., 1 Vern. 335; Morret *v.* Paske, 2 Atk. 53, 54. Davis *v.* Barrett, 14 B. 542, at p. 554, shews that the rule does not apply to a purchase by the reversioner in fee, who is not the original mortgagor.

purchasing a puisne incumbrance for less than its value will be entitled to what is due upon it as against intermediate incumbrancers or others (*a*).

But if a person stands in any fiduciary relation towards the owner of the estate, he will, in account, be allowed only what he paid for an incumbrance (*b*), and that even though the fiduciary relation has ceased (*c*). The rule has been applied to a solicitor or clerk of a solicitor to the mortgagor (*d*), to the heir-at-law of the mortgagor, in favour of purchasers (*e*) or general creditors, even without notice of their debts (*f*). So also it has been said that a tenant for life purchasing a mortgage on the inheritance can only claim the amount which he has paid as against the remainderman (*g*). The rule has been applied in taking an account between joint purchasers. So where A. and B. bought an estate subject to incumbrances to be discharged out of the purchase-money, on some of the incumbrancers making abatements of claims for interest in favour of A., he was compelled to account for them to B. (*h*). But there is no fiduciary relation between co-tenants of real estate (*i*). Nor does the rule apply to a subsequent incumbrancer who, having advanced his money without notice, buys in a prior incumbrance for protection, though he may stand in a fiduciary position to the mortgagor (*k*).

7. Keeping alive Charges.

As to the mortgagor keeping alive charges when paid off, see *Forbes* v. *Moffatt* (*l*).

(*a*) Morret *v.* Paske, 2 Atk. 54; Darcy *v.* Hall, 1 Vern. 49; Bromley *v.* Holland, 5 V. 620 (n.); and see as to purchases by a subsequent mortgagee from a prior mortgagee Shaw *v.* Bunny, 2 De G. J. & S. 472; Dobson *v.* Land, 8 Ha. 220; Kirkwood *v.* Thompson, 2 H. & M. 400.

(*b*) Morret *v.* Paske, 2 Atk. 54; Powell *v.* Glover, 3 P. W. 251 (n.); Anon., 1 Salk. 155.

(*c*) Carter *v.* Palmer, 8 Cl. & Fin. 657.

(*d*) Nelson *v.* Booth, 3 Jur. (N. S.) 95; Hobday *v.* Peters, 28 B. 349; Carter *v.* Palmer, 8 Cl. & Fin. 657.

(*e*) Long *v.* Clopton, 1 Vern. 464.

(*f*) Lancaster *v.* Evors, 10 B. 164, 1 Ph. 354; see also Darcy *v.* Hall, 1 Vern. 49; Braithwaite *v.* B., 1 Vern. 334; Long *v.* Clopton, 1 Vern. 464; Morret *v.* Paske, 2 Atk. 54.

(*g*) Hill *v.* Browne, Dr. 426, 433.

(*h*) Carter *v.* Horne, 1 Eq. Cas. Abr. 7.

(*i*) Kennedy *v.* De Trafford, (1896) 1 Ch. 762, (1897) A. C. 180; cf. *Re* Biss, (1903) 2 Ch. 40 (as to the absence of fiduciary relations between tenants in common of leaseholds on a renewal of the lease).

(*k*) Darcy *v.* Hall, 1 Vern. 49; Davis *v.* Barrett, 14 B. 542.

(*l*) Tudor, Lead. Ca. R. P., 4th ed., p. 244. And see Long *v.* Clopton, 1 Vern. 464.

In cases where, unless the charge were kept up, the purchaser could not get what he bargained for—*i.e.*, an estate free from incumbrances—the Courts have gone a long way in presuming an intention to keep alive a mortgage in order to prevent a second or third incumbrancer whom it was not intended to benefit from obtaining priority by a mere accident at the expense of other people (*a*) ; in all of which cases the old decision of *Toulmin* v. *Steere* (*b*) has been questioned; see for discussion of the limits of this equitable presumption (*c*).

It was laid down in *Otter* v. *Lord Vaux* (*d*) that if an owner of an estate creates two mortgages he cannot, if he pays off the first mortgage, keep that mortgage alive against the second incumbrancer by taking an assignment of the first mortgage debt to a trustee. Until the passing of the Companies Act, 1907, s. 15 (*e*), the rule in *Otter* v. *Lord Vaux* was applicable to debentures of companies incorporated under the Companies Acts. Such a company having power to borrow upon debentures may issue debentures as collateral security, and the holder of debentures so issued may prove against the assets of the company subject to the debentures, *pari passu* with the holders of other debentures of the same series issued by the company, until the whole of his debt has been repaid (*f*). But where a company, having issued debentures either by way of collateral security or in the ordinary course of business, redeemed or purchased such debentures, it was held that the rule in *Otter* v. *Lord Vaux* applied, that the redemption or purchase *ipso facto* extinguished the debt, and that the company could not transfer the debentures so as to confer upon the transferees the right to rank *pari passu* with the ordinary debentures of the series (*g*). The rule was applied whether the debentures upon redemption or

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(*a*) Phillips *v.* Guttridge, 4 De G. & J. 531; Anderson *v.* Pignet, L. R. 8 Ch. 180; Adams *v.* Angell, 5 C. D. 634, see p. 645; Stevens *v.* Mid-Hants Railway, L. R. 8 Ch. 1064; Thorne *v.* Cann, (1895) A. C., p. 11; and see *Re* Pride, (1891) 2 Ch. 135; Minter *v.* Carr, (1894) 3 Ch. 501; Capital and Counties Bank, Ltd. *v.* Rhodes, (1903) 1 Ch. 631; *Re* Gibbon, (1909) 1 Ch. 367; Manks *v.* Whiteley, (1911) 2 Ch. 448.

(*b*) 3 Mer. 210.

(*c*) Liquidation Estates Purchase Co. *v.* Willoughby, (1896) 1 Ch. 726, reversed (1898) A. C. 321, where the House of Lords thought that the doctrines discussed in the Court of Appeal had little bearing on the case.

(*d*) 2 K. & J. 650, 657; see Platt *v.* Mendel, 27 C. D. 246.

(*e*) See now Companies (Consolidation) Act, 1908, s. 104.

(*f*) *Re* Regent's Canal Ironworks, 3 C. D. 43.

(*g*) *Re* George Routledge & Sons, (1904) 2 Ch. 474.

purchase were registered in the name of the company and retransferred by it to the subsequent purchaser (*a*), or the company took a blank transfer and filled in the name of the subsequent purchaser (*b*). And where a company issued debentures in blank as security for a loan, and the debentures were handed back to the company upon the loan being paid off, the company could not subsequently reissue the debentures (*c*). It is now provided by sect. 104 of the Companies (Consolidation) Act, 1908, that in the absence of express provision to the contrary in the articles or conditions of issue, or unless the debentures have been redeemed in pursuance of any obligation of the company (not being an obligation enforceable only by the person to whom the debentures redeemed were originally issued or his assigns), a company shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of reissue (*d*).

8. Parties to Foreclosure and Redemption Actions.

As a general rule all persons interested in the equity of redemption, and therefore in the proper taking of the account, either primarily, as the mortgagor, or derivatively, as the trustee in bankruptcy of the mortgagor, the assignees of the equity of redemption (*e*), the devisee and heir of the mortgagor and his personal representative, and also all persons interested in the security primarily, as the mortgagee, or derivatively, as his heir or personal representative, or his assignee or devisee of the security and debt, are necessary parties to foreclosure and redemption actions (*f*).

An administrator *pendente lite* does not sufficiently represent the mortgagor's estate, but a general administrator is a necessary party (*g*).

A mortgagee who brings an action for foreclosure or sale, whether he is a first (*h*) or any subsequent (*i*) incumbrancer, and whether of a

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(*a*) Ibid.

(*b*) *Re* Tasker & Sons, (1905) 2 Ch. 587; *Re* Russian Petroleum Co., (1907) 2 Ch. 541.

(*c*) *Re* Perth Electric Tramways, (1906) 2 Ch. 216.

(*d*) See *Re* New London and Suburban Omnibus Co., (1908) 1 Ch. 621.

(*e*) Secretary of State, &c. *v.* British, &c., 67 L. T. 434.

(*f*) Seton (1901), p. 1932; A. P. (1911), pp. 170, et seq. O. XVI.; Fisher on Mortgages, 6th ed., pp. 841, et seq.; Mills *v.* Jennings, 13 C. D. 639; Moore *v.* Morton, (1886) W. N. 196; Francis *v.* Harrison, 43 C. D. 183; Griffith *v.* Pound, 45 C. D. 567; 59 L. J. Ch. 522; *Re* Booth, &c., 62 L. J. Ch. 40; *Re* Mitchell, 65 L. T. 851.

(*g*) Ellis *v.* Deane, Beat. 5; Cave *v.* Cork, 2 Y. & C. Ch. 130.

(*h*) Adams *v.* Paynter, 1 Coll. 530.

(*i*) Johnson *v.* Holdsworth, 1 Si. (N. S.) 109.

legal (*a*) or equitable (*b*) estate, must make every incumbrancer subsequent to himself a party to his action (*c*). And if, being a second or subsequent mortgagee, he desires also to redeem the mortgagees prior to him, he must make them parties, offering to redeem them.

The mortgagor of another estate charged as a collateral security is a necessary party to an action for foreclosure (*d*). But it seems that a surety bound by a personal covenant only is not a necessary party unless he has paid off part of the debt (*e*).

So, too, partners of a mortgagor who have a right of redemption over his mortgaged share are necessary parties (*f*).

If there are several mortgagees who are joint tenants [of an entire thing], all must be parties to the foreclosure (*g*), and the same with tenants in common (*h*).

Also all judgment creditors who have a lien on the land are necessary parties (*i*). As to what constitutes a lien on the land now see infra.

By R. S. C., 1883, Order XVI., r. 8, trustees, executors and administrators may be plaintiffs or defendants to actions for foreclosure or redemption without joining their *cestuis que trust* (*k*).

9. Remedies of the Mortgagee.

After a mortgage had become forfeited at law by non-payment of the principal or interest at the time fixed for payment (*l*), the mortgagee might pursue his remedies in different Courts at the same time; that is to say, he might proceed at common law against the mortgagor *personally*, for the debt, or by ejectment; and also in equity,

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(*a*) Adams *v.* Paynter, supra.

(*b*) Tylee *v.* Webb, 6 B. 552.

(*c*) Coote on Mortgages, (1904) edit., 1023.

(*d*) Stokes *v.* Clendon, 3 Swans. 150 (n.).

(*e*) Newton *v.* Egmont, 4 Si. 574; Gedye *v.* Matson, 25 B. 310.

(*f*) Redmayne *v.* Forster, 2 Eq. 467.

(*g*) Lowe *v.* Morgan, 1 Bro. Ch. 368.

(*h*) Vickers *v.* Cowell, 1 B. 529.

(*i*) Adams *v.* Paynter, 1 Coll. 530; Harrison *v.* Pennell, 4 Jur. (N. S.) 682.

(*k*) See A. P. (1909), pp. 183 et seq. As to redemption actions, see Jennings *v.* Jordan, 6 A. C. 698; as to foreclosure actions, cf. Francis *v.* Harrison, 43 C. D. 183, and the words added to the rule in Nov., 1893.

(*l*) Bonham *v.* Newcomb, 1 Vern. 232, distinguished in *Re* Carshalton, Park, &c., (1908) 2 Ch. 62; Gladwyn *v.* Hitchman, 2 Vern. 134; Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Roddy *v.* Williams, 3 Jo. & Lat. 1; Edwards *v.* Martin, 25 L. J. Ch. 284; Langridge *v.* Payne, 2 J. & H. 423; Keene *v.* Biscoe, 8 C. D. 201; Williams *v.* Morgan, (1906) 1 Ch. 804.

where his remedy was *in rem* against the mortgaged property, either by seeking foreclosure or sale (*a*).

Since the Judicature Act, 1873, a fusion of law and equity has taken place, and a mortgagee can now obtain, in an action commenced by writ, the following relief:—If at the hearing the amount due is proved, agreed, or admitted, an order for immediate payment, unless the Judge think fit to postpone such payment, of the principal sum and interest thereon, with so much of the costs of the action as would have been incurred if it had been brought for payment only. If the amount is not so proved, agreed, or admitted, the judgment will be for an account of what is due to the mortgagee and for payment of the amount immediately on the certificate, unless the Judge postpones payment (*b*). If the defendant does not appear, the plaintiff, if the writ be indorsed for a specific sum and foreclosure, may have an order to sign final judgment for the amount indorsed and subsequent judgment for foreclosure (*c*). Since after the Judicature Act a personal order for payment can be made in a foreclosure action begun in the Chancery Division, the bringing of a second action for payment of moneys due on the mortgage is improper, and will be stayed (*d*).

A mortgagee may sue on the covenant under R. S. C., O. XIV., although a receiver has been appointed, if he has received nothing (*e*), but the writ must comply with the terms of R. S. C., O. III., r. 6 (*f*).

As to obtaining a judgment for an account and foreclosure under R. S. C., 1883, O. XV., in *Blake* v. *Harvey* (*g*), *Cotton*, L. J., in the course of the argument, expressed a doubt whether the rule authorised the making of a foreclosure order. In *Smith* v. *Davies* (*h*), *Chitty*, J., had carefully considered the terms of the rule and had made the order. In *London Loan, &c. Co.* v. *Wall* (*i*), he declined to make an order for foreclosure in Chambers in deference to the doubt expressed by *Cotton*, L. J., but he made it in Court on motion. In *Dyott* v. *Nevile* (*k*), an order for an account and in default foreclosure was made, and on appeal the Court refused to vary the order.

(*a*) As to sale by the Court, see infra, p. 62.

(*b*) Farrer *v.* Lacy, Hartland & Co., 31 C. D. 42; Seton (1901), p. 1897, F. 4; Instone *v.* Elmslie, 54 L. T. 730.

(*c*) Bissett *v.* Jones, 32 C. D. 635; and see Simmons *v.* Blandy, (1897) 1 Ch. 19.

(*d*) Poulett *v.* Hill, (1893) 1 Ch. 277; Williams *v.* Hunt, (1905) 1 K. B. 512.

(*e*) Lynde *v.* Waithman, (1895) 2 Q. B. 180; Bourke *v.* Donahue, 20 L. R. Ir. 234.

(*f*) Imbert Terry *v.* Carver, 34 C. D. 506.

(*g*) 29 C. D. 831.

(*h*) 28 C. D. 650; 31 C. D. 595.

(*i*) 30 Sol. Jo. 338.

(*k*) (1887) W. N. 35.

Smith v. *Davies, supra,* was followed by the Court of Appeal in *Horton* v. *Bosson* (*a*), and there is now no question as to the jurisdiction. The usual course now is to proceed by originating summons under R. S. C., O. LV., r. 5 (*b*).

A mortgagee cannot, it is said, obtain a personal order for payment under R. S. C., 1883, O. LV., r. 5A; although, by the terms of rule 8 of that order, the Court can pronounce such judgment as the nature of the case may require (*c*). Nor can a question of priority between mortgagees be decided thereunder (*d*).

When a personal judgment for the mortgage debt is given against the mortgagor either in a foreclosure or separate action the person redeeming can require a transfer of the judgment (*e*).

If the mortgagee be not fully paid after judgment on his covenant he may foreclose (*f*), or exercise his power of sale. Even after judgment for foreclosure he may sue on the covenant, provided he can reconvey the property, but not otherwise, as he gives a new right of redemption (*g*).

It has been held that as the covenant gives or acknowledges the right of redemption the mortgagee can only sue when he can reconvey the whole property (*h*), including any collateral securities (*i*), and restore the title deeds (*k*). And where the mortgagor has assigned his equity of redemption and is then sued on his covenant, he can still redeem, and on redeeming becomes entitled to hold the mortgaged property for the amount paid by him against his assignee (*l*). The principle of these cases would seem to prevent the mortgagee suing after exercising the power of sale, and has been so treated in works of authority (*m*). But in *Rudge* v. *Richens* (*n*), the mortgagee having sold for less than the debt and

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(*a*) 80 L. T. 435 (C. A.).

(*b*) See further on this subject Bissett *v.* Jones, 32 C. D. 635, and notes in the Annual Practice (1911), vol. 1, p. 169.

(*c*) Cf. Brooking *v.* Skewis, 58 L. T. 73; Barr *v.* Harding, 36 W. R. 216; O'Kelly *v.* Culverhouse, (1887) W. N. 35.

(*d*) *Re* Giles, 43 C. D. 391.

(*e*) See Greenough *v.* Littler, 15 C. D. 93.

(*f*) Palmer *v.* Hendrie, 27 B. 349.

(*g*) Palmer *v.* Hendrie, supra; Lockhart *v.* Hardy, 9 B. 349; Haynes *v.* H., 3 Jur. (N. S.) 504.

(*h*) Palmer *v.* Hendrie, supra, but cf. Worthington & Co., Ltd. *v.* Abbott, (1910) 1 Ch. 588, (a puisne mortgagee who voluntarily submits to a foreclosure order is not thereby disabled from suing).

(*i*) Walker *v.* Jones, L. R. 1 P. C. 50.

(*k*) Schoole *v.* Sall, 1 Sch. & L. 176; Bentinck *v.* Willink, 2 Ha. 1.

(*l*) Kinnaird *v.* Trollope, 39 C. D. 636.

(*m*) Davidson's Conveyancing (1869), vol. 2, pt. 2, p. 618.

(*n*) L. R. 8 C. P. 358.

then sued at law, the mortgagor pleaded that he was deprived of the right to redeem. The plea was struck out at Chambers, and the Court refused to interfere; and see *Re Oxford & Canterbury Hall Co.* (*a*), where the mortgagees were allowed to prove in the winding-up for the whole amount of the debt, less the purchase-money, mentioned in a contract for sale of part of the property by the mortgagees.

If the mortgagee claims administration as well as foreclosure, he will be entitled, so far as administration has been necessary, to add his costs to his security, and to be paid them in priority to the administration costs of the executor of the mortgagor (*b*).

Foreclosure.—A foreclosure may be either absolute or *nisi.*

An immediate foreclosure judgment may be made absolute in the first instance against an infant or married woman, if it appears to the Court to be for their benefit, and the property is insufficient to pay principal, interest and costs, and they ask neither for redemption nor an account, and the plaintiff offers to pay the defendant's costs of the action as between solicitor and client (*c*).

As regards the case where an infant is interested in the equity of redemption, it was at one time thought that one object of sect. 30 of the Trustee Act, 1850 (*d*), was to obviate the necessity of inserting in decrees for foreclosure made against infants a day for the infant to shew cause against the decree when he attained twenty-one; but in *Newbury* v. *Marten* (*e*), in 1851, shortly after the passing of the Act, Lord *Cranworth* held that notwithstanding the Act, the infant should have a day to shew cause in a foreclosure decree. Conveyance of the legal estate is necessary in foreclosure of an equitable mortgage to complete the judgment. In foreclosure of a legal mortgage the legal estate is already in the mortgagee. Sect. 30 gave the Court the power to make orders vesting the estates of infants parties to suits as in the case of trustees. It was therefore contended that it was in no case necessary to give the infant, entitled to an equity of redemption, and defendant in a foreclosure suit, a day after majority. Where the equity of redemption had been devised in trust for sale and to divide the proceeds among the children, the legal estate descending to the eldest son and heir, the registrar in drawing up the order for foreclosure gave the heir six months after coming of

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(*a*) 8 Eq. 691; on appeal, L. R. 5 Ch. 433.

(*b*) *Re* Banks, 45 W. R. 206.

(*c*) Wolverhampton, &c. Co. *v.* George, 24 C. D. 707; Croxon *v.* Lever, 12 W. R. 237; Bennett *v.* Harfoot, 19 W. R. 428.

(*d*) 13 & 14 Vict. c. 60.

(*e*) 15 Jur. 166.

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age; but *Jessel*, M.R., said that in that action the infant stood solely in the position of a trustee, and the minutes must be varied by striking this out (*a*).

In *Mellor* v. *Porter* (*b*), in 1883, *Kay*, J., held, following *Price* v. *Carver* (*c*), in an action by an equitable mortgagee by deposit against the widow and infant heir for foreclosure, the defendants not having appeared, that the infant heir must be ordered to convey when he attained twenty-one, and have a day to shew cause in the usual way.

In *Gray* v. *Bell* (*d*), in 1882, *Fry*, J., made a similar order giving a day to shew cause in an action for foreclosure of a legal mortgage, and said that the practice was not affected by the Trustee Act, 1850. Sect. 30 of that Act is now replaced by sect. 31 of the Trustee Act, 1893, which seems to be in similar terms. See as to the practice when the infant comes of age Annual Practice (1911), vol. 1, p. 201.

Where the time and place for payment of the money found due are appointed under a foreclosure decree, if no one appears on behalf of the defendant to pay the money, the usual order for making the foreclosure absolute will be made, although the solicitor's clerk attending for the plaintiff at the time and place appointed had no authority or power of attorney to receive the money (*e*).

It is sufficient for counsel to hand to the registrar his brief duly indorsed, unless there are special circumstances to be mentioned to the Court (*f*). But if a summons for foreclosure does not ask for possession, an order for foreclosure absolute will not be made *ex parte* (*g*). But after foreclosure absolute in such a case, possession may be applied for *ex parte* (*h*).

Before drawing up the order the registrar requires the production of an affidavit by the plaintiff that he has not between the day of attendance and the date of the order for foreclosure absolute been paid the money found due (*i*); not following *Frith* v. *Cooke* (*k*), where it was held that the affidavit might be made by a person attending on behalf of the mortgagee to receive the mortgage money.

(*a*) Foster *v.* Parker, 8 C. D. 147.

(*b*) 25 C. D. 159.

(*c*) 3 My. & C. 157.

(*d*) 30 W. R. 606.

(*e*) Cox *v.* Watson, 7 C. D. 196.

(*f*) Seton (1901), p. 1994.

(*g*) Le Bas *v.* Grant, 64 L. J. Ch. 368.

(*h*) Jenkins *v.* Ridgley, 68 L. T. 671.

(*i*) Seton (1901), p. 1994; Barrow *v.* Smith, (1855) W. N. 136.

(*k*) 33 W. R. 688.

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If a party to a foreclosure action has assigned his interest *after* decree, the assignee may be made a party to the action even after the order for foreclosure absolute (*a*). A judgment creditor who has obtained equitable execution against the mortgagor's equity of redemption is entitled to be joined as a party, but without extension of the time of redemption (*b*).

As a general rule a defendant is entitled to his costs of a foreclosure action incurred after he has made a proper offer to disclaim, and to be dismissed without costs (*c*).

It seems that in a foreclosure suit it is not competent for the defendant to impeach the mortgage on the ground of fraud, without instituting a cross suit (*d*).

A debenture-holder of a railway company is not entitled to a decree either for a foreclosure or sale, as such companies have public duties to perform, from which nothing but an Act of Parliament can release them (*e*); but *secus* in the case of an ordinary limited company, see *Sadler* v. *Worley* (*f*), where it was held that debenture-holders were entitled to foreclosure.

An action for foreclosure is an action for recovery of land within the Rules of the Supreme Court, 1883, O. XVIII., r. 2, but the additions to the section made by R. S. C., Dec., 1885, provide that nothing in the Order shall prevent a plaintiff in a foreclosure action asking for possession. The better course appears to be to ask for possession in the original application (*g*).

When the mortgagee commences an action to foreclose the equity of redemption, making prior incumbrancers parties, he must offer to redeem them (*h*).

The dismissal of a bill for redemption of a legal mortgage other-

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(*a*) Campbell *v.* Holyland, 7 C. D. 173, 174.

(*b*) *Re* Parbola, (1909) 2 Ch. 437.

(*c*) Ford *v.* Chesterfield, 16 B. 516; see also Benbow *v.* Davies, 11 B. 369; Davis *v.* Whitmore, 28 B. 617; Talbot *v.* Kemshead, 4 K. & J. 93; Greene *v.* Foster, 22 C. D. 566, 569.

(*d*) Eddleston *v.* Collins, 3 De G. M. & G. 1.

(*e*) Furness *v.* Caterham Ry. Co., 25 B. 614.

(*f*) (1894) 2 Ch. 170; and see further as to foreclosure in a debenture-holder's action *Re* Continental, &c. Co., (1897) 1 Ch. 511; Wallace *v.* Evershed, (1899) 1 Ch. 891.

(*g*) A. P. (1911), vol. 1, pp. 260-262; and see Salter *v.* Edgar, (1886) W. N. 47, 54 L. T. 374; Craven Bank *v.* Hartley, (1886) W. N. 189; Best *v.* Applegate, 37 C. D. 43; Lacon *v.* Tyrrell, 56 L. T. 483; Keith *v.* Day, 39 C. D. 452; and see Le Bas *v.* Grant, 64 L. J. Ch. 368.

(*h*) Inman *v.* Wearing, 3 De G. & Sm. 729; and see National Bank of Australasia *v.* United, &c., 4 A. C. 391.

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wise than for want of prosecution operates as a foreclosure (*a*), but not in the case of an equitable mertgage (*b*). In foreclosure proceedings the mortgagee is entitled to interest up to the date specified in the order for redemption (*c*).

It has been said that the right to redeem and the right to foreclose are co-relative, but this is not strictly accurate, for when property is conveyed to trustees for sale, in order to secure a sum of money, although the mortgagor may be entitled to redeem, the mortgagee is not entitled to foreclosure, but to a decree for sale (*d*); and it has been held that mortgagees in trust might file a bill for an account and sale, without praying foreclosure, although the mortgage security contained an express power of sale (*e*), though there is no trust for the mortgagor which he could enforce (*f*).

As to the stamp on a conveyance under an order for foreclosure, see *Huntingdon* v. *Commissioners, &c.* (*g*).

Redeem.—The former practice in a foreclosure action was to give the several incumbrancers or the owners or purchasers of the equity of redemption, successive periods for redemption, according to the order in which they acquired their charges or interests (*h*), allowing a period of six months from the date of the certificate to the first party entitled to redeem, and three months (*i*), or sometimes one month (*k*), to each successive party.

In *Moore* v. *Morton* (*l*) the mortgagee had obtained the usual foreclosure decree against the mortgagor when subsequent incumbrancers were discovered; a further action was commenced against them, not making the mortgagor a party: held, that a decree could not be made in his absence.

But where, in foreclosure actions, questions as to priorities not affecting the plaintiff were raised between co-defendants, a day certain was fixed for all the defendants to redeem or be foreclosed,

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(*a*) Inman *v.* Wearing, 3 De G. & Sm. 729.

(*b*) Marshall *v.* Shrewsbury, L. R. 10 Ch. 250.

(*c*) Hill *v.* Rowlands, (1897) 2 Ch. 361.

(*d*) Schweitzer *v.* Mayhew, 31 B. 37; *Re* Alison, 11 C. D. 284; Kirkwood *v.* Thompson, 2 H. & M. 392; Locking *v.* Parker, L. R. 8 Ch. 30.

(*e*) Hutton *v.* Sealy, 27 L. J. Ch. 263.

(*f*) Locking *v.* Parker, supra; and *Re* Alison, supra.

(*g*) (1896) 1 Q. B. 422.

(*h*) Beevor *v.* Luck, 4 Eq. 537; Titley *v.* Davies, 2 Y. & C. Ch. 399; Loveday *v.* Chapman, 32 L. T. 689; Sweet *v.* Combley, 25 C. D. 463.

(*i*) Seton, 1901 edit., pp. 1983 et seq.

(*k*) Houghton *v.* Sevenoaks Estates Co., (1884) W. N. 243.

(*l*) 82 L. T. 98.

without prejudice to the rights of the several defendants *inter se* (*a*).

And where subsequent incumbrances have been created on the same day (*b*), where different persons claim under one puisne incumbrancer as sub-mortgagees or devisees (*c*), or under the same instrument (*d*), one single right of redemption only has been granted.

The practice has been the same in the case of judgment creditors who are puisne incumbrancers where there are no intermediate incumbrancers (*e*).

As to successive periods of redemption, in *Doble* v. *Manley* (*f*), *Chitty*, J., said he had consulted *Pearson*, J., and *Kay*, J., and all were unanimously of opinion that, if the subsequent incumbrancers did not appear, one time only would be given for redemption. If any subsequent mortgagees appeared and claimed to have successive periods, it would have to be considered whether they were entitled to them or not. In *Platt* v. *Mendel* (*g*), *Chitty*, J., said that if puisne incumbrancers appear and there is no question of priority, at their request, and not at the request of the mortgagor, the practice is to give successive periods of redemption. For an order giving successive periods of redemption, see *Smithett* v. *Hesketh* (*h*), where there were several mortgages to the same mortgagees prior and subsequent to a jointure, and other subsequent mortgages.

But, although a foreclosure or sale will be ordered to satisfy the mortgagee, nevertheless indulgence will be shown to the mortgagor, and the *time for payment will be enlarged*, even after an order absolute of foreclosure has been signed and enrolled (*i*), if a proper case can be shown, and the security be not deficient (*k*). But the order to enlarge the time for payment is by no means of course ; and

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(*a*) Bartlett *v.* Rees, 12 Eq. 395 ; see also Edwards *v.* Martin, 7 W. R. 30 ; General Credit, &c. Co. *v.* Glegg, 22 C. D. 549 ; Smith *v.* Olding, 25 C. D. 462.

(*b*) Long *v.* Storie, 23 L. J. Ch. 200.

(*c*) Loveday *v.* Chapman, 32 L. T. 689.

(*d*) Beevor *v.* Luck, supra ; Seton, 1901 edit., pp. 1983, 1984.

(*e*) Bates *v.* Hillcoat, 16 B. 139 ; Radcliff *v.* Salmon, 4 De G. & Sm. 526 ; Stead *v.* Banks, 5 De G. & Sm. 560.

(*f*) 28 C. D. 664.

(*g*) 27 C. D. 246 ; and see Colman *v.* Llewellyn, 34 C. D. 143.

(*h*) 44 C. D. 161.

(*i*) Thornhill *v.* Manning, 1 Si. (N. S.) 451 ; Patch *v.* Ward, L. R. 3 Ch. 203 ; Beaton *v.* Boulton, (1891) W. N. 30.

(*k*) Cocker *v.* Bevis, 1 Ch. Ca. 61 ; Ismoord *v.* Claypool, 1 Ch. R. 139 ; Anon., Barnard, 221 ; Edwards *v.* Cunliffe, 1 Madd. 287 ; Ford *v.* Wastell, 6 Ha. 229, 2 Ph. 591 ; Holford *v* Yate, 1 K. & J. 677.

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though a strong reason is not required, it will be refused where none is assigned (*a*), or where the security does not appear ample (*b*), or where the mortgagor is plaintiff (*c*), and, even in the case of infant mortgagors, the time will only be extended upon the terms of the immediate payment of the interest and costs (*d*). Where the mortgagor appeals against the decree the terms imposed are as follows: The time appointed for redemption is enlarged, pending the appeal, upon the terms of the mortgagor paying into Court the principal and arrears of interest, and the costs of the suit and of the application for enlarging the time, the mortgagee to receive the dividends of the money paid into Court when invested, on his undertaking to repay them should the decree be reversed (*e*).

On proceedings for foreclosure, where the mortgagor asks to enlarge the time appointed for payment, the Court will accede to the application only on the terms of his first paying the interest and costs already reported due; and these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid (*f*). And although such interest and costs are generally directed to be paid at the time appointed for the payment of the whole (*g*), under particular circumstances a longer time will be allowed, as when the mortgagee has prevented the mortgagor from receiving the rents (*h*); and if payment be not made, time may be enlarged if a reasonable excuse be given (*i*). And where the mortgagee varied the account, by receiving the rent after the Master's report and before the day fixed for payment, the mortgagee was held not to be entitled to an order absolute for foreclosure, but a further reference and account was directed, and a new day appointed for payment (*k*).

(*a*) Nanny *v.* Edwards, 4 Russ. 125.

(*b*) Eyre *v.* Hanson, 2 B. 479.

(*c*) Faulkner *v.* Bolton, 7 Si. 319.

(*d*) Coombe *v.* Stewart, 13 B. 111.

(*e*) Finch *v.* Shaw, 20 B. 555.

(*f*) Whatton *v.* Cradock, 1 Keen, 267; Brewin *v.* Austin, 2 Keen, 211; Seton, 1901 edit., pp. 1987, 1988; Elton *v.* Curteis, 19 C. D. 49.

(*g*) Edwards *v.* Cunliffe, 1 Madd. 287, and see 2 Keen, 212.

(*h*) Geldard *v.* Hornby, 1 Ha. 251; Ellis *v.* Griffiths, 7 B. 83; Eyre *v.* Hanson, 2 B. 478.

(*i*) Jones *v.* Creswicke, 9 Si. 304; Nanfan *v.* Perkins, ibid., 308.

(*k*) Garlick *v.* Jackson, 4 B. 154; Alden *v.* Foster, 5 B. 592; Ellis *v.* Griffiths, 7 B. 83; Jenner-Fust *v.* Needham, 32 C. D. 582; Peat *v.* Nicholson, 34 W. R. 451; but see contra House *v.* Stephens, 32 C. D. 194, and Welch *v.* National Cycle Works, 35 W. R. 137; and see Annual Practice (1911), vol. 1, pp. 789-790.

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In *Webster* v. *Patteson* (*a*), an action by executors of a mortgagee against the mortgagor and a puisne mortgagee, successive periods for redemption were given; after time fixed and before final order, the mortgagee received rent: held that the time was not to be enlarged against the puisne mortgagee, and he was absolutely foreclosed, but a further account was ordered against the mortgagor.

It was held in *Colman* v. *Llewellyn* (*b*), that the time was not to be enlarged where the order *nisi* provided for application at Chambers with respect to moneys coming to the receiver, but in *Cheston* v. *Wells* (*c*), *North*, J., refused to make an order in the form of that in *Colman* v. *Llewellyn*, and see for a form of order for bringing into account sums in the hands of a receiver (*d*). It has also been held that a fresh account should be taken where rents have been received after the day fixed for redemption, but before the foreclosure order has been made absolute (*e*); but *Chitty*, J., has refused to follow that case, and granted foreclosure absolute without further accounts, in *National Permanent, &c. Society* v. *Raper* (*f*).

Even after final order, foreclosure may, under certain circumstances, be opened: see *Beaton* v. *Boulton* (*g*), where a policy had increased by the death of insured after the day appointed for payment but before final order; the chief clerk made the order absolute on an *ex parte* application, and on appeal to the Court *Stirling*, J., held that the foreclosure must be opened.

It is impossible to say, *à priori*, upon what terms the judicial discretion should be exercised: *Thornhill* v. *Manning* (*h*), and see *Campbell* v. *Holyland* (*i*), where the mortgagee had sold his interest before the foreclosure was made absolute, and see cases where the mortgagee has opened the foreclosure by suing on the covenants (*k*).

The mortgagor should, however, come within a reasonable time, and what this is may depend upon the nature of the property; thus,

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(*a*) 25 C. D. 626; see also Whitbread *v.* Lyall, 8 De G. M. & G. 383; Constable *v.* Howick, 5 Jur. (N. S.) 331; Collinson *v.* Jeffery, (1896) 1 Ch. 644.

(*b*) 34 C. D. 143; Smith *v.* Pearman, 36 W. R. 681.

(*c*) (1893) 2 Ch. 151; and see Cumming *v.* Metcalf, 13 R. 115.

(*d*) Barber *v.* Jeckells, (1893) W. N. 91; Christy *v.* Godwin, 38 Sol. Jo. 10; Lush *v.* Sebright, 71 L. T. 59; and see Simmons *v.* Blandy, (1897) 1 Ch. 19.

(*e*) Ross Commissioners *v.* Usborne, (1890) W. N. 92.

(*f*) (1892) 1 Ch. 54.

(*g*) (1891) W. N. 30.

(*h*) 1 Si. (N. S.) 451, 454.

(*i*) 7 C. D. 166; Patch *v.* Ward, L. R. 3 Ch. 203; Ford *v.* Wastell, 6 Ha. 229; Jones *v.* Creswicke, 9 Si. 304.

(*k*) P. 53, supra, notes (*g*) and (*h*).

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where the estate is an estate in land in possession, and the mortgagee takes it in possession and deals with it, and alters the property, the mortgagor must come much more quickly than where it is an estate in reversion, as to which the mortgagee can do nothing except sell it (*a*).

A decree for foreclosure has been opened under peculiar circumstances, after the mortgagee had been in possession sixteen years (*b*); and for fraud, or collusion in getting the decree (*c*) ; or by the mortgagee's proceeding against the mortgagor upon some collateral security, as a bond or covenant, after foreclosure (*d*), which he can do as long as he retains the estate in his own hands, though not, it seems, according to the more recent authorities, if he has sold the estate, though for less than the amount due (*e*).

The mere overvalue of the estate, or a parol agreement or declaration of the mortgagee's to allow redemption (*f*), or his filing a bill of revivor and supplement, after a decree (*g*), or his devising the estate as money (*h*), or calling it a debt in his will (*i*), or an error in a matter of form after long possession (*k*), will not induce the Court to open a decree of foreclosure.

More especially will a decree not be opened after long possession, where the estate has been dealt with in settlements, or alterations have been made in erecting and pulling down buildings (*l*).

A decree of foreclosure may, in the discretion of the Court, even be opened against a *purchaser* from the mortgagee. "The purchaser must be taken to know the general law that an order for foreclosure may be opened under proper circumstances and under a proper exercise of discretion by the Court" (*m*). If, for instance, the purchaser bought the estate within twenty-four hours after the foreclosure absolute, and with notice of the fact that it was of greater value than the amount of the mortgage debt, the Court

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(*a*) Campbell *v.* Holyland, 7 C. D. 172, and instances there given.

(*b*) Burgh *v.* Langton, 5 Bro. P. C. 213 ; S. C., 2 Eq. Ca. Abr. 619, 5 Vin. Abr. 476, pl. 2.

(*c*) Loyd *v.* Mansell, 2 P. W. 73 ; Gore *v.* Stacpoole, 1 Dow, 18 ; Harvey *v.* Tebbutt, 1 J. & W. 197.

(*d*) Dashwood *v.* Blithway, 1 Eq. Ca. Abr. 317, 15 Vin. Abr. 476, pl. 3.

(*e*) Lockhart *v.* Hardy, 9 B. 349.

(*f*) Whishall *v.* Short, 2 Eq. Cas. Abr. 177, pl. 1, 7 Vin. Abr. 298, pl. 15, affirmed Dom. Proc. 3 Bro. P. C. 558.

(*g*) Birch's Case, Gilb. Rep. 186.

(*h*) Silberschildt *v.* Schiott, 3 V. & B. 45 ; Stuckville *v.* Dolben, cited Sel. Ch. Ca. 10, 15 Vin. Abr. 476, pl. 1.

(*i*) Took *v.* Ely, 2 Eq. Ca. Abr. 608, pl. 1, 15 Vin. Abr. 476, pl. 1 (n.).

(*k*) Jones *v.* Kenrick, 5 Bro. P. C. 244.

(*l*) Took *v.* Ely, supra ; Lant *v.* Crispe, 5 Bro. P. C. 200.

(*m*) See per *Jessel*, M. R., in Campbell *v.* Holyland, 7 C. D. at pp. 173, 174.

would open the order for foreclosure (*a*). *Secus*, if the purchaser bought a freehold estate in possession after the lapse of a considerable time from the order of foreclosure absolute, with no notice of extraneous circumstances which would induce the Court to interfere (*b*).

Where, in a foreclosure suit, part of the mortgagor's interest was vested in the Crown, the Court would not decree foreclosure in respect thereof, but gave the plaintiff liberty to apply in Chambers for a sale (*c*).

So, where a mortgagor was convicted of felony, and the mortgagee filed a bill to realise his security, the Court decreed a sale, an account, payment of the purchase-money into Court, and payment of the mortgage debt, with liberty to the Attorney-General to apply for payment out of the balance (*d*). But see now the Act for Abolishing Forfeitures for Treason and Felony (*e*).

Sale by the Court (*f*).

A sale, previous to the Chancery Improvement Act (*g*), would have been decreed by the Court instead of a foreclosure in certain cases, as in the case of a mortgage of a dry reversion (*h*); or if the security were scanty (*i*); or if the bill, praying a sale, were taken *pro confesso*. And see *Lucas* v. *Seale* (*k*), where one of the executors was mortgagor, and *Daniel* v. *Skipwith* (*l*), where the same person was heir and executor of the mortgagor.

In the case of an infant heir or devisee of the mortgagor, there would, with the mortgagee's consent, even previous to the alteration in the law, have been an inquiry which would be more beneficial for

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(*a*) Campbell *v.* Holyland, 7 C. D. 173.

(*b*) Ibid.

(*c*) Bartlett *v.* Rees, 12 Eq. 395; Hancock *v.* A.-G., 33 L. J. Ch. 661.

(*d*) Hancock *v.* A.-G., 33 L. J. Ch. 661.

(*e*) 33 & 34 Vict. c. 23.

(*f*) See as to the exercise of the jurisdiction of the Court of Chancery to order a sale in place of foreclosure under the Chancery Improvement Act, 1852, Hurst *v.* H., 16 B. 372; Smith *v.* Robinson, 1 Sm. & G. 140; Laslett *v.* Cliffe, 2 Sm. & G. 278; Wickham *v.* Nicholson, 19 B. 38; Hewitt *v.* Nanson, 28 L. J. Ch. 49; Phillips *v.* Guttridge, 4 De G. & J. 531; Foster *v.* Harvey, 11 W. R. (V.-C. W.) 899, 12 W. R. (L. J.) 92; and Morgan & Chute's Chancery Acts and Orders, 5th ed. 196.

(*g*) 15 & 16 Vict. c. 86.

(*h*) How *v.* Vigures, 1 Ch. R. 18, 15 Vin. 475.

(*i*) Earl of Kinnoul *v.* Money, 3 Swans. 202 (n.).

(*k*) 2 Atk. 56.

(*l*) 2 Bro. Ch. 154.

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the infant, a sale or foreclosure (*a*), and an order for sale without a reference would be made, if it appeared clearly for his benefit (*b*); and if a decree for sale were obtained (in fact) subsequently to the infant attaining his majority, he could not, if he omitted, on his attaining his age, to make a new defence or apply for leave to redeem, object to the decree (*c*).

As regards the case of an infant, sects. 7 and 8 of the Trustee Act, 1850, now replaced by sect. 28 of the Trustee Act, 1893, enabled the Court to make an order vesting or releasing the land where an infant is entitled to any interest in it by way of security.

Further jurisdiction to direct a sale instead of foreclosure was given to the Court by the 48th section of the Chancery Improvement Act (*d*), in a suit for foreclosure; but this section has been repealed, and much larger powers were conferred upon the Court by the 25th section of the Conveyancing and Law of Property Act, 1881 (*e*). The decisions on the repealed section still afford some guidance as to practice in applications for sale in foreclosure actions: see as to the discretion of the Court under the repealed section (*f*); as to the mode and time of application (*g*); the conduct was given to the first mortgagee for the sake of convenience (*h*); a reserve bidding was fixed sufficient to account for the amount due to the first mortgagee (*i*); and, if a prior mortgagee dissented, the person requesting a sale was required to deposit sufficient to cover expenses (*k*).

By the Conveyancing Act, 1881, s. 25, the power of ordering a sale is extended to an action for redemption as well as to an action for foreclosure, and powers are conferred of ordering a sale, providing for a deposit or security for costs, and making an immediate order without determining priorities.

An order, it seems, can be made under this section in a foreclosure or redemption action at any time before the action is concluded by a

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(*a*) Mondey *v.* M., 1 V. & B. 222, overruling Goodier *v.* Ashton, 18 V. 83.

(*b*) Davis *v.* Dowding, 2 Keen, 247.

(*c*) Davis *v.* Dowding, 2 Keen, 245; see also Foster *v.* Eddy, 18 L. J. Ch. 151.

(*d*) 15 & 16 Vict. c. 86.

(*e*) 44 & 45 Vict. c. 41.

(*f*) Hurst *v.* H., 16 B. 372; Robert *v.* Price, 1 W. R. 303; Newman *v.* Selfe, 33 B. 522; Hiorns *v.* Holtom, 16 Jur. 1077.

(*g*) London & County Banking Co. *v.* Dove, 11 C. D. 204; Wayn *v.* Lewis, 1 Dr. 487; Girdlestone *v.* Lavender, 9 Ha. App. 53.

(*h*) Hewitt *v.* Nanson, 7 W. R. 5.

(*i*) Whitbread *v.* Roberts, 7 W. R. 206.

(*k*) Bellamy *v.* Cockle, 2 W. R. 326; Boydell *v.* Manby, 9 Ha. App. 53; and see Corsellis *v.* Patman, 4 Eq. 156.

foreclosure absolute (*a*); and the order may be made on an interlocutory application before the trial of the action, see *Woolley* v. *Colman* (*b*).

As to forms of order for sale where the mortgagor has not appeared see *Wade* v. *Wilson* (*c*).

The Court has a discretion under this section (*d*), and has refused to order a sale against the wishes of a first mortgagee, where the security was likely to prove insufficient. Where prior incumbrances do not oppose the application then subject to the provisions of subsection 3 of s. 25, the order is made as of course (*e*). A sale may be directed of a mere equity of redemption (*f*), and, if other parties do not appear, a sale is ordered only of so much as will satisfy the plaintiff's mortgage (*g*). Although it has been laid down that the proper remedy of a mortgagee by deposit is foreclosure and not sale (*h*), a sale was ordered by *James*, L. J., in *Woof* v. *Barron* (*i*), on the ground that there was a memorandum of agreement to execute a legal mortgage with a power of sale. In *Wade* v. *Wilson* (*k*), in a foreclosure action by equitable mortgagees by deposit, mortgagor not appearing, the Court ordered an account and a sale of so much as would be necessary to satisfy the debt; it is not stated whether there was a memorandum or not in this case. In *Oldham* v. *Stringer* (*l*), in 1885, there was no memorandum, but only a deposit of deeds; the mortgagor did not appear; *Kay*, J., ordered a sale at the request of the mortgagee. Where the defendant in a foreclosure action applied for a sale at the making of the order, he was ordered to deposit security in Court for the costs of the sale and otherwise to be foreclosed (*m*).

But in *Davies* v. *Wright* (*n*), where the conduct of the sale was

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(*a*) Union Bank of London *v.* Ingram, 20 C. D. 463; Weston *v.* Davidson, (1882) W. N. 28; South Western Bank *v.* Turner, 31 W. R. 113.

(*b*) 21 C. D. 169.

(*c*) 22 C. D. 235. For a form of order for a sale out of Court, Cumberland, &c. *v.* Maryport, (1892) 1 Ch. 92.

(*d*) Merchant Banking Co. *v.* London, &c., Bank, (1886) W. N. 5; 55 L. J. Ch. 479; Provident Clerks, &c. *v.* Lewis, 67 L. T. 644, cf. Norman *v.* Beaumont, (1893) W. N. 45.

(*e*) Cf. Clarke *v.* Pannell, 29 Sol. Jo. 147.

(*f*) Cripps *v.* Wood, 51 L. J. Ch. 584.

(*g*) Wade *v.* Wilson, 22 C. D. 235.

(*h*) James *v.* J., 16 Eq. 153; Backhouse *v.* Charlton, 8 C. D. 444.

(*i*) (1873) W. N. 71.

(*k*) 22 C. D. 235.

(*l*) 33 W. R. 251; see also York Union Banking Co. *v.* Artley, 11 C. D. 205.

(*m*) Weston *v.* Davidson, (1882) W. N. 28; Woolley *v.* Colman, 21 C. D. 169; Brewer *v.* Square, (1892) 2 Ch. 111.

(*n*) 32 C. D. 220.

given to the defendant mortgagor, he was not required to give security. As to the conduct of sale, in *Christie* v. *Van Tromp* (*a*), where the first mortgagee was plaintiff, and the property was clearly ample to answer all mortgages, the conduct was given to the plaintiff; in other cases, where it has been doubtful whether the property will really be sufficient, the conduct has been determined by the consideration as to who is most interested in getting a price (*b*); and leave has been given to sell out of Court, and, in case of sale by mortgagor, a reserve is fixed sufficient to cover what is due on the mortgages (*c*); and see as to general powers given by the rules for requiring proposals to be laid before the judge, and for sales out of Court, R. S. C., Order LIV., 1a, and rr. 2, 3, 3a, 4, 5, 6, and 6a.

By the 5th section of the Conveyancing and Law of Property Act, 1881 (*d*), "where land *subject to any incumbrance*, whether immediately payable or not, is sold by the Court, or out of Court, the Court may direct or allow payment into Court of sufficient to answer the incumbrance and direct that the property be sold free from the incumbrance" (*e*).

In Ireland, sale, instead of foreclosure, has always been directed (*f*), but formerly in this country, in the case of an equitable mortgage, a foreclosure but not a sale was decreed. Now under the Conveyancing and Law of Property Act, 1881, s. 25, sub-s. 2, a sale has been ordered at the request of an equitable mortgagee by deposit, though there was no agreement for legal mortgage (*g*). Before this Act it had been decided that an equitable mortgagee by deposit was entitled to foreclosure and not sale (*h*); and also a judgment creditor (*i*). A person entitled to an equitable charge created by will is entitled to sale, not foreclosure (*k*).

Prior to the Conveyancing Act, 1881, which by section 19 gives the

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(*a*) (1886) W. N. 111.

(*b*) See Woolley *v.* Colman, 21 C. D. 169; Brewer *v.* Square, (1892) 2 Ch. 111; Davies *v.* Wright, 32 C. D. 220; and Norman *v.* Beaumont, (1893) W. N. 45; Union Bank *v.* Munster, 37 C. D. 51.

(*c*) Ibid.

(*d*) 44 & 45 Vict. c. 41.

(*e*) Dickin *v.* D., (1882) W. N. 113, 30 W. R. 887; *Re* Lake & Taylor's Mortgage, 28 C. D. 402; Patching *v.* Ball, 30 W. R. 244.

(*f*) See Perry *v.* Barker, 13 V. 205; Hutton *v.* Mayne, 3 Jo. & Lat. 586.

(*g*) Oldham *v.* Stringer, W. N. (1884) p. 235; 33 W. R. 251; and see Wade *v.* Wilson, 22 C. D. 235.

(*h*) James *v.* J., 16 Eq. 153; Backhouse *v.* Charlton, 8 C. D. 444; and see for nature of action for foreclosure by an equitable mortgagee, judgment of *James*, L. J., in Marshall *v.* Shrewsbury, L. R. 10 Ch. 250, at p. 254.

(*i*) Jones *v.* Bailey, 17 B. 582; Messer *v.* Boyle, 21 B. 559.

(*k*) *Re* Owen, (1894) 3 Ch. 220.

mortgagee an implied power of sale where the mortgage is by deed, the mortgagee of *land* had, in the absence of a power expressly given to him, no power of sale. A mortgagee of stocks and shares had the rights of a pledgee and could sell if the time for repayment had passed, or if no time were fixed, then on default in repayment after reasonable notice (*a*).

Sale by Mortgagee under Statutory Power of Sale.—The mortgagee is not a trustee of his statutory power of sale (*b*), but he must exercise a reasonable care and prudence in selling (*c*).

But where he has exercised the power and paid himself, he is in a fiduciary position as to the surplus for the mortgagor (*d*), and is bound to pay that surplus to the persons entitled (*e*).

Sect. 21, sub-sect. 3, of the Conveyancing and Law of Property Act, 1881, expressly provides that the mortgagee shall hold the proceeds of sale after discharge of prior incumbrances *in trust* to be applied in the manner therein directed. The words "in trust" would appear to make the mortgagee who sells an express trustee of any surplus remaining, after discharge of his claims, for the benefit of the persons entitled to the equity of redemption (*f*). The mortgagee, if a claim is made against him as to the surplus, cannot therefore, as he could if he were merely a constructive trustee, rely on the Statutes of Limitations, unless he can bring his case within sect. 8 of the Trustee Act, 1888. In *Thorne* v. *Heard* (*g*), the solicitor for the first mortgagees, who was solicitor for the mortgagor, received the purchase-money on a sale by the first

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(*a*) See Deverges *v.* Sandeman, (1902) 1 Ch. 579; Stubbs *v.* Slater, (1910) 1 Ch. 633, and see infra notes to Russel *v.* R.

(*b*) Warner *v.* Jacob, 20 C. D. 220; Farrar *v.* Farrars, Ltd., 40 C. D. 410, 411; Kennedy *v.* De Trafford, (1896) 1 Ch. 762, 772, (1897) A. C. 180; Nutt *v.* Easton, (1899) 1 Ch. 873, (1900) 1 Ch. 29; but see and cf. Hodson *v.* Deans, (1903) 2 Ch. 647.

(*c*) Coulson *v.* Williams, 61 L. T. 71.

(*d*) Kennedy *v.* De Trafford, (1896) 1 Ch., per *Kay*, J., at pp. 774, 775; Charles *v.* Jones, 35 C. D. 544.

(*e*) West London Commercial Bank *v.* Reliance Building Society, 27 C. D. 187, 29 C. D. 954; Charles *v.* Jones, supra; Eley *v.* Read, 76 L. T. 39.

(*f*) See per *James*, L. J., in Locking *v.* Parker, L. R. 8 Ch. at p. 40; per *Kay*, J., in Banner *v.* Berridge, 18 C. D., pp. 260—270, especially p. 269. In the latter case the sale was by a mortgagee of a ship under sect. 71 of the Merchant Shipping Act, 1854, and that section contained no words declaring any trusts of the purchase-money. It was held that the mortgagee was a *constructive* trustee of the surplus. The decisions in Locking *v.* Parker, *Re* Alison, 11 C. D. 284, and Banner *v.* Berridge are explained in Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196, at pp. 208, 209.

(*g*) (1895) A. C. 495.

mortgagees, and after satisfying their mortgage misappropriated the surplus. The surplus moneys having never come into the hands of the first mortgagees, and they not being parties or privies to the fraud, it was held that they could set up the Statutes of Limitations against a claim by the second mortgagees.

As a general rule, a sale by a mortgagee will be restrained only on payment into Court by the mortgagor of the amount which the mortgagee swears to be due to him (*a*). But where the mortgagee was the mortgagor's solicitor, see *Macleod* v. *Jones* (*b*).

After a judgment *nisi* for foreclosure the mortgagee cannot exercise his power of sale without the leave of the Court (*c*).

As to the power of sale in the case of an assignment of a mortgage to a building society, see *Re Rumney & Smith* (*d*).

After the death of the mortgagor, the mortgagee has the option of commencing an action for administration or one to enforce his security (*e*). And where the mortgagor died previously to the Judicature Act, 1875, the mortgagee might receive a dividend without prejudice to his security for the balance (*f*). But, under sect. 10 of the Judicature Act of 1875, the mortgagee in an administration suit can only prove for his whole debt upon giving up his security, and if he does not, he can only prove for the deficiency.

In *Re Gale* (*g*), *Bacon*, V.-C., held that the rule that an action against the executor personally for *devastavit* is barred after six years applied to a case where the executors had distributed personal estate with notice of a liability of testator's estate to a mortgage debt, and disallowed the claim of the mortgagee plaintiffs against the executors personally, while he made an order for administration of the estate.

Kay, J., however, in *Re Marsden* (*h*), and *Chitty*, J., in *Re Hyatt* (*i*), both held that this doctrine did not apply to such a case. *Kay*, J., referred to the executor as a trustee for creditors, but *Chitty*, J., said he preferred to say that the executor, without calling him a trustee, owed a duty to the creditors and could not set up his own

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(*a*) Hickson *v.* Darlow, 23 C. D. 690, and the observations there on Hill *v.* Kirkwood, 28 W. R. 358; as to tender by cheque, Blumberg *v.* Life Interests, &c., Corporation, (1897) 1 Ch. 1.

(*b*) 24 C. D. 289.

(*c*) Stevens *v.* Theatres, Ltd., (1903) 1 Ch. 857.

(*d*) (1897) W. N. 42; 13 T. L. R. 479; 66 L. J. Ch. 482.

(*e*) Dighton *v.* Withers, 31 B. 243.

(*f*) Rhodes *v.* Moxhay, 10 W. R. 103; Mason *v.* Bogg, 2 My. & C. 448; see ante, notes to Aldridge *v.* Cooper, vol. 1, p. 48.

(*g*) 22 C. D. 820.

(*h*) 26 C. D. 783.

(*i*) 38 C. D. 609; see also decision of the same Judge in *Re* Birch, 27 C. D. 622.

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breach of duty as being a *devastavit* from which he would be protected after six years. Though *Chitty*, J., refused to describe the executor as a trustee, it is probable that the question as to the right of the executors to plead six years as a bar, is now established by sect. 8 of the Trustee Act, 1888, as the distribution of the assets would have been a breach of trust. This, of course, would be subject to the limitations in that section, and if the assets were retained by the executor the section would not apply.

So far as regards the claim of a mortgagee under the covenant against the assets of a deceased mortgagor not included in the mortgage, it has long been settled that, if the heir in case of an intestacy, or the devisee in case of an absolute devise without a charge of debts, aliened for value before any action for administration, the land in the hands of the alienee was not liable for debts (*a*), though the heir or devisee became personally liable to the value of the land aliened (*b*). The doctrine was applied to leaseholds bequeathed as well as freeholds, where the executor had assented to the bequest (*c*). In *Dilkes* v. *Broadmead* (*d*), a case of marriage settlement, it was decided that when personal estate of a testator is *boná fide* conveyed by a legatee to a purchaser for value without notice of the debt due from the testator, a creditor cannot claim that the assignee should refund (*e*). The doctrine is in no way affected by the Land Transfer Act, 1897. Under that Act (sect. 3, sub-s. 1) the heir now takes by conveyance from the personal representative, the devisee by the assent of or conveyance from the personal representative. The assent or conveyance may be made "subject to a charge for the payment of any money which the personal representatives are liable to pay or without any such charge." The Act, however, contains nothing which creates a right in the creditors to follow lands sold by an heir, or a devisee, into the hands of purchasers, even though the assent or conveyance of the personal representative was made

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(*a*) Spackman *v.* Timbrell, 8 Si. 253; Richardson *v.* Horton, 7 B. 112; Pimm *v.* Insall, 1 Mac. & G. 449, 458; *Ex p.* Morton, 5 V. 549; and see and cf. Coope *v.* Cresswell, L. R. 2 Ch. 112, 122; British Mutual Investment Co. *v.* Smart, L. R. 10 Ch. 567 (doctrine applied to equitable mortgage); *Re* Hedgely, 34 C. D. 379; *Re* Atkinson, (1908) 2 Ch. 307; *Re* Moon, (1907) 2 Ch. 304, 310.

(*b*) 3 Will. & M. c. 14, re-enacted with enlargements by Debts Recovery Act, 1830.

(*c*) Spackman *v.* Timbrell, supra.

(*d*) 2 De G. F. & J. 566.

(*e*) See also *Re* Hedgely, supra; and see Seton (1901), pp. 1660 et seq.

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subject to the charge specified in the sub-section (*a*). That charge does not extend to debts for which, prior to the Land Transfer Act, the executors would have been freed from liability by giving the usual statutory notice. If the personal representative conveys or assents after giving such notice no claim against the land can be made under the charge (*a*).

The decision of *Hall*, V.-C., in *Hooper* v. *Smart* (*b*), shows that this rule does not protect persons who take assignments for value of interests in a fund in Court while it remains in Court, although there may have been a certificate that no debts were due, if other creditors afterwards prove. But where the funds are still in the hands of beneficiaries, it has been held that the mortgagee may claim in equity that they should refund after considerable lapse of time, and that mere delay would not bar the equitable right (*c*).

As to proceedings for foreclosure after a decree for the administration of a mortgagor's estate, see *Brooksbank* v. *Higginbottom* (*d*). In *Re Summers* (*e*), it was held that in an administration of the estate of a person dying insolvent since 1875, a debt of an ordinary creditor bearing interest, only carried interest to the date of the administration judgment ; but in the case of an action by a mortgagee to enforce his security and administer the estate of the deceased mortgagor, he was held entitled to have the proceeds of sale applied first in payment of interest down to the date of payment, then in payment of principal, and then to prove for balance of principal, not exceeding amount of principal due at date of judgment (*f*).

The mortgagee's costs in an administration action have priority over the costs of the executors and devisees (*g*).

As to the fund out of which a mortgage is payable on the death of the mortgagor before payment, see *Ancaster* v. *Mayer*, ante, vol. i., pp. 12 *et seq.*

Receiver.—Although, according to the old practice, the Court would not appoint a receiver on the application of a legal mortgagee (*h*), under

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(*a*) *Re* Cary & Lott, (1901) 2 Ch. 463.

(*b*) 1 C. D. 91 ; and see Noble *v.* Brett, 24 B. 499 ; Graham *v.* Drummond, (1896) 1 Ch. 974.

(*c*) Ridgway *v.* Newstead, 3 De G. F. & J. 474 ; Blake *v.* Gale, 31 C. D. 196, 32 C. D. 571 ; Adamson *v.* Hammond, L. R. 3 P. & D. 144, at p. 148.

(*d*) 31 B. 35.

(*e*) 13 C. D. 136.

(*f*) *Re* Talbott, 39 C. D. 567.

(*g*) Pinchard *v.* Fellows, 17 Eq. 421 ; *Re* Banks, 75 L. T. 387 ; 45 W. R. 206 ; Seton, 6th edit., p. 1925 ; Cook *v.* Hart, 12 Eq. 463 ; Mason *v.* Bogg, 2 My. & C. 443 ; but see contra *Re* Spensley, 15 Eq. 16, and case there cited.

(*h*) Habershon *v.* Gill, (1875) W. N. 231.

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the Judicature Act, 1873, s. 25 (8), a receiver may be appointed "in all cases in which it shall appear to the Court to be just and convenient that such order should be made." On an interlocutory application in a foreclosure suit an order was made for the appointment of a receiver of the whole property, as to part of which he was legal, and as to part equitable mortgagee (*a*). The mortgagee has now power to appoint a receiver under the Conveyancing and Law of Property Act, 1881 (*b*), without coming to Court, but this does not interfere with the right to apply for a receiver under sect. 25 of the Judicature Act, 1873, and it has been held more desirable, where an action for foreclosure was pending, that the appointment should be made by the Court under that Act (*c*). The mortgagor, if he wishes it, may have the nomination made in Chambers; but if not, the Court will appoint the nominee of the mortgagee (*d*).

In *Mason* v. *Westoby* (*e*), a receiver was appointed at the application of a mortgagee in possession who had got all interest and costs and held a balance of rents; but in *Re Prytherch* (*f*) the Court said a mortgagee in possession cannot, at his own pleasure, get rid of his responsibilities, and *as a rule* the Court will not assist him by appointing a receiver. Where the devisee of the mortgagor was in possession, the Court directed a reference to appoint a receiver and fix an occupation rent, and ordered the devisee to attorn tenant or give up possession to the receiver (*g*). As to appointing a receiver at the instance of a mortgagee of property on which a business is carried on, it has been held that a receiver will not be appointed to manage the business unless:

(1) The business is included in the security (*h*);

(2) Or it is necessary to protect the mortgaged property (*i*);

(3) Or it is necessary to protect the property by selling the business with it as a going concern (*k*).

(*a*) Pease *v.* Fletcher, 1 C. D. 274; and see Truman *v.* Redgrave, 18 C. D. 547.

(*b*) 44 & 45 Vict. c. 41, s. 19, s.s. 3.

(*c*) Tillett *v.* Nixon, 25 C. D. 238.

(*d*) Ibid.

(*e*) 32 C. D. 206.

(*f*) 42 C. D. 590; cf. County of Gloucester Bank *v.* Rudry Merthyr Steam, &c. Co., (1895) 1 Ch. 629.

(*g*) *Re* Burchnall, (1893) W. N. 171; Yorkshire Banking Co. *v.* Mullan, 35 C. D. 126. See generally as to the powers and duties of receivers *Re* Graham, (1894) 1 Ch. 68; (1895) 1 Ch. 66.

(*h*) Whitley *v.* Challis, (1892) 1 Ch. 64, (C. A.); *Re* Leas Hotel Co., (1902) 1 Ch. 332.

(*i*) Campbell *v.* Lloyds, &c. Bank, (1891) 1 Ch. 136 (n.).

(*k*) Makins *v.* Percy Ibotson & Sons, (1891) 1 Ch. 133.

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And a legal mortgagee of *business premises*, such as an hotel, or of a colliery with the business or goodwill, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, an injunction restraining the mortgagor from interfering with the management of the business, and the possession of the premises (*a*) ; *secus*, if the mortgage does not include the business or goodwill (*b*). Debenture-holders who have a floating security upon the undertaking and all the property, present and future, of a company, are entitled to the appointment of a receiver of the property subject to the debentures if their security is in jeopardy, although nothing may be payable in respect of principal or interest, and there has been no default or breach of contract by the company (*c*). The Court has jurisdiction to appoint a receiver in an action to enforce a floating security, though the writ was issued before money was payable under the debenture, if the security has matured at the date of the appointment (*d*).

Bankruptcy of Mortgagor, &c.—Upon the bankruptcy of the mortgagor, the mortgagee may either realise his security and prove for the balance due to him, after deducting the net amount realised, or may surrender his security and prove for the whole debt, or may require the trustee to elect whether he will exercise his power of redeeming the security or requiring it to be realised, and then, if the trustee does not elect within six months, the mortgagee becomes entitled to the property free from redemption (*e*). For notes as to remedies in the bankruptcy of a mortgagor, see the notes to *Russel* v. *R.*, infra, p. 85.

Where an order has been made to wind up a company, a mortgagee, who has commenced an action against the company to realise his security, will be given leave, under sect. 142 of the Companies (Consolidation) Act, 1908 (*f*), to proceed with his action,

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(*a*) Truman *v.* Redgrave, 18 C. D. 547.

(*b*) County of Gloucester Bank *v.* Rudry Merthyr, &c. Colliery Co., (1895) 1 Ch. 629 ; Whitley *v.* Challis, (1892) 1 Ch. 64 ; Bartlett *v.* West Met. Tramways Co., (1893) 3 Ch. 437 ; and see Gardner *v.* L. C. & D. Ry., L. R. 2 Ch. 385 ; Marshall *v.* South Staffs. Tramways Co., (1895) 2 Ch. 36 ; *Re* Leas Hotel Co., (1902) 1 Ch. 332.

(*c*) *Re* London Pressed Hinge Co., (1905) 1 Ch. 576, where the cases as to "jeopardy" are reviewed by *Buckley*, J.

(*d*) *Re* Carshalton Park Estate, (1908) 2 Ch. 62.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sched. 2, rr. 9, 10, 11, 17.

(*f*) Replacing Companies Act, 1862, s. 67.

except under special circumstances, or unless the same relief is or will be given to him in the winding-up as he would obtain in the action (*a*). So also a receiver appointed in a debenture-holders' action, commenced subsequently to the winding-up proceedings, will be continued when leave is given to the plaintiffs in the debenture-holders' action to proceed (*b*).

The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor, and is not obliged to make his application to the Court of Bankruptcy (*c*). Where the validity of the mortgage was the only question at issue, it was held that the trustee in bankruptcy had no right to require a transfer of a foreclosure action to be tried by the judge in Bankruptcy (*d*).

It may be here mentioned that, irrespective of any proceedings to enforce his security, the mortgagee, if he find that his security is defective, or that the legal estate is outstanding, may commence an action to compel a conveyance to himself of the legal estate, or otherwise for the perfecting of his security (*e*).

10. Remedies of the Mortgagor.

Redemption.—The following persons may redeem: The *heir* at common law, or the customary heir, according to the tenure of the land, and to entitle him to relief, a *primâ facie title* is sufficient (*f*); a lunatic, through his committee (*g*); the devisee of the equity of redemption, who need not make the heir-at-law of the testator a party to his bill to redeem, unless he claims to have the will established (*h*); a tenant for life, remainderman (*i*), or reversioner (*k*); a dowress (*l*), *secus*, if she joined in the conveyance with her

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(*a*) See *Re* David Lloyd & Co., 6 C. D. 339; *Re* Longdendale Cotton Spinning Co., 8 C. D. 150; *Re* Pound, Son & Hutchins, 42 C. D. 402; cf. Jones *v.* Swansea Society, 44 L. T. 106.

(*b*) Strong *v.* Carlyle Press, (1893) 1 Ch. 268.

(*c*) Waddell *v.* Toleman, 9 C. D. 212; *Ex p.* Fletcher, 10 C. D. 610; Bankruptcy Act, 1883, s. 102.

(*d*) *Re* Champagné, (1893) W. N. 153.

(*e*) See Grugeon *v.* Gerrard, 4 Y. & C. Ex. 119; Malone *v.* Geraghty, 3 Dr. & W. 246, 1 H. L. Cas. 81; Sporle *v.* Whayman, 20 B. 607.

(*f*) Pym *v.* Bowreman, 3 Swans. 241 (n.); Lloyd *v.* Wait, 1 Ph. 61.

(*g*) *Ex p.* Grimstone, Amb. 706.

(*h*) Lewis *v.* Nangle, 2 Ves. Sen. 431; Philips *v.* Hele, 1 Ch. R. 190.

(*i*) Cf. Prout *v.* Cock, (1896) 2 Ch 808.

(*k*) Ravald *v.* Russell, You. 9; Raffety *v.* King, 1 Keen, 618; Aynsly *v.* Reed, Dick. 249.

(*l*) Palmes *v.* Danby, Pr. Ch. 137

husband (*a*), unless the right to redeem was reserved to her (*b*); tenant by the curtesy (*c*); jointress (*d*); an assignee (*e*); assignees in bankruptcy (*f*).

Also a subsequent mortgagee making the mortgagor or his heir a party to his bill (*g*); judgment creditors (*h*); tenants by elegit or statute and sequestration (*i*); a judgment creditor, whose judgment does not affect the land at the date of a decree in a foreclosure suit, if he acquire a charge on the land by issuing a writ of elegit, and obtaining a return from the sheriff, within six months from the date of the decree (*k*), a judgment creditor, also, although he is unable to proceed with the execution of an elegit by reason of there being mortgages on the estate, notwithstanding the provisions of 27 & 28 Vict. c. 112 (*l*); a plaintiff in a creditor's suit (*m*); a creditor whose debt subsists in equity, although released at law (*n*).

Also the Crown or its grantee, upon forfeiture of the equity of redemption (*o*); the lord claiming the reversion on forfeiture of the equity of redemption of a term (*p*); and a tenant holding under a lease made by the mortgagor after a legal mortgage (*q*).

Likewise a volunteer, although claiming under a deed fraudulent and voidable under 27 Eliz. c. 4 as against the mortgagee *quoad* his mortgage as to which he is a purchaser (*r*). Persons also entitled in default of appointment, where a mortgage is made in execution of a power (*s*).

Any person, in short, interested in the equity of redemption is

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(*a*) Dawson *v.* Bank of Whitehaven, 6 C. D. 218.

(*b*) Ibid., 225; and see Jackson *v.* Parker, Amb. 687; Jackson *v.* Innes, 1 Bli. 104.

(*c*) Jones *v.* Meredith, Bunb. 347.

(*d*) See principal case of Howard *v.* Harris.

(*e*) Anon., 3 Atk. 314; and see Secy. of State, &c. *v.* British, &c., 67 L. T. 434.

(*f*) Francklyn *v.* Fern, Barnard, 30.

(*g*) Fell *v.* Brown, 2 Bro. Ch. 279.

(*h*) Stonehewer *v.* Thompson, 2 Atk. 440.

(*i*) Jones *v.* Meredith, Bunb. 347, 2 Eq. Ca. Abr. 549; Fawcet *v.* Fothergill, Dick. 19.

(*k*) Mildred *v.* Austin, 8 Eq. 220.

(*l*) Beckett *v.* Buckley, 17 Eq. 435; and see Hatton *v.* Haywood, L. R. 9 Ch. 229; Thompson *v.* Gill, (1903) 1 K. B. 760.

(*m*) Christian *v.* Field, 2 Ha. 177.

(*n*) Acton *v.* Peirce, 2 Vern. 480; S. C., nom. Acton *v.* A., Pr. Ch. 237.

(*o*) A.-G. *v.* Crofts, 4 Bro. P. C. 136; Lovell's Case, 1 Salk. 85, 1 Eden, 210.

(*p*) Downe *v.* Morris, 3 Ha. 394.

(*q*) Keech *v.* Hall, Dougl. 22; Tarn *v.* Turner, 39 C. D. 456.

(*r*) See now Voluntary Conveyances Act, 1893; Rand *v.* Cartwright, 2 Ch. Ca. 59; Barthrop *v.* West, 2 Ch. R. 62; Thorne *v.* T., 1 Vern. 182.

(*s*) Innes *v.* Jackson, 16 V. 367.

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entitled to redeem, and where, being so entitled, he tenders the mortgage money and interest and costs, he is entitled to the delivery of the title-deeds, and to have a reconveyance of the property (*a*). The form of the conveyance depends upon circumstances, and should shew the right to redemption of persons having other interests (*b*).

In *Wicks* v. *Scrivens* (*c*), the equity of redemption had been settled subject to a mortgage in form of a trust for sale; the plaintiff was assignee of the life interest under the settlement; the order made was, on payment of what might be found due, the mortgagees to assign the premises to the plaintiff, he to hold the equity of redemption subject to the trusts of the settlement.

In *Hall* v. *Heward* (*d*), the executrix of the mortgagor was held entitled to redeem the real as well as the personal estate of the testator, on the ground that the owner of the equity in one of two mortgaged estates is not entitled and cannot be compelled to redeem one without the other (*e*). *Bacon*, V.-C., made the usual order for accounts and, on payment of what should be found due, for conveyance to the executrix free from all incumbrances by the defendant, but subject to such right or equity of redemption as might be subsisting therein in any other person or persons, and his judgment was affirmed by the Court of Appeal. In *Flint* v. *Howard* (*f*), P. in 1876 mortgaged some paper mills to H. for 6,000*l.*, and by deed of even date assigned a reversion in personalty as collateral security for the debt. In 1882 P. made a second mortgage of the mills and the reversion to the plaintiff for 5,000*l.*; and in 1884 P. made a third mortgage of the mills only to the plaintiff for 2,500*l.* In 1885 the plaintiff by deed transferred his third mortgage to H. and released the mills from his second mortgage, so that H. became first and second mortgagee of the mills, as well as first mortgagee of the reversion, and the plaintiff second mortgagee of the reversion. P. made subsequent mortgages both of mills and reversion. The plaintiff foreclosed the mortgages on the reversion which were subsequent to his own, and then brought an action claiming to redeem H.'s mortgage on the reversion on

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(*a*) Per Lord *Hatherley*, L. C., in Pearce *v.* Morris, L. R. 5 Ch. 229; Tarn *v.* Turner, supra.

(*b*) Ibid.

(*c*) 1 John. & H. 220.

(*d*) 32 C. D. 430.

(*e*) Ibid.; and see Smith *v.* Green, 1 Coll. 555; Elisha *v.* E., Seton (1901), pp. 1936, 1978, and Form 4, p. 2076.

(*f*) (1893) 2 Ch. 54; see notes to Aldrich *v.* Cooper, vol. i., pp. 57 et seq.

payment of 6,000*l.*, and to have a transfer from him of his first mortgage on the mills, as a security for what he had paid. *Held* (by the Court of Appeal, affirming *Romer*, J.), that he was entitled to redeem the reversion and the mills on payment of the 6,000*l.* to H.; that this sum must be apportioned between the mills and the reversion, according to their respective values; and that the plaintiff was entitled to have a conveyance of the reversion absolutely, and of the mills to be held as security for such part of the money paid as should be apportioned to that property. For a form of order in a complicated case, where the plaintiffs were first and second mortgagees, and a jointress was the third incumbrancer in respect of her jointure, the plaintiffs fourth mortgagees, and there were other subsequent mortgages, see *Smithett* v. *Hesketh* (*a*), in which case the Court said the jointress was entitled to redeem, and on redeeming to have an assignment of the plaintiffs' first and second mortgages, so as to keep them alive—that if she redeemed, the plaintiffs as fourth mortgagees could only redeem subject to her jointure; if she did not redeem she would be foreclosed.

"The tenant for life having a conveyance, and having the deeds, cannot be redeemed by those in remainder, but retains the life estate, and when the remainderman comes into possession of the estate he can then obtain a redemption of the charge which the tenant for life had acquired" (*b*).

A mortgagee who is also assignee or mortgagee of a particular estate in the equity of redemption is not, during the continuance of that particular estate, subject to redemption at the hands of a remainderman (*c*).

A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title-deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase part of the mortgaged estate, and has not accepted the title (*d*).

Tender.—It has been held that a person cannot redeem before the time appointed in the mortgage deed for payment, although he tenders to the mortgagee both the principal and the interest due up to that time (*e*).

(*a*) 44 C. D. 161.

(*b*) Per Lord *Hatherley*, L. C., in Pearce *v.* Morris, L. R. 5 Ch. 230.

(*c*) Prout *v.* Cock, (1896) 2 Ch. 808.

(*d*) Pearce *v.* Morris, L. R. 5 Ch. 227, varying the decree in S. C., 8 Eq. 217.

(*e*) Brown *v.* Cole, 14 Si. 427; but see Bovill *v.* Endle, (1896) 1 Ch. 648.

Ordinarily, after default in payment according to the terms of the deed, a mortgagor desiring to redeem must, by a rule of practice (*a*), give six months' notice of his intention to do so, or pay six months' interest in lieu thereof (*b*). Where, however, the mortgagee has demanded payment or commenced an action (*c*), or entered into possession (*d*), then neither notice or payment of six months' interest is necessary, and the mortgagor can redeem at once, on payment of principal and interest, whether the day of payment under the mortgage has arrived or not. After the usual certificate in a foreclosure action, finding the amount due up to the end of six months from date of certificate, the mortgagor is not entitled to redeem before the expiration of the six months on payment of principal with interest up to time of payment only (*e*).

The rule as to the right of the mortgagee to six months' notice or interest applies to all mortgages of property, whether real or personal, in possession or in reversion, where the mortgage is in legal form by conveyance with proviso for redemption. It does not, however, apply to an equitable mortgage by deposit of title deeds (*f*).

Where notice is given by the mortgagor of his intention to pay off, or by the mortgagee for payment, and the money is not paid at the appointed time, a new notice must be given or a further six months' interest is payable if the mortgagee demands it (*g*).

But if the mortgagee after due notice refuses to accept a tender of a sum sufficient to cover principal, interest, and costs, he will be compelled to pay the costs of a suit for redemption (*h*), but it seems he will not be deprived of his costs in a redemption suit because he

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(*a*) See per *Shadwell*, V.-C., in Browne *v.* Lockhart, 10 Si. at p. 424; per *Romer*, J., in Smith *v.* S., (1891) 3 Ch. 552.

(*b*) Johnson *v.* Evans, 61 L. T. 18.

(*c*) Letts *v.* Hutchins, 13 Eq. 176, explained in Smith *v.* S., (1891) 3 Ch. 550; *Re* Alcock, 23 C. D. 372; cf. Matson *v.* Swift, 5 Jur. 645.

(*d*) Bovill *v.* Endle, (1896) 1 Ch. 648.

(*e*) Hill *v.* Rowlands, (1897) 2 Ch. 361.

(*f*) Fitzgerald's Trustee *v.* Mellersh, (1892) 1 Ch. 385, where the cases are discussed; and see Spencer-Bell to L. & S. W. Ry. Co., 33 W. R. 771.

(*g*) Bartlett *v.* Franklin, 15 W. R. (V.-C. M.) 1077; distinguished in Edmondson *v.* Copland, (1911) 2 Ch. 301; *Re* Moss, 31 C. D. at p. 94.

(*h*) Grugeon *v.* Gerrard, 4 Y. & C. Ex. 128; Harmer *v.* Priestley, 16 B. 569; see also Hoskin *v.* Sincock, 13 W. R. 487.

has overstated the amount due to him (*a*). A mortgagee denying the title of the mortgagor may be ordered to pay costs (*b*).

It has been held that, though a conditional tender is not good, a tender under protest, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any conditions on the creditor, and that after such a tender the mortgagor is entitled to accounts, reserving further consideration and costs in case it should appear that the tender was sufficient (*c*). A mortgagee's solicitor may not accept a cheque unless authorised to do so; consequently the tender of a cheque is not good in the absence of such authority (*d*).

To stop interest running, not only must there be a sufficient tender by the mortgagor of principal, interest, and costs, but he must be able to satisfy the Court that he had and always kept the money ready for payment (*e*). Tender properly made and improperly rejected, is not, in case of a mortgage, equivalent to payment so as to be the foundation of an action for detinue for wrongful detention of the deeds. Lord *Macnaghten* explains the distinction herein between the pledge of a chattel, where the general property in the chattel remained in the pledgor, and a special property in the pledgee which is determined by sufficient tender, and a mortgage where the mortgagor has no property at law (*f*). *Semble*, since the Judicature Acts, an equitable mortgagee is on the same footing as a legal mortgagee in this respect (*g*). The proper course for the mortgagor after tender is to submit to pay into Court a sufficient sum and apply for an order (*h*).

Clandestine mortgage.—A mortgagor may lose his right to redeem by what is called a clandestine mortgage. By 4 & 5 W. & M. c. 16, intituled "An Act to prevent frauds by clandestine mortgages," a person mortgaging lands and tenements without discovering in writing under his hand to the mortgagee any former mortgage or mortgages forfeits his right to redemption. The Act is construed strictly and applies only to a mortgage in the ordinary form and not

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(*a*) Cotterell *v.* Stratton, L. R. 8 Ch. 295.

(*b*) Kinnaird *v.* Trollope, 42 C. D. 610, at p. 619; and Hall *v.* Heward, 32 C. D. 430.

(*c*) Greenwood *v.* Sutcliffe, (1892) 1 Ch. 1 (C. A.).

(*d*) Blumberg *v.* Life, &c. Corporation, (1897) 1 Ch. 1.

(*e*) Edmondson *v.* Copland, (1911) 2 Ch. 301.

(*f*) Bank of New South Wales *v.* O'Connor, 14 A. C. 273.

(*g*) Ibid.

(*h*) Seton (1901), p. 1926, Form 2.

to a mere charge (*a*), nor if lands to a substantial amount are in the second which are not in the first, nor if the second is obtained unfairly (*b*). From the observations of *Kay*, J., in *James* v. *Kerr* (*c*), it would appear that a person relying on the statute must plead it.

11. Fixtures as between Mortgagor and Mortgagee.

As to Fixtures.—It is settled that the rules as to removal as between landlord and tenant do not apply as between mortgagor and mortgagee (*d*). As between a mortgagee in fee of land and the mortgagor the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage (*e*). This rule applies whether the interest mortgaged is freehold or leasehold (*f*), and it is immaterial whether the mortgage is legal or equitable (*g*).

The rule has been fully applied even where chattels have been affixed to the mortgaged premises under hire-purchase agreements entered into by the mortgagor. In cases of this character, as between the vendor and the purchaser, the latter until all instalments agreed upon are paid is but a bailee, and the vendor, on default by the purchaser in the payment of any instalment, has the right to retake the chattels so bailed. When the mortgage precedes the hire-purchase agreement the application of the rule presents little difficulty. The chattels when affixed are comprised in the mortgage, and nothing short of some agreement, express or implied, will limit the mortgagee's rights over them as a part of his security (*h*). Accordingly, in *Reynolds* v. *Ashby* (*i*), the vendor under such an

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(*a*) Kennard *v.* Futvoye, 6 Jur. (N. S.) 312.

(*b*) Stafford *v.* Selby, 2 Vern. 591.

(*c*) 40 C. D. 455.

(*d*) Meux *v.* Jacobs, L. R. 7 H. L. 481; Longbottom *v.* Berry, L. R. 5 Q. B. 123; Ellis *v.* Glover & Hobson, (1908) 1 K. B. 388; and see Elwes *v.* Maw, S. L. C.

(*e*) See, e.g., Meux *v.* Jacobs, L. R. 7 H. L. 481; Walmesley *v.* Milne, 7 C. B. (N. S.) 115; Holland *v.* Hodgson, L. R. 7 C. P. 328; Hobson *v.* Gorringe, (1897) 1 Ch. 189; Ellis *v.* Glover & Hobson, (1908) 1 K. B. 388; see judgment of *Farwell*, L. J., at p. 398; Reynolds *v.* Ashby, (1903) 1 K. B. 87.

(*f*) Southport & West Lancashire Ry. Co. *v.* Thompson, 37 C. D. 64; Meux *v.* Jacobs, supra.

(*g*) See, e.g., Meux *v.* Jacobs, supra; but see and cf. *Re* Samuel Allen & Sons, Ltd., (1907) 1 Ch. 575.

(*h*) See per *Farwell*, L. J., in Ellis *v.* Glover & Hobson, Ltd., (1908) 1 K. B. 399.

(*i*) (1903) 1 K. B. 87; (1904) A. C. 466; cf. Howie's Trustees *v.* MacLay, 5 F. 214.

agreement, seeking to exercise his rights under the agreement, was held not entitled to recover the chattels from mortgagees who had taken possession. So also in *Ellis* v. *Glover & Hobson, Ltd.* (*a*), the mortgagee, who had not entered, was held entitled to recover the value of fixtures removed by the vendor in breach of a hire-purchase agreement by the mortgagor, together with damages for the removal. It would, however, appear that during the continuance of the mortgagor's possession the mortgagee would not be entitled to an injunction to restrain the removal of such fixtures or to obtain damages for their removal unless his security were thereby rendered deficient (*b*). Further, it may be that if the mortgagee had express notice of the terms of a hire-purchase agreement made with the mortgagor whilst in possession, the mortgagee would be bound thereby on taking possession (*c*).

Where the hire-purchase agreement precedes the mortgage, and a legal mortgagee has advanced his money without notice of the hire-purchase agreement, he has been held entitled *on taking possession* to retain the chattels then affixed against the vendor (*d*). The decision in *Gough* v. *Wood* (*e*) must be regarded as turning on the special circumstances of that case. The Court of Appeal in that case, having regard to the nature of the premises mortgaged (nursery gardens), held that the mortgagee by allowing the mortgagor to continue in possession impliedly authorised him to remove fixtures which he might affix for the purposes of his business. Accordingly the vendor was entitled to fixtures which he had removed on the purchaser's default *before* the mortgagee entered. This implied licence would of course be determined by the mortgagee's entry (*f*).

In *Hobson* v. *Gorringe* (*g*), *A. L. Smith*, L. J., in delivering the judgment of the Court (*h*), pointed out that the mortgagee in that case was a purchaser without notice, and it would appear to have been

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(*a*) (1908) 1 K. B. 388.

(*b*) See per *Farwell*, L. J., Ellis *v.* Glover & Hobson, Ltd., supra, at p. 399.

(*c*) See per *Romer*, L. J., in Reynolds *v.* Ashby, (1903) 1 K. B. at p. 101.

(*d*) Hobson *v.* Gorringe, (1897) 1 Ch. 182.

(*e*) (1894) 1 Q. B. 713.

(*f*) See this case explained per *Kay*, L. J., ex parte, Huddersfield Banking, &c., (1895) 2 Ch. at p. 286, discussed in Hobson *v.* Gorringe, supra, and distinguished in Reynolds *v.* Ashby, supra, and by *Farwell*, L. J., in Ellis *v.* Glover & Hobson, supra, at pp. 401, 402. In the latter case there was an express provision in the mortgage deed against removal of fixtures.

(*g*) (1897) 1 Ch. 182.

(*h*) Ibid., at p. 192.

the opinion of the Court that if the mortgagee had had notice of the agreement, he would have been bound thereby and not entitled to retain the chattels as against the vendor under the hire-purchase agreement. In *Re Samuel Allen & Sons, Ltd.* (*a*), the purchaser under a hire-purchase agreement, subsequently made an equitable mortgage of the premises, to which the chattels were then affixed, to a bank by deposit of title deeds. The purchaser made default under the agreement, and the vendor thereupon demanded redelivery of the chattels. *Parker*, J., held that the agreement could not be considered as of a purely personal nature, and that, since the claims of the vendor and the bank were alike equitable, the claim of the vendor must be preferred as being prior in time.

Questions of great difficulty as to the mortgage of fixtures arise under the Bills of Sale Act, 1878, and the amending Act of 1882. So far at least as regards the most important fixtures, *i.e.*, trade machinery, it seems necessary to go back to the law as it stood before the Bills of Sale Act, 1878. This is to be collected from several somewhat inconsistent decisions, and it is difficult to give their effect concisely and accurately; but, treating *Re Trethowan* (*b*) as a case depending on special circumstances and not affecting the rules, it may be taken that, when the Act of 1878 was passed, a mortgage of land, whether by deed (*c*), or deposit with (*d*) or without (*e*) a memorandum, passed the fixtures to the mortgagee as part of the land, provided there was simply a mortgage of the land and no separate assignment, power of sale, or power of removal of the fixtures, and such mortgages stood outside the law of bills of sale; but, on the other hand, if with the assurance of the land there were an assignment by a separate witnessing part (*f*), or by the same witnessing part with a separate *habendum* to the mortgagee absolutely (*g*); or by the same witnessing part with an omission of a *habendum* as to the fixtures, while the *habendum* as to the land was for a term (*h*); or if there were a power of severing or selling fixtures separately (*i*);

(*a*) (1907) 1 Ch. 575.

(*b*) 5 C. D. 559.

(*c*) *Ex p.* Barclay, *Re* Joyce, L. R. 9 Ch. 577; and see Boyd *v.* Shorrock, 5 Eq. 72; Climie *v.* Wood, L. R. 4 Ex. 328, in Exch. Chamb.; Holland *v.* Hodgson, L. R. 7 C. P. 329, in Exch. Chamb.; Mather *v.* Fraser, 2 K. & J. 536.

(*d*) *Ex p.* Astbury, L. R. 4 Ch. 630; *Ex p.* Barclay, *Re* Gowan, 5 De G. M. & G. 403.

(*e*) Longbottom *v.* Berry, L. R. 5 Q. B. 123.

(*f*) Begbie *v.* Fenwick, L. R. 8 Ch. 1075 (n.).

(*g*) *Re* Eslick, *Ex p.* Alexander, 4 C. D. 503.

(*h*) *Ex p.* Brown, *Re* Reed, 9 C. D. 390.

(*i*) *Ex p.* Daglish, L. R. 8 Ch. 1072; Johns *v.* Ware, (1899) 1 Ch. 359.

then the mortgage, if unregistered, was void as against holders of registered bills of sale, or execution creditors, or a trustee in bankruptcy or liquidation. But it seems that while the Bills of Sale Act, 1854, was in force, any mortgage including fixtures, though only a mortgage by deposit with memorandum, was valid as to fixtures as between the mortgagee on the one hand, and on the other the mortgagor or any person other than the holder of a registered bill of sale, execution creditor, or creditor in bankruptcy (*a*).

The Bills of Sale Act, 1878, by sect. 4, included in "personal chattels" all fixtures and growing crops where "separately" assigned, but, excepting "trade machinery," excluded from "personal chattels" all other fixtures when assigned with any freehold or leasehold land to which they were attached. By sect. 5, trade machinery is defined to be machinery in or attached to any factory or workshop exclusive of (1) the fixed motive power, (2) fixed power machinery, and (3) pipes therein mentioned. Sect. 7 enacted that no fixtures or growing crops should be deemed to be separately assigned by reason only of being assigned by separate words, or that power was given to sever them, provided that by the same instrument any freehold or leasehold interest was assigned in the land to which they were attached, and that the construction should be retrospective and apply to mortgages before the Act (*b*). It may here be noted that debentures of a joint stock company, creating a floating charge which may comprise fixtures, are expressly excepted from the Bills of Sale Act, 1882, by sect. 17 of that Act; and debentures for the registration of which provision is made in the Companies (Consolidation) Act, 1908, are not within the Bills of Sale Act, 1878 (*c*).

The Bills of Sale Act, 1882, created further difficulties because by sect. 9 it enacted that a bill of sale, given as security for the payment of money by the grantor, if not in accordance with the form in the schedule, should be absolutely void (*d*).

After the Acts of 1878 and 1882, in *Re Yates* (*e*), the owner of a building used for his business in which was trade machinery had, in 1886, mortgaged it in fee by deed without any special reference

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(*a*) Meux *v.* Jacobs, L. R. 7 H. L. 481; and see Richards *v.* James, L. R. 2 Q. B. 285.

(*b*) *Ex p.* Moore & Robinson's Banking Co., 14 C. D. 379.

(*c*) *Re* Standard Manufacturing Co., (1891) 1 Ch. 627.

(*d*) As to fixtures excluded by the Bills of Sale Act, 1878, s. 5, from trade machinery, see *Re* Standard, &c. Co., (1891) 1 Ch. 627; Richards *v.* Overseers, &c., (1896) 2 Ch. 212; Topham *v.* Greenside, 37 C. D. 281; cf. Clark *v.* Balm, (1908) 1 K. B. 667.

(*e*) 38 C. D. 112.

to fixtures or machinery, but it was agreed expressly by the mortgage deed that the powers of sect. 19 of the Conveyancing Act, 1881, should be exerciseable without notice. It was argued that the section gave power to sell part separately from the whole, and that this made the deed void as to the trade machinery, it being unregistered. The Court of Appeal held that the statutory power would not authorise a sale of the fixtures separately from the land, and that the deed passed the trade machinery to the mortgagee only by virtue of its being affixed to the freehold.

Bowen, L. J., says: "Then comes sect. 5, which introduces the real difficulty as to trade machinery, because it enacts that trade machinery is to be deemed that which it is not, * * * 'personal chattels.' * * * According to the modern system of drafting, an Act of Parliament might be passed with regard to dairy farms, which, after a number of regulations as to how cows are to be milked, went on to say that for all purposes of the Act a horse is to be deemed a cow. * * * I think the words in sect. 5, as to a disposition of trade machinery, were intended only to exclude from the Act such dispositions as, if they related to ordinary personal chattels, would not be within the Act. * * * Assuming, then, that, for the purposes of the Act trade machinery is personal chattels to all intents and purposes, we still have to come back to sect. 4, and find out whether this is an assurance of trade machinery in the sense in which the term 'assurance' is used as to personal chattels. It cannot be treated as such an assurance, for it does not seem to give the mortgagee any right to the trade machinery apart from the land. The trade machinery simply follows the land as the shadow follows the substance" (*a*).

In *Ex. p. Lusty* (*b*), in 1888 the bankrupt had deposited with the plaintiff the deeds of title relating to leaseholds, which included fixed trade machinery, by way of mortgage, with a memorandum agreeing to give a legal mortgage but not specifically mentioning the fixtures. In 1888 a receiving order was made against him. Held by *Cave*, J., that the official receiver was not entitled to the trade machinery as against the mortgagee. He said: "In the case of *Re Yates*, the Court of Appeal came to the conclusion that the assignment of trade machinery, there struck at, must be an express assignment, and that an assignment of something else, which, by virtue of the law, carries with it trade machinery, does not fall within the Bills of Sale Act, 1878."

(*a*) 38 C. D. 128.

(*b*) 60 L. T. 150, 37 W. R. 304.

In *Small* v. *National Provincial Bank of England* (*a*), *Stirling*, J., held that a mortgage of land with fixed machinery specially mentioned and with special covenants was void as respects the machinery, but in the later case of *Re Brooke* (*b*), *Kekewich*, J., held that the principle of *Re Yates* (supra), that a conveyance of land passes fixed trade machinery not expressly mentioned and is not a bill of sale, applies equally where the conveyance expressly mentions the fixed trade machinery by reference to a schedule or otherwise.

Any opinion as to the effect of the Bills of Sale Acts, not taken in so many words from the judgment of the Court of Appeal, must be expressed with diffidence, but the result appears to be that by the Act of 1878 the distinction taken by the cases that an assignment of fixtures must be registered if made by separate witnessing part, or with a separate *habendum*, or with a power of sale separately, is abolished so far as regards all fixtures except "trade machinery," provided such fixtures are assigned by the same deed with the land to which they are attached, whether with a separate witnessing part, or a separate power of sale or not; but that the Acts leave trade machinery fixtures in the same position as all fixtures stood in before the Act of 1878, except that if they were assigned in such a manner as to require registration as a bill of sale, and the assignment be not in the form and registered in the way prescribed by the Act of 1882, the assignment is void as against everybody, and not valid even as against the mortgagor, as would have been the case under the old law.

This is the effect of sect. 9 of the Bills of Sale Act, 1882, and on this section it was contended that it would invalidate the whole of any deed, if any part was a bill of sale unregistered; and in *Davis* v. *Rees* (*c*), this was held to apply to the covenant for payment in a bill of sale by assignment to the mortgagee of chattels; but in *Re Burdett* (*d*), it was held that a deed, void under the Act of 1882, s. 9, as to chattels, is valid as to other property comprised in it if it be possible to sever the security upon the chattels from that upon the other property.

Sect. 6 of the Bills of Sale Act, 1878, makes an attornment clause giving a power of distress operate as a bill of sale as to personal chattels which could be seized or taken under the power of distress, subject to a proviso that this shall not extend to any mortgage of

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(*a*) (1894) 1 Ch. 686.

(*b*) (1894) 2 Ch. 600.

(*c*) 17 Q. B. D. 408.

(*d*) 20 Q. B. D. 310; see also *Re* Willis, 21 Q. B. D. 384.

any estate or interest in land which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

In *Hall* v. *Comfort* (*a*), this was treated as saving the ordinary attornment clause, and it is said that, during the argument, Lord *Coleridge* mentioned that the clause was to his knowledge inserted for this purpose. But it was afterwards held that such a clause was not within the proviso of sect. 6 of the Act of 1878, and was void, under sect. 8 of the Act of 1882, for want of registration (*b*). In *Mumford* v. *Collier* (*c*), it was held that the attornment clause was only invalidated as regards personal chattels, and if none were taken it still remained valid as creating the relation of landlord and tenant, and accordingly enabled the mortgagee to recover possession under R. S. C., Order III., r. 6, or Order XIV., r. 1.

Assuming that a mortgage on a building is so made as to operate as a conveyance of the fixtures with the land without being obnoxious to the Bills of Sale Acts or the provisions as to apparent possession in those Acts, it is apprehended that, though the mortgagor remains in possession, the fixtures would not pass to the trustee in bankruptcy as being within the reputed ownership clauses of the Bankruptcy Act of 1883. This seems to be accepted as clear by the standard works on bankruptcy and bills of sale (*d*).

(*a*) 18 Q. B. D. 11.

(*b*) Green *v.* Marsh, (1892) 2 Q. B. 330; *Re* Willis, supra.

(*c*) 25 Q. B. D. 281.

(*d*) Robson, 7th edit. (1894), pp. 515, 516; Williams' Bankruptcy Practice, 9th edit. (1908), p. 233; Reed's Bills of Sale Acts, 13th edit. (1909), p. 271.

RUSSEL *v.* RUSSEL.

1 Bro. Ch. 269 (*a*).

Equitable Mortgage by Deposit of Title-deeds.

Pledge of a lease carried into effect, against assignees of a bankrupt. Evidence of the bankrupt, he having had his allowance and certificate allowed to be read.

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. *Lloyd*, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. *Kenyon*, for the defendants, the assignees, insisted that the plaintiff's claim was against the law of the land ; for that it would be charging land without writing, which is against the fourth clause of the Statute of Frauds (*b*).

LORD LOUGHBOROUGH, Lord Commissioner.—In this case it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not *to be* performed, but *is* executed.

ASHURST, Lord Commissioner.—Where the contract is for a sale and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

(*a*) Hales *v.* Van Berchem, 2 Vern. 617, where it was held that the deposit in that case for the performance of a written agreement, though there was no writing declaring it to be a security, was not within the statute.

(*b*) 29 Car. 2, c. 3, s. 4.

Russel v. Russel.

A question arose as to reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial, the jury found it was deposited as a security (*a*).

NOTES.

1. Generally.
2. How equitable mortgages may be created, p. 93.
3. What property and interests are included in a mortgage by deposit, p. 98.
4. For what debts an equitable mortgage may be a security, p. 99.
5. To whom the benefit of an equitable mortgage by deposit will extend, p. 101.
6. As against whom a deposit of title-deeds is good, p. 102.
7. Priorities of mortgages legal and equitable, p. 104.
8. Privileges and remedies of equitable mortgagees, p. 112.

1. Generally.

By the fourth section of the Statute of Frauds it is enacted "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing and signed* by the party to be charged therewith."

The principal case of *Russel* v. *R.*, decided in 1783, was often commented on and disapproved of as creating an interest in land without any memorandum of writing signed by the party to be charged (*b*), contrary to the fourth section of the Statute of Frauds. The decision is explained as resting on the ground of part performance, and there must be some act changing the legal position of the parties. Lord *Loughborough*, in the principal case, said: "In these

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(*a*) The Reporter has been informed that this cause came on afterwards (though he has not been able to ascertain the date) before Lord *Thurlow*, on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the cases of Featherstone *v.* Fenwick, May, 1784, and Hurford *v.* Carpenter, 17th and 18th of April, 1785, where Lord *Thurlow* held, that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. Although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

(*b*) See per Lord *Eldon* in *Ex p.* Coming, 9 V. 115; *Ex p.* Whitbread, 19 V. 209; *Ex p.* Wright, 19 V. 258.

cases the contract is not *to be* performed, but *is* executed," and in the case of *Ex p. Broderick* (*a*), it was held that the doctrine allowing an equitable mortgage by deposit of deeds was grounded on its being a contract part performed, that a mere verbal agreement for deposit without an act is not sufficient to exclude the Statute of Frauds, and that to make it effectual there must be some act of part performance changing the legal position of the parties. In *Ex p. Broderick* there was an oral promise to give a bank security for a debt; the promisor was owner of an undivided fifth in reversion of a farm. Subsequently the reversion fell into possession, and the owner of another fifth, who was holder of the deeds in right of his fifth and happened to be manager of the bank, told the promisor that he held the deeds as to the latter's one-fifth for the bank. It was held that there being no act altering the legal position of the parties, this was not sufficient to take the case out of the statute or make a valid equitable mortgage.

As to personal estate, a verbal agreement is sufficient to create a charge (*b*).

An equitable mortgagee by deposit of title-deeds has no legal right to possession, or to be paid the rents of the mortgaged property. If he acquires possession lawfully, he is entitled to the rents from the date of his taking possession (*c*), and rents paid to him with notice of his rights cannot be recovered back (*d*). These rights were recognised even before the Judicature Act, 1873, but as the law then stood an equitable mortgagee by deposit, could not retain the title-deeds of an estate in an action of trover at law against him by a previous purchaser of the fee from the depositor, who had negligently, but not fraudulently, allowed the mortgagor vendor to retain the deeds (*e*).

All property which can be made the subject of a legal mortgage can be made the subject of an equitable mortgage; and future property incapable of being legally mortgaged may yet be charged equitably (*f*).

A deposit of a copy of Court rolls (*g*), of an agreement for a

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(*a*) 18 Q. B. D. 380; ibid. C. A. 766; and see *Ex p.* Coombe, 4 Madd. 249.

(*b*) Poole *v.* P., 53 L. T. 35.

(*c*) *Ex p.* Bignold, 4 D. & C. 259; cf. Sumpter *v.* Cooper, 2 B. & Ad. 223; and consider Turner *v.* Walsh, (1909) 2 K. B. 484.

(*d*) Finck *v.* Tranter, (1905) 1 K. B. 427.

(*e*) Harrington *v.* Price, 3 B. & Ad. 170; but cf. Walker *v.* Linom, (1907) 2 Ch. 105.

(*f*) *Re* Kelcey, (1899) 2 Ch. 530.

(*g*) *Ex p.* Warner, *Re* Cooke, 1 Rose, 286, 19 V. 202; Winter *v.* Lord Anson, 3 Russ. 493; Whitbread *v.* Jordan, 1 Y. & C. Ex. 303.

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lease (*a*), though afterwards granted upon different terms (*b*), or of a building agreement to grant leases (*c*), or of a policy of insurance (*d*), or of a registered mortgage of a ship (*e*), will create an equitable mortgage.

Shares in Companies.—These are frequently mortgaged by the deposit of share certificates, notice of the deposit being given to the company (*f*). The lender in such case is not merely a pledgee, and so where a certificate of shares is deposited as security for a debt and interest without a transfer or memorandum, the remedy of the lender against the shares is an order for transfer and foreclosure (*g*). The mortgagee by deposit of shares has an implied power to sell; and, if no time for payment has been fixed, then upon giving reasonable notice of his intention to sell (*h*), and where a mortgagee by mistake demands payment in his notice of more than is due the sale is not invalidated (*i*).

It has been held that, where the owner of shares borrows money, and deposits with the lender certificates of his shares, and also transfers thereof not by way of deed signed by him, but with the date and name of the transferee left blank, the lender has an implied power to fill up the blanks, and obtain registration, in cases where a deed is not required for transfer (*k*). But if no time be fixed for repayment of the loan, and nothing was said as to the object of a transfer, the depositee has no authority, *without* a previous demand for repayment of the loan, to sell or sub-mortgage the shares and fill

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(*a*) The Unity Joint Stock Mutual Banking Association *v.* King, 25 B. 72.

(*b*) *Ex p.* Reid, 17 L. J. Bank. 19.

(*c*) Union Bank of London *v.* Kent, 39 C. D. 238.

(*d*) Ferris *v.* Mullins, 2 Sm. & G. 378.

(*e*) Lacon *v.* Liffen, 4 Gif. 75, 9 Jur. (N. S.) 13.

(*f*) *Ex p.* Moss, 3 De G. & Sm. 599; *Ex p.* Stewart, *Re* Shelley, 34 L. J. Bank. 6, 13 W. R. 356; Colonial Bank *v.* Whinney, 11 A. C. 426. Sed vide *Ex p.* Boulton, *Re* Sketchley, 1 De G. & J. 163.

(*g*) Harrold *v.* Plenty, (1901) 2 Ch. 314.

(*h*) Deverges *v.* Sandeman, (1902) 1 Ch. 579 (C. A.); see judgment of *Stirling*, L. J., at pp. 592 et seq., where the earlier authorities are collected. In this case the shares were registered in the names of the mortgagees, but there was no deed of mortgage by virtue of which the powers of sale under the Conveyancing Act, 1881, could be implied.

(*i*) Stubbs *v.* Slater, (1910) 1 Ch. 633, explaining Pigot *v.* Cubley, 15 C. B. (N. S.) 701.

(*k*) *Ex p.* Sargent, *Re* Tahiti Cotton Co., 17 Eq. 273; and see *Re* Tees Bottle Co., Davies' Case, 33 L. T. 834, 38 L. T. 147; *Re* Kimberley Co., 58 L. T. 305; Companies (Consolidation) Act, 1908, section 22, Palmer's Company Precedents, 10th ed., Part I., pp. 606, 607.

in the name of the purchaser or sub-mortgagee as transferee (*a*), or give to another a similar right (*b*). A transferee of shares by blank transfer deposited by way of security cannot give to another any greater rights than he himself has as equitable mortgagee. The execution of a transfer in blank may, however, bind the transferor by estoppel in favour of persons taking in good faith from the transferee (*c*).

The cases, however, affirming the validity of blank transfers filled up after signature by the transferor only apply when the transfer of shares is and may lawfully be made without a deed. A deed delivered with the transferee's name in blank is void and cannot be set up as the deed of the transferor by authority not under seal to fill up the blanks (*d*), and see *Powell* v. *London and Provincial Bank* (*e*), where a trustee deposited certificates and blank transfer signed and sealed as a deed to secure his own debt with a bank who had no notice of the trust. The bank filled up the blanks and procured themselves to be registered as owners: it was held that as the transfer was not re-executed after the blanks had been filled up it was not the deed of the transferor and did not pass the legal estate, and that the prior title of the beneficiaries prevailed. A person executing such a deed might, however, be precluded from denying its validity against a grantee for value without notice (*f*).

The effect of notice in determining the priorities of equitable rights is inapplicable to shares in a company incorporated under the Companies Act, 1862 (*g*).

And a deposit of a land order of the New Zealand Company, by way of mortgage, was held to be good, without notice having been given to the company of the deposit (*h*).

A limited liability company can make a mortgage by deposit (*i*),

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(*a*) France *v.* Clark, 22 C. D. 830, 26 C. D. 257 (C. A.).

(*b*) Ibid.; cf. Deverges *v.* Sandeman & Co., (1902) 1 Ch. 579.

(*c*) Sheffield *v.* London Joint Stock Bank, 13 A. C. 333; Colonial Bank *v.* Hepworth, 36 C. D. 36; and see Colonial Bank *v.* Cady, 15 A. C. 267; London & County Banking Co. *v.* London & River Plate Bank, 21 Q. B. D. 535; Simmons *v.* London Joint Stock Bank, (1892) A. C. 201; Bentinck *v.* London Joint Stock Bank, (1893) 2 Ch. 120.

(*d*) Société Générale de Paris *v.* Walker, 11 A. C. 20, approving Hibblewhite *v.* McMorine, 6 M. & W. 200.

(*e*) (1893) 1 Ch. 610, (1893) 2 Ch. 555 (C. A.).

(*f*) Colonial Bank *v.* Cady, 15 A. C., per Lord *Herschell* at p. 286; and Sheffield *v.* London Joint Stock Bank, 13 A. C. 333.

(*g*) Société Générale, &c. *v.* Walker, 11 A. C. 20.

(*h*) *Ex p.* Barnett, 1 De G. 194.

(*i*) See, e.g., *Re* General Provident Assurance Co., *Ex p.* National Bank,

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and section 93 of the Companies (Consolidation) Act, 1908, requires registration of the prescribed particulars of certain specified mortgages or charges together with the instrument of charge, if any. That section accordingly applies though there is no memorandum accompanying the deposit (*a*).

Deposits by Building Societies.—Persons taking mortgages by deposit from a building society take subject to the rules of the society as to borrowing and giving security (*b*), but if the borrowing was *ultra vires*, the mortgagees have been allowed to hold the deeds as a security, for so much of their loans as was applied in payment of the debts and liabilities of the society properly payable (*c*). So where the rules did not allow mortgages by deposit of deeds to be made of specific properties for specific sums, but only a charge of all moneys borrowed on the general funds, the mortgagees by deposit were compelled to give up their securities, but were entitled to payment out of the assets in the winding-up, after satisfaction of outside creditors, and in priority to the claims of all shareholders and *members* (*d*).

Deeds relating to Land in Foreign Countries.—Although the law of Scotland knows nothing of equitable mortgages, the owner of a Scotch estate can be compelled in England to give effect to a charge made by the deposit of title-deeds (*e*), there being nothing in the *lex loci* to prevent it.

And it has been held that a deposit of a minute of a lease of lands and a pledge of chattels in Scotland did not require registration under the Bills of Sale Act, 1854 (*f*).

A deposit of the title-deeds of a house in Shanghai has been held good, although no memorandum of the deposit was made at the British Consulate at Shanghai, and the house remained registered in the name of the depositors (*g*).

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14 Eq. 507; *Re* Patent File Co., *Ex p.* Birmingham Banking Co., L. R. 6 Ch. 83; Seligman *v.* Prince & Co., (1895) 2 Ch. 617.

(*a*) As to s. 43 of the Companies Act, 1862, now repealed and replaced by ss. 93, 100, and 101 of the Act of 1908, see Smith's Case, 11 C. D. 579, 585.

(*b*) Laing *v.* Reed, L. R. 5 Ch. 4; *Re* Victoria Building Society, 9 Eq. 605.

(*c*) Blackburn Building Society *v.* Cunliffe Brooks & Co., 22 C. D. 61; and see vol. i., pp. 152, et seq., "Subrogation."

(*d*) Murray *v.* Scott, 9 A. C. 519; see also *Re* Mutual Aid, &c., Society, 29 C. D. 182, 30 C. D. 434.

(*e*) *Ex p.* Pollard, Mont. & C. 239, 4 Deac. 27; Coote *v.* Jecks, 13 Eq. 597; Westl., International Law, 4th ed. p. 211. Cf. Duder *v.* Amsterdamsch Trustees Kantoor, (1902) 2 Ch. 132.

(*f*) Coote *v.* Jecks, 13 Eq. 597, 602.

(*g*) *Ex p.* Holthausen, L. R. 9 Ch. 722.

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Moreover, where the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title-deeds (*a*). See as to deposit of shares in a company governed by the law of New York *Colonial Bank* v. *Hepworth* (*b*).

Certificates under Land Transfer Act, 1897.—Where land was registered under the Land Registry Act of 1862 (*c*), no equitable mortgage could be created by a deposit of the title-deeds (sect. 63), but it might be created by a deposit of the land certificate (sect. 73).

Under the Land Transfer Act, 1897 (*d*), the registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or office copy of registered lease, or certificate of charge; and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title-deeds or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage. The deposit can be protected by notice to the registrar, and the entry of such notice will operate as a caution (r. 243). So long as such notice is on the register no new certificate will be issued without notice similar to that under a caution (r. 249), but the notice may be withdrawn in the prescribed manner (r. 250). A lien equivalent to that created by the deposit of a certificate may be created by giving notice to the registrar of an intention to deposit the certificate with another person as security for money (rr. 244, 245). A notice of intended deposit will operate as a caution (r. 246). Notice of deposit or intended deposit shall not be entered while another such notice is on the register (r. 247). The lien created by deposit or notice of intended deposit shall be subject to any unregistered estates, rights, or interests protected by caution or other entry on the register at the time of the creation of the lien (r. 251).

Effect of Deposit of Title-deeds.—The effect of a mere deposit of title-deeds to secure a sum of money has been thus stated by *Kindersley*, V.-C.: "By the deposit the mortgagor contracts that

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(*a*) Varden Seth Sam *v.* Luckpathy Royjee Lallah, 9 Moo. Ind. App. 303.

(*b*) 36 C. D. 36.

(*c*) 25 & 26 Vict. c. 53.

(*d*) 60 & 61 Vict. c. 65, s. 8 (6).

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his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee" (*a*); and *Jessel*, M. R., in *Carter* v. *Wake* (*b*), says of a mortgage by deposit of title-deeds of land, "When there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage."

The effect, it seems, of an equitable mortgage by deposit of title-deeds, is to give a lien on the lands and not on the deeds. Hence it has been held in Ireland that where title-deeds are deposited by way of equitable mortgage, the equitable mortgagee may be ordered, without prejudice to his rights, to lodge the deeds in Court (*c*). But if with such deposit there be a memorandum in writing of the equitable mortgage, such memorandum, it seems, would be an instrument creating a security or dealing with it, which the mortgagee would be entitled to retain (*d*).

Where a person deposits deeds upon a condition, as, for instance, that a sum of money shall be advanced for seven days to another party, if the persons with whom the deeds are deposited do not fulfil the condition, they will have no lien upon the deeds (*e*).

Where a person fraudulently obtains the title-deeds from the real owner, he cannot, by depositing them with a third party to secure an advance of money, create an equitable mortgage as against the real owner (*f*), who will be able to recover them back by an action (*g*); and the Statute of Limitations will not run against the real owner until a demand has been made by him for the deeds and it has been refused (*h*).

If there are no title-deeds or conveyances in the depositors' possession, an equitable mortgage may be created by the deposit of the receipt for purchase-money containing the terms of the agreement for sale (*i*); but the deposit of an attested copy of a deed will not, it seems, be sufficient for that purpose (*k*).

Transfer of Equitable Mortgage.—A mortgage by deposit may be transferred by a delivery of the deeds without the memorandum,

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(*a*) Pryce *v.* Bury, 2 Drew. 41; affirmed 18 Jur. 67; see 16 Eq. 153 (n.).

(*b*) 4 C. D. 605, 606.

(*c*) *Re* Girdwood, 5 L. R. Ir. 45.

(*d*) Ibid., p. 47.

(*e*) Burton *v.* Gray, L. R. 8 Ch. 932.

(*f*) Spackman *v.* Foster, 11 Q. B. D. 99—101.

(*g*) Ibid.

(*h*) Ibid., and see Miller *v.* Dell, (1891) 1 Q. B. 468.

(*i*) Goodwin *v.* Waghorn, 4 L. J. Ch. 172.

(*k*) *Ex p.* Broadbent, 1 M. & A. 635, 4 D. & C. 3.

should there be one, if the transfer is for value (*a*), but not by a parol *voluntary* gift with delivery of the deed (*b*).

The assignee, as in other cases of transfer, takes subject to the account and equities between the mortgagor and mortgagee; see notes to *Howard* v. *Harris*, supra.

2. How Equitable Mortgages may be Created.

The general rule is that an equitable mortgage can only be created either (1) by actual deposit of title-deeds, in which case parol evidence is admissible to shew the meaning of the deposit and the extent of the security created (*c*), or (2) if there be no deposit of title-deeds, then by a complete memorandum in writing (*d*), purporting to create a security for money advanced (*e*). When there is a deposit the evidence of intention may be by a memorandum in writing, or partly by writing and partly by parol (*f*), and to constitute a charge it is not necessary that there should be formal words of charge; the intention may be collected from the general nature of the instrument (*g*).

A valid equitable mortgage may be created by a written memorandum of deposit, although no deposit of deeds may have been actually made with the creditor; as, for instance, when the deeds are already in the hands of a third party (*h*).

A *written* agreement also to deposit a deed not then executed, as for instance, a lease when granted, has been held upon the granting of the lease to create a valid equitable mortgage (*i*). But if no

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(*a*) *Ex p.* Smith, *Re* Hildyard, 2 Mont. D. & De G. 587.

(*b*) *Re* Richardson, 30 C. D. 396; and see Edwards *v.* Jones, 1 My. & Cr. 226, and infra, notes to Ellison *v.* E.

(*c*) *Ex p.* Haigh, 11 V. 403; *Ex p.* Mountfort, 14 V. 606; *Ex p.* Kensington, 2 V. & B. 83; Cradock *v.* Scottish Provident, 69 L. T. 380, (1894) W. N. 88, affirming (1893) W. N. 146.

(*d*) *Ex p.* Leathes, 3 Deac. & C. 112; *Ex p.* Heathcoate, 2 Mont. D. & De G. 711; Daw *v.* Terrell, 33 B. 218; and see infra, note (*h*).

(*e*) If the agreement is executory there is no equitable mortgage and the agreement is not specifically enforceable; see Rogers *v.* Challis, 27 B. 175; South African Territories, Ltd. *v.* Wallington, (1898) A. C. 309; Western Wagon Co. *v.* West; but note s. 105 of Companies (Consolidation) Act, 1908, as to specific performance of agreement to take debentures.

(*f*) See *Ex p.* Coombe, 17 V. 369. Not admissible to contradict a written memorandum; see infra, p. 95.

(*g*) Casperd *v.* A.-G., 6 Price, 411; Ede *v.* Knowles, 2 Y. & C. Ch. 172; Burgess *v.* Moxon, 2 Jur. (N. S.) 1059; Cradock *v.* Scottish, &c., 69 L. T. 380; *Re* Hurley, (1894) 1 Ir. R. 488.

(*h*) Daw *v.* Terrell, 33 B. 218; *Ex p.* Farley, 1 Mont. D. & De G. 683; *Ex p.* Heathcoate, 2 Mont. D. & De G. 711.

(*i*) *Ex p.* Orrett, *Re* Pye, 3 Mont. & A. 153; *Ex p.* Smith, 2 Mont. D. & De G. 587; *Ex p.* Sheffield Union Bank Co., 13 L. T. 477.

deposit has been actually made, a mere verbal agreement to deposit a lease when granted (*a*), or a mere verbal order to the intended lessor to do so (*b*), will not create a valid equitable mortgage in favour of the persons with whom the deposit is so agreed or ordered to be made (*c*).

Moreover, a written memorandum of a mere *intention* to make a deposit, if it were not communicated to the creditor by the debtor while he could legally do so, though it might create a trust for the payment of the debt will not create a valid equitable mortgage (*d*).

The circumstances of the deposit must be such as to justify a presumption of intention. As to this, in *Burgess* v. *Moxon* (*e*), *Stuart*, V.-C., considered that a presumption in favour of a mortgage being intended arises from the mere possession of the deeds. Lord *Selborne*, however, in *Dixon* v. *Muckleston* (*f*), says the mere possession of deeds without evidence of the manner in which the possession originated, so that a contract may be inferred, will not be enough to create an equitable mortgage. In *Bozon* v. *Williams* (*g*), Sir *W. Alexander*, C. B., says: "It is stated to have been decided that the mere deposit of deeds constitutes an equitable mortgage, even without a word being said. * * * Where it has been so decided, it has always been where the possession could be accounted for in no other way, or the holder was otherwise a stranger to the title and the lands," as in *Smith* v. *Constant* (*h*).

Where title-deeds were left in the counting-house of a banker, after he had refused to advance money on them, it was inferred that no equitable mortgage was intended (*i*).

So it has been held that the mere possession, by a mortgagee by deed of freeholds, of the deeds relating to leaseholds belonging to the same owner, was not sufficient to imply a mortgage of the leaseholds (*k*).

(*a*) *Ex p.* Coombe, *Re* Beavan, 4 Madd. 249.

(*b*) *Ex p.* Perry, *Re* Collins, 3 Mont. D. & De G. 252.

(*c*) See also *Ex p.* Hallifax, 2 Mont. D. & De G. 544.

(*d*) Wilson *v.* Balfour, 2 Camp. 579; *Re* Bankhead's Trust, 2 K. & J. 560.

(*e*) Supra, doubting Chapman *v.* C., 13 B. 308.

(*f*) L. R. 8 Ch. 155.

(*g*) 3 Y. & J. 150; at p. 161; see also Featherstone *v.* Fenwick, 1 Bro. Ch. 270 (n.); Harford *v.* Carpenter, ibid.; Edge *v.* Worthington, 1 Cox, 211; *Ex p.* Langston, 17 V. 227.

(*h*) 4 De G. M. & G. 213; see p. 216. See also *Ex p.* Jones, 3 M. & A. 152; Williams *v.* Medlicot, 6 Price, 495; MacMahon *v.* M., 55 L. T. 763; *Re* Greer, (1907) 1 Ir. R. 57.

(*i*) Lucas *v.* Dorrien, 7 Taunt. 278, 1 J. B. Moore, 29.

(*k*) See Wardle *v.* Oakley, 36 B. 27.

The evidence that the deeds were deposited as security ought to be produced at the hearing of the cause (*a*); for, if it be not then sufficient, no inquiry will be directed (*b*).

The terms of an agreement upon the deposit of the deeds may shew the intention of the parties was not to create a mortgage, but merely to provide an indemnity against some liability, *e.g.*, a contingent liability on a joint and several promissory note (*c*).

And it has been long since established that, where there is a statement or memorandum in writing of the circumstances under which the deposit was made, parol evidence is not admissible to contradict it (*d*). But it has been held that an agreement in writing, accompanying the deposit of title-deeds to secure a specific sum, might be extended as a security for future advances beyond that sum by a subsequent verbal agreement (*e*).

An agreement accompanied by a deposit of title-deeds, for making a mortgage, or for pledging the same as a security, requires an *ad valorem* stamp (*f*), *secus* a memorandum simply stating the purpose of the deposit (*g*). But where the agreement, in consequence of being unstamped, is inadmissible as evidence, other parol evidence may be given in order to establish the equitable mortgage (*h*).

Formerly, the memorandum of deposit of deeds to secure an *annuity* required enrolment, which in such cases is not now necessary; but by a subsequent Act (*i*), registration in the Common Pleas (*k*) of the grant of annuity is requisite, as against purchasers, mortgagees, and creditors.

A presumption arises of an intention to create an equitable mortgage by the deposit of title-deeds, for the purpose of preparing a

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(*a*) Chapman *v.* C., 13 B. 308.

(*b*) Ibid.; Holden *v.* Hearn, 1 B. 456; Kebell *v.* Philpot, 7 L. J. Ch. 237.

(*c*) Sporle *v.* Whayman, 20 B. 607.

(*d*) *Ex p.* Coombe, 17 V. 369; Shaw *v.* Foster, L. R. 5 H. L. 340, 341; and see Baynard *v.* Woolley, 20 B. 583.

(*e*) *Ex p.* Kensington, 2 V. & B. 79, 13 R. R. 32; *Ex p.* Nettleship, 2 Mont. D. & De G. 124, and see p. 100, infra.

(*f*) Stamp Act, 1891, ss. 85, 86.

(*g*) Meek *v.* Bayliss, 31 L. J. Ch. 448.

(*h*) Hiern *v.* Mill, 13 V. 114; and see Birchall *v.* Bullough, (1896) 1 Q. B. 325, shewing how an unstamped document may be used to refresh witnesses' memory in cross-examination.

(*i*) 18 & 19 Vict. c. 15, s. 12.

(*k*) Now at the Land Registry Office (63 & 64 Vict. c. 26).

legal mortgage (*a*); or by a direction to hold them until the settlement of an account or the execution of a mortgage (*b*).

Where the deeds remain as a deposit in the hands of the debtor, although accompanied by a memorandum, especially if it be not communicated to the creditor, a valid equitable mortgage will not be created thereby. This was decided in *Adams* v. *Claxton* (*c*), going beyond the doubt, rather strongly expressed by *Eldon*, C., in *Ex p. Coming* (*d*).

Where, however, the debtor holds the deposit with a memorandum of deposit as the servant of the creditor it may be good (*e*).

A deposit of deeds with a third person for the benefit of, and communicated to, the creditor will be valid, provided the intention with which it was made be satisfactorily proved. And the possession of the agent of the debtor will be sufficient if the intention to make him a trustee be shewn by the memorandum of deposit (*f*).

A deposit of deeds with the wife of the depositor, to be kept by her for the creditor, was held by *Eldon*, C., not to constitute a valid equitable mortgage (*g*).

It is clear that an equitable mortgage may be created by a deposit of *part of* the title-deeds only (*h*); if part of the deeds be given to A, and afterwards part to B, by way of security in each case, both A and B will be secured (*i*), and in the absence of negligence on the part of A he will be preferred to B (*k*).

Nor is it necessary that the deeds deposited should shew a good title in the depositor, as for instance, when he deposits all the deeds except the conveyance to himself (*l*).

(*a*) Edge *v.* Worthington, 1 Cox, 211; Hockley *v.* Bantock, 1 Russ. 141; Keys *v.* Williams, 3 Y. & C. Ex. 62; James *v.* Rice, 5 De G. M. & G. 461, overruling Brander *v.* Boles, Pr. Ch. 375; Brizick *v.* Manners, 9 Mod. 284; King *v.* Benson, 6 Price, 433, cited; *Ex p.* Hooper, 1 Mer. 7; *Ex p.* Pearse & Prothero, 1 Buck, 525.

(*b*) Fenwick *v.* Potts, 8 De G. M. & G. 506; Lloyd *v.* Attwood, 3 De G. & J. 614.

(*c*) 6 V. 226, 230.

(*d*) 9 V. 115.

(*e*) Ferris *v.* Mullins, 2 Sm. & G. 378.

(*f*) Lloyd *v.* Attwood, 3 De G. & J. 614.

(*g*) *Ex p.* Coming, supra.

(*h*) *Ex p.* Chippendale, 1 Deac. 67; S. C., 2 M. & A. 299; *Ex p.* Arkwright, 3 Mont. D. & De G. 129; Lacon *v.* Allen, 3 Dr. 579.

(*i*) Roberts *v.* Croft, 24 B. 223, 2 De G. & J. 1; Dixon *v.* Muckleston, L. R. 8 Ch. 155; cf. *Ex p.* Pearse & Prothero, Buck, 525.

(*k*) As to degree of case, see Dixon *v.* Muckleston, supra, pp. 160 *et seq.*

(*l*) *Ex p.* Wetherell, 11 V. 398; Roberts *v.* Croft, 24 B. 223, 2 De G. & J. 1; Thorpe *v.* Holdsworth, 7 Eq. 147; *Ex p.* Pott, 7 Jur. 159; but cf. Walker *v.* Linom, (1907) 2 Ch. 104.

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A deposit, moreover, by a landlord of a lease to a creditor as a security, has been held to amount to an equitable mortgage of the whole fee (*a*).

A deposit of deeds, relating to part of an estate, with a representation that they relate to the whole, will not create an equitable mortgage over the whole of the property, but merely over that part actually comprised in the deeds so deposited (*b*) ; but the depositor would if his representation were fraudulent be liable in damages (*c*).

A deposit of an agreement for a lease by a person having only a lien upon the property will, as against the lien, create a charge for the amount advanced upon the deposit (*d*).

Where a deposit has been made by a partial owner, as a tenant for life, he will only thereby affect his own interest, and not that of remaindermen (*e*).

An executor, having a beneficial interest in the property, may make a deposit without his co-executor joining (*f*).

A joint owner, as a tenant in common, joining in a deposit, may bind his share, but if he joins without intending to bind his share, he will not be held so far as regards such share to have made a deposit (*g*).

An equitable mortgage of lands in Middlesex, created by a mere deposit of deeds, does not require registration under the provisions of the Middlesex Registry Act (*h*), because there is no instrument to be registered (*i*). And it will not be rendered void by a subsequent deed conveying the premises duly registered (*k*). Where a deposit of deeds is accompanied by a memorandum, it will require registration in order to maintain its priority (*l*). An order of adjudication in

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(*a*) Richards *v.* Borrett, 3 Esp. 102.

(*b*) Jones *v.* Williams, 24 B. 47.

(*c*) Roberts *v.* Croft, 24 B. 223, where it is said that the "Court would, under another head of equity, compel the depositor to make good his words" in such a case. As to this alleged doctrine, now abandoned, see Pollock on Contract (1911), pp. 558, 559, and Appendix I.

(*d*) The Unity Joint Stock Mutual Banking Association *v.* King, 25 B. 72.

(*e*) Williams *v.* Medlicot, 6 Price, 495 ; Turner *v.* Letts, 20 B. 185.

(*f*) *Ex p.* Sheffield Union Banking Co., 13 L. T. 477.

(*g*) Burgess *v.* Moxon, 2 Jur. (N. S.) 1059.

(*h*) 7th Anne, c. 20.

(*i*) Sumpter *v.* Cooper, 2 B. & Ad. 223, 226; *Re* M'Kinney's Estate, 6 Ir. R. Eq. 445 ; *Re* Hamilton, 9 Ir. Ch. R. 512.

(*k*) Sumpter *v.* Cooper, 2 B. & Ad. 223; and see White *v.* Neaylon, 11 A. C. 171.

(*l*) Neve *v.* Pennell, 2 Hem. & M. 170; Moore *v.* Culverhouse, 27 B. 639 ; *Re* Wright's Mortgage, 16 Eq. 41 ; Credland *v.* Potter, 18 Eq. 350, L. R. 10 Ch. 8.

bankruptcy is not a "conveyance" within the meaning of sect. 1 of the same Act (*a*).

In Ireland a person taking under a subsequently registered conveyance, without notice of a prior unregistered equitable mortgage created by a written agreement, is entitled to priority over the unregistered equitable mortgagee (*b*).

In Ireland also it was held, in *Re Burke's Estate* (*c*), that a deposit of title-deeds, unaccompanied by any memorandum in writing, was outside the Registry Acts, and the fact that another man without notice got a subsequent deed, and put it on the registry, did not give him a better equity under these Acts.

But where in a registry county, a prior equitable mortgagee by deposit accompanied by a memorandum, neglects to register the memorandum, and, *à fortiori*, if he leave a great number of the deeds affecting the property in the hands of the mortgagor, he will be postponed to a subsequent equitable mortgagee who has got in the rest of the deeds (*d*).

Sect. 7 of the Yorkshire Registries Act, 1884, applies to an equitable mortgage by deposit of deeds whether accompanied by a memorandum or not, and deprives the equitable mortgagee of priority, as against any assurance for valuable consideration which may be registered under the Act, unless and until a memorandum thereof has been registered in accordance with the provisions of this section (*e*). See further on this subject notes to *Le Neve* v. *Le N.*, post.

3. What Property and Interests are included in a Mortgage by Deposit.

Primâ facie, the deposit of deeds by a debtor constitutes what in familiar language is called an equitable mortgage upon the whole of the property comprised in them (*f*).

(*a*) *Re* Calcott & Elvin's Contract, (1898) 2 Ch. 460.

(*b*) Fullerton *v.* Provincial Bank of Ireland, (1903) A. C. 309, reversing *Re* Stevenson's Estate, (1902) 1 Ir. R. 23.

(*c*) 9 L. R. Ir. 24, reversing S. C., 7 L. R. Ir. 57, and overruling *Re* M'Kinney's Estate, 6 Ir. R. Eq. 445; see also *Re* Driscoll's Estate, 1 Ir. R. Eq. 285; Reilly *v.* Garnett, 7 Ir. R. Eq. 1; *Re* Stephen's Estate, 10 Ir. R. Eq. 282.

(*d*) *Re* Lambert's Estate, 11 L. R. Ir. 534, 13 L. R. Ir. 235, 241; and see Agra Bank *v.* Barry, L. R. 7 H. L. 135.

(*e*) See Battison *v.* Hobson, (1896) 2 Ch. 403. As to the position of an unregistered equitable mortgagee as against the trustee in bankruptcy of the mortgagor, see Jones *v.* Barker, (1909) 1 Ch. 321.

(*f*) Per *Knight-Bruce*, V.-C., in Ashton *v.* Dalton, 2 Coll. 566; and see *Ex p.* Bisdee, 1 Mont. D. & De G. 333.

Where, however, the deposit is accompanied by a written memorandum, it may shew to what property the security extends, as, for instance, whether certain estates (*a*), fixtures (*b*), or furniture (*c*), are to be comprehended therein.

For instance, if deeds deposited by way of equitable mortgage apply to various properties, but it is apparent on the memorandum accompanying the deposit and from the dealings of the parties that a portion only of these properties was intended as a security, the lien of the depositee will extend no further than that portion (*d*).

Prima facie an equitable mortgage by deposit of deeds will be confined to the property comprised in the deeds deposited (*e*), even though the depositor may falsely state that the deeds actually deposited relate to property not comprised therein (*f*). But it was held in a case where a map was deposited with the deeds that the security extended to premises delineated on the map but to which the mortgagor had only a possessory title (*g*).

Where a debtor who has deposited deeds with his creditor abstracts them, and they cannot be distinguished, the creditor will have a lien on all the deeds of the debtor (*h*).

A deposit of title-deeds will comprehend any interest which the depositor may afterwards acquire in the property (*i*), and a share taken by partition in lieu of an undivided interest (*k*); and where the owner of an estate subject to a mortgage afterwards paid it off, although he took a surrender of the term and kept the deed in his own possession, it was held that the lien created by the deposit extended to the whole of the estate, freed from the incumbrance (*l*).

4. For what Debts an Equitable Mortgage may be a Security.

Ordinarily, as in *Russel* v. *R.*, an equitable mortgage by deposit will be a security only for the sum then advanced, or which may be mentioned in the memorandum accompanying it, if any; and it will

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(*a*) *Ex p.* Glyn, 1 Mont. D. & De G. 29.

(*b*) *Ex p.* Lloyd, 1 M. & A. 494, 3 D. & C. 765.

(*c*) *Ex p.* Hunt, 1 Mont. D. & De G. 139.

(*d*) Wylde *v.* Radford, 33 L. J. Ch. 51, 12 W. R. (V.-C. K.) 38; see also *Ex p.* Heathcoate, 2 Mont. D. & De G. 711; *Ex p.* Robinson, 1 D. & C. 119; *Ex p.* Leathes, 3 D. & C. 112; Daw *v.* Terrell, 33 B. 218.

(*e*) *Ex p.* Powell, 6 Jur. 498.

(*f*) Jones *v.* Williams, 24 B. 47.

(*g*) Simmons *v.* Montague, (1909) 1 Ir. R. 87.

(*h*) Mason *v.* Morley, 34 B. 475.

(*i*) Pryce *v.* Bury, 16 Eq. 153 (n.), S. C., 2 Drew. 11.

(*k*) *Ex p.* Farley, 1 Mont. D. & De G. 683.

(*l*) *Ex p.* Bisdee, 1 Mont. D. & De G. 333.

not, by implication only, be held to include antecedent debts (*a*), unless having regard to the whole transaction and the circumstances of the case, it appears to have been the intention of the parties (*b*); and the expression "may advance," in the accompanying memorandum, does not necessarily prevent the deposit from being a security for past advances (*c*). If the transaction is executory, as where there is a mere agreement in writing to lend upon security, and no money is advanced, no equitable mortgage is created (*d*).

Although a legal mortgage cannot be extended to subsequent advances by a subsequent parol agreement, see per Lord *Eldon* in *Ex p. Hooper* (*e*), still, as was recognised in that case, a deposit of deeds, whether it be accompanied by a memorandum or not, may by evidence, either written or parol, be held to extend to subsequent advances, upon proof of an agreement that the deposit was originally made as a security as well for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it (*f*); for Lord *Eldon* said, that this distinction appeared to him to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of the cases (*g*).

Upon the same principle, where money had been advanced, previous to the abolition of the usury laws, at 6*l.* per cent. on a promissory note, and a deposit of title-deeds of freehold property as a collateral security, and afterwards it was agreed by parol that a legal mortgage should be executed to secure the principal, and interest at 5*l.* per cent., but no mortgage was executed, it was held by the Lords Justices, reversing the decision of *Page-Wood*, V.-C. (*h*), that the parol agreement was sufficient to change the illegal into a legal

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(*a*) *Ex p.* Martin, 4 D. & C. 457, 2 M. & A. 243; Mountford *v.* Scott, T. & R. 274.

(*b*) *Ex p.* Farley, 1 Mont. D. & De G. 683, 689; *Ex p.* Smith, *Re* Hildyard, 2 Mont. D. & De G. 587.

(*c*) Ibid.

(*d*) Rogers *v.* Challis, 27 B. 175; Western Wagon and Property Co. *v.* West, (1892) 1 Ch. 271.

(*e*) 1 Mer. 7.

(*f*) *Ex p.* Langston, 17 V. 227, 11 R. R. 66; *Ex p.* Whitbread, 19 V. 209, 16 R. R. 148; *Ex p.* Kensington, 2 V. & B. 79, 13 R. R. 32; *Ex p.* Nettleship, *Re* Burkhill, 2 Mont. D. & De G. 124; Ede *v.* Knowles, 2 Y. & C. Ch. 172.

(*g*) *Ex p.* Kensington, 2 V. & B. 83, 2 Rose, 138.

(*h*) Kay, 231.

contract, and that a return and fresh deposit of the deeds was not necessary to take the second contract out of the Statute of Frauds (*a*).

A debtor had deposited his title-deeds with his creditor *until such time as his account should not exceed* 100*l.*, at which time they were to be restored to him. The debtor died indebted to the creditor in 274*l.* It was held by *Knight-Bruce*, V.-C., that the deeds so deposited were a security *for the whole* 274*l.* (*b*).

Although the deposit of deeds has been merely for the purpose of securing a simple contract debt, the debt will, in accordance with the practice of the Court, bear interest from the date of the deposit, and by reason of it, though there be no express contract as to interest (*c*).

Where there is a contract in a security for the payment of money on a day certain, with interest at a fixed rate down to that day, no further contract for the continuance of the same rate of interest after that day is implied (*d*); but interest by way of damages at 4*l.* or 5*l.* per cent. from that date will be allowed by the Court or a jury, until the day of payment of the principal (*e*), and, if a provision be made as to the amount of interest payable on non-payment of the principal upon a certain day, it must be complied with (*f*).

5. To whom the Benefit of an Equitable Mortgage by Deposit will extend.

A mortgage by deposit with a firm may be extended to future members by agreement by parol (*g*), or by dealings with the new firm (*h*).

It seems, however, that parol evidence, without a memorandum in writing, is not admissible to prove that a man who holds deeds as a security for his own debt holds them also as trustee to secure the debt of another. It would be otherwise where the depositee has himself advanced nothing (*i*).

(*a*) James *v.* Rice, 5 De G. M. & G. 461; see also Hodgkinson *v.* Wyatt, 9 B. 566.

(*b*) Ashton *v.* Dalton, 2 Coll. 565.

(*c*) *Re* Kerr's Policy, 8 Eq. 331; *Re* Drax, (1903) 1 Ch. 781; Carey *v.* Doyne, 5 Ir. Ch. R. 104; but see Ashton *v.* Dalton, 2 Coll. 565; Lippard *v.* Ricketts, 14 Eq. 291.

(*d*) Cook *v.* Fowler, L. R. 7 H. L. 27.

(*e*) Ibid., and see *Re* Roberts, 14 C. D. 49; Mellersh *v.* Brown, 45 C. D. 225; see also L. C. & D. Ry. Co. *v.* S. E. Ry. Co., (1893) A. C. 429; and cf. *Re* Dixon, (1900) 2 Ch. 561, as to interest on penal bond.

(*f*) *Ex p.* Furber, 17 C. D. 191.

(*g*) *Ex p.* Kensington, 2 V. & B. 79, 83, 13 R. R. 32.

(*h*) *Ex p.* Oakes, *Re* Worters, 2 Mont. D. & De G. 234; see also *Ex p.* Smith, *Re* Gye, ibid., 314; and see *Re* O'Brien, 11 L. R. Ir. 263.

(*i*) *Ex p.* Whitbread, 19 V. 209, 16 R. R. 148; *Ex p.* Crossfield, 3 Ir. R. Eq. 67.

And new owners of property may have shewn such acquiescence in a deposit by the former owners as to be equivalent to a re-deposit (*a*).

Bankers by the usage of trade, which, being part of the law merchant, is therefore judicially noticed, have a general lien on all securities deposited with them as bankers by a customer (*b*). So likewise have stockbrokers (*c*), and, although a general lien will not exist if there be an express contract or circumstances that shew an implied contract inconsistent with such lien (*d*), nevertheless a deposit to secure a specific sum will not prevent a general lien from attaching (*e*).

Whether taking security amounts to an abandonment of a lien, is a question of intention (*f*).

6. As against whom a Deposit of Title-deeds is Good.

A deposit of deeds is good as against the Crown, if made before the depositor became a debtor to the Crown by record or specialty (*g*), unless it be made in favour of a person in whom it was a breach of duty to the Crown to take it (*h*).

An equitable mortgagee, by deposit of title-deeds, has priority over a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit*, without notice of the equitable mortgage (*i*). For a judgment creditor only takes the interest of the debtor; he is not a mortgagee, and takes subject to all charges (*k*).

(*a*) *Re* Wynn Hall Coal Co., 10 Eq. 515, 520.

(*b*) Davis *v.* Bowsher, 5 T. R. 488; Bolland *v.* Bygrave, 1 R. & M. 279; *Re* European Bank, Agra Bank Claim, L. R. 8 Ch. 41.

(*c*) Jones *v.* Peppercorne, John. 430; *Re* London & Globe Finance Corporation, (1902) 2 Ch. 416.

(*d*) Brandao *v.* Barnett, 3 C. B. 519, 12 Cl. & Fin. 787; Wilde *v.* Radford, 9 Jur. (N. S.) 1169, 33 L. J. Ch. 51, 12 W. R. (V.-C. K.) 38; Vanderzee *v.* Willis, 3 Bro. Ch. 21; Leese *v.* Martin, 17 Eq. 224; London Chartered Bank of Australia *v.* White, 4 A. C. 413.

(*e*) Jones *v.* Peppercorne, supra; *Re* Joseph Williams, 3 Ir. R. Eq. 346; *Re* London & Globe Finance Corporation, supra.

(*f*) *Re* Taylor, (1891) 1 Ch. 590; Bank of Africa *v.* Salisbury, (1892) A. C. 281; Groom *v.* Cheesewright, (1895) 1 Ch. 730; *Re* Douglas Norman & Co., (1898) 1 Ch. 199.

(*g*) Casperd *v.* A.-G., 6 Price, 411; S. C., Dan. 239.

(*h*) Broughton *v.* Davis, 1 Price, 216.

(*i*) Whitworth *v.* Gaugain, 3 Ha. 416, affirmed by Lord *Lyndhurst*, C., 1 Ph. 728; Abbott *v.* Stratten, 9 Ir. R. Eq. 233; Anderson *v.* Kemshead, 16 B. 329, 344; Battersby *v.* Homan, 2 Ir. Ch. R. 232.

(*k*) Per *Kay*, J., *Re* Bell, 34 W. R.

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An equitable mortgagee of land being a purchaser for valuable consideration *pro tanto*, his charge would, if made prior to the Voluntary Conveyances Act, 1893 (*a*), be effectual against a prior voluntary settlement (*b*). But that Act as to documents executed after the 29th of June, 1893, has abolished the rule that a conveyance for value by the settlor would, under 27 Eliz. c. 4, override a voluntary settlement, and the Act applies to settlements before and after its date. As a creditor, the equitable mortgagee may, if he can shew that the settlement was fraudulent under 13 Eliz. c. 5, avoid such settlement provided that he was a creditor at the time of the execution thereof (*c*).

It was held in *Meggison* v. *Foster* (*d*), in 1843, that an equitable mortgage by deposit of title-deeds to secure a voluntary bond debt was valid as against a subsequent bankruptcy of the obligor, where it was shewn that he was solvent at the time of the transaction, and that there was no fraud, and that the bond without reference to the charge was subsequently settled on, and in consideration of, a marriage. In this case the subsequent consideration of marriage may have operated on the same principle as that on which a subsequent valid agreement may render valid a deposit for illegal consideration (*e*); but, as the deposit operates as an agreement to execute a mortgage (*f*), it cannot be taken as establishing that a deposit would be effectual if purely voluntary, and not confirmed by some subsequent agreement for value; and if effectual as a voluntary settlement it would be liable to be upset within two or ten years under sect. 47 of the Bankruptcy Act, 1883.

Under the law before the Married Women's Property Act, 1882, although a husband, by a mere transfer for value of title-deeds, of which his wife was equitable mortgagee, did not thereby reduce the sum secured into possession, he effectually did so to the extent of any money he actually received (*g*).

363; *Re* London Pressed Hinge Co., (1905) 1 Ch. 576 (creditors and debenture holders); and see cases supra, and Badeley *v.* Consolidated Bank, 38 C. D. 238; *Re* Marquis of Anglesey, (1903) 2 Ch. 727; Jones *v.* Barker, (1909) 1 Ch. 321.

(*a*) 56 & 57 Vict. c. 21.

(*b*) See Ede *v.* Knowles, 2 Y. & C. Ch. 172; Lister *v.* Turner, 5 Ha. 281; Kerrison *v.* Dorrien, 9 Bing. 76.

(*c*) Lister *v.* Turner, 5 Ha. 281; Ede *v.* Knowles, 2 Y. & C. Ch. 172.

(*d*) 2 Y. & C. Ch. 336.

(*e*) James *v.* Rice, 5 De G. M. & G. 461, contract originally invalid as in breach of the usury laws.

(*f*) Pryce *v.* Bury, 2 Drew. 11; Carter *v.* Wake, 4 C. D. 605, 606.

(*g*) Michelmore *v.* Mudge, 2 Gif. 183.

7. Priorities of Mortgages Legal and Equitable.

Generally.—Equitable mortgages are subject to the rule that where equities are equal (*a*) the prior equity shall prevail. The rule applies in the case of deposit by a trustee holding documents relating to the trust property. The *cestui que trusts* "will not lose their priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the *cestui que trusts* have no reason to suppose that there has been any want of good faith on the part of the custodian of the deeds" (*b*).

Thus the mere fact of the *cestui que trusts* of railway shares, registered in the name of a sole trustee, allowing him to have possession of the certificates of the shares which the trustee deposits by way of equitable mortgage, will not have the effect of postponing the prior title of the *cestui que trusts* to that of the equitable mortgagee (*c*). It has been decided that the mere taking a conveyance in the name of a clerk who had access to the securities and who took and deposited the deeds with a mortgagee was not sufficient to postpone the real owner to the trustee's mortgagee (*d*). On the same principle where a banker held certificates of stock in trust for a company and deposited them by way of security for the banker's debt, it was held that the equitable title of the company had priority to the mortgage (*e*), nor can the claim of purchaser for value without notice be raised by the equitable mortgagees, as against equitable interests prior in date (*f*). In *Cave* v. *C.* (*g*) the distinction between a prior *equity* and a prior equitable interest was recognised, and

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(*a*) See as to the meaning of equality the judgment of *Kindersley*, V.-C., in Rice *v.* R., 2 Drew. 73.

(*b*) See the general principles stated in Taylor *v.* London & County Bank, (1901) 2 Ch. 231, per *Stirling*, L. J., at p. 261; Burgis *v.* Constantine, (1908) 2 K. B. at p. 501, per *Farwell*, L. J.

(*c*) Shropshire Union Railways & Canal Co. *v.* The Queen, L. R. 7 H. L. 496; Burgis *v.* Constantine, (1908) 2 K. B. 484.

(*d*) Carritt *v.* Real and Personal Advance Co., 42 C. D. 263, distinguished in Rimmer *v.* Webster, (1902) 2 Ch. 163.

(*e*) Shropshire Union Railways & Canal Co. *v.* Reg., L. R. 8 Q. B. 420, L. R. 7 H. L. 496, distinguished in Lloyds Bank *v.* Bullock, (1896) 2 Ch. 192; see infra, p. 107; and see Cory *v.* Eyre, 1 De G. & S. 149; *Re* Vernon, Ewens & Co., 33 C. D. 402; Manningford *v.* Toleman, 1 Coll. 670; *Ex p.* Smith, *Re* Hildyard, 2 Mont. D. & De G. 587; *Ex p.* Wright, 3 M. & A. 49; Stackhouse *v.* Countess of Jersey, 1 John. & H. 721; Bradley *v.* Riches, 9 C. D. 189; Welchman *v.* Coventry Union Bank, 8 W. R. 729.

(*f*) See note to Basset *v.* Nosworthy, post, pp. 175, 176.

(*g*) 15 C. D. 639; National Provincial Bk. *v.* Whipp, 33 C. D. 1; Cloutte *v.* Storey, (1911) 1 Ch. 18.

it was held that a legal mortgagee, without notice, obtained priority over the *cestui que trust*, but that the claim of the *cestui que trust*, being prior in point of time, took priority over an equitable mortgage. In *Lloyds Bank* v. *Jones* (*a*), the trustee, legal owner, and his *cestui que trusts* were postponed to a prior equitable charge by deposit, but that was on the ground that it was the duty of the trustee to inquire for the deeds; he had failed to do so, and the *cestui que trusts* were postponed by reason of his negligence.

In *Walker* v. *Linom* (*b*), W., by his marriage settlement, conveyed real estate to trustees. The solicitors, who acted for all parties, believed that the trustees had received all the title-deeds, but W. in fact retained the last deed, the conveyance to himself. W. subsequently conveyed the real estate to a purchaser for value without notice. *Parker*, J., on the ground that the trustees had been guilty of negligence in not getting in the title-deeds, held that the equity of the *cestui que trusts*, prior in order of time, was postponed to the subsequent equity of the purchaser (*c*).

Postponing the Legal Mortgagee.—It has been settled since the old case of *Plumb* v. *Fluitt* (*d*), that a legal mortgagee or any purchaser for value without notice having the legal estate takes priority over all equitable mortgages or claims unless there is something to postpone him. The doctrine is there stated that "nothing but fraud, or gross and voluntary negligence in leaving the title-deeds, will oust the priority of the legal claimant" (*e*).

In the case of *Northern Counties of England Fire Insurance Co.* v. *Whipp* (*f*), *Fry*, L. J., delivering the judgment of the Court of Appeal, gave a clear epitome of the result of the cases to that date, 1884.

(*a*) 29 C. D. 221; and see Oliver *v.* Hinton, (1899) 2 Ch. 264; Berwick & Co. *v.* Price, (1905) 1 Ch. 632; *Re* Castell & Brown, Ltd., (1898) 1 Ch. 315; *Re* Valletort, &c. Laundry Co., (1903) 2 Ch. 654; Wilson *v.* Kelland, (1910) 2 Ch. 306; cf. Cottey *v.* National Provincial Bank, &c., 20 T. L. R. 607; Bank of Ireland *v.* Cogry, &c. Co., (1909) 1 Ir. R. 219.

(*b*) (1907) 2 Ch. 104; and see and cf. *Re* Bobbett's Estate, (1904) 1 Ir. R. 461; Capell *v.* Winter, (1907) 2 Ch. 376. In this last case the equities of beneficiaries claiming shares of proceeds under a trust for sale were held not to be postponed to an equitable mortgagee deriving title under a conveyance made by the trustee for sale in fraud of his power of sale; see supra, p. 45.

(*c*) See also *Re* Richards, 45 C. D. 589; Isaac *v.* Worstencroft, 67 L. T. 351; Powell *v.* London & Provincial Bank, (1893) 1 Ch. 610, (1893) 2 Ch. 555 (C. A.); Carritt *v.* Real and Personal Advance Co., supra; *Re* Vernon, Ewens & Co., 33 C. D. 402.

(*d*) 2 Anst. 432.

(*e*) See as to negligence Oliver *v.* Hinton, (1899) 2 Ch. 264; Walker *v.* Linom, (1907) 2 Ch. 104, and infra.

(*f*) 26 C. D. 482, distinguished in Farrand *v.* Yorkshire, &c. Co., 40 C.

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He divided the cases into two categories. First, those which relate to the conduct of the legal mortgagee in not obtaining possession of the title-deeds. Secondly, those relating to the conduct of the legal mortgagee in giving up or not retaining possession of the deeds when he had them. Those under the first category he divides into four classes as follows:

(1) Where the legal mortgagee or purchaser has made no inquiry for the title-deeds, and has been postponed, either to a prior equitable estate, as in *Worthington* v. *Morgan* (*a*), or to a subsequent equitable owner who used diligence in inquiring for the deeds (*b*).

(2) Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority (*c*).

(3) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority (*d*).

(4) Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of his raising money on the security of the estate, and he has exceeded the collateral instructions given to him, in such a case the legal mortgagee has been postponed (*e*).

As to the second category, where the mortgagee parts with the deeds, *Fry*, L. J., divides the cases into two classes:

(1) Where the title-deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to his object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities (*f*).

D. 182, infra, and Taylor *v.* London & County Banking Co., (1901) 2 Ch. 231; and see Garside *v.* Liverpool B. S., 13 T. L. R. 189.

(*a*) 16 Si. 547.

(*b*) Clarke *v.* Palmer, 21 C. D. 124.

(*c*) Barnett *v.* Weston, 12 V. 130; Hewitt *v.* Loosemore, 9 Ha. 449; Brown *v.* Stedman, 44 W. R. 458; Cottey *v.* National Provincial Bank of England, &c., 20 T. L. R. 607; see also Manners *v.* Mew, 29 C. D. 725; Lloyds Bank *v.* Jones, 29 C. D. 221; Garnham *v.* Skipper, 53 L. T. 940; Agra Bank *v.* Barry, L. R. 7 H. L. 135.

(*d*) Hunt *v.* Elmes, 2 De G. F. & J. 578; Ratcliffe *v.* Barnard, L. R. 6 Ch. 652; Colyer *v.* Finch, 5 H. L. C. 905; Oliver *v.* Hinton, (1899) 2 Ch. 264, and the observations therein on Ratcliffe *v.* Barnard, supra.

(*e*) Perry-Herrick *v.* Attwood, 2 De G. & J. 21 (in this case the mortgagor had authority to raise a certain amount for his own benefit), explained and followed by *Farwell*, J., in Rimmer *v.* Webster, (1902) 2 Ch. 163, which is explained by *Farwell*, L. J., in Burgis *v.* Constantine, (1908) 2 K. B. at p. 503.

(*f*) Peter *v.* Russel, 1 Eq. Ca. Abr. 321; Martinez *v.* Cooper, 2 Russ. 198.

(2) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee, in such cases the Court has, on the ground of authority, postponed the legal to the equitable estate (*a*).

Fry, L. J., said that there was no case in which a legal mortgagee had been postponed for mere negligence, and held that he could not be so (*b*). The negligence in the *Northern Counties, &c.* v. *Whipp* case consisted in leaving a mortgage to a company by its manager in a safe of which the manager had a duplicate key, by means of which he got the deed and fraudulently obtained money on a subsequent mortgage.

As to cases since 1884, on the fourth class of the first category given by *Fry*, L. J., *i.e.*, giving or leaving the deeds to or with an agent for the purpose of raising money. In *Brocklesby* v. *Temperance, &c. Society* (*c*), the legal mortgagee was postponed where his agent not only exceeded his authority, but obtained the loan by fraud and forgery, although the lender had made no inquiry as to the agent's authority. In *Lloyds Bank, Ltd.* v. *Bullock* (*d*), the doctrine of *Perry-Herrick* v. *Attwood* (*e*) was not applied as against a building society who were mortgagees and had indorsed the statutory receipt on their mortgage deed, and given it up to their solicitor to obtain payment, who then fraudulently dealt with it. It was held that the society had delivered the mortgage as an escrow, that the legal estate remained in the society, and that they were entitled to priority over a subsequent equitable mortgagee. On the other hand, it is to be observed that these cases rest simply upon the general principles of the law of principal and agent (*f*). They in no way affect the principle laid down by Lord *Cairns* in *Shropshire Union, &c.* v. *Reg.* (*g*), that the title of a *cestui que trust* is not displaced by anything short of the acquisition of the legal

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(*a*) Briggs *v.* Jones, 10 Eq. 92; and see Perry-Herrick *v.* Attwood, supra; Brocklesby *v.* Temperance, &c. Society, (1893) 3 Ch. 130, (1895) A. C. 173. Cf. Lloyds Bank *v.* Cooke, (1907) 1 K. B. 794; Farquharson Brothers & Co. *v.* King & Co., (1902) A. C. 325.

(*b*) But see Oliver *v.* Hinton, (1899) 2 Ch. 264; Walker *v.* Linom, (1907) 2 Ch. 104.

(*c*) (1895) A. C. 173.

(*d*) (1896) 2 Ch. 192, distinguishing Shropshire Union, &c. *v.* Reg., L. R. 7 H. L. 496.

(*e*) 2 De G. & J. 21; see Rimmer *v.* Webster, (1902) 2 Ch. 163.

(*f*) See per Lord *Macnaghten* in Brocklesby *v.* Temperance, &c. Society, (1895) A. C. at p. 184.

(*g*) L. R. 7 H. L. at pp. 507, 509.

estate by a *bonâ fide* purchaser for value without notice of the trust (*a*).

In addition to the cases mentioned by *Fry*, L. J., a legal mortgagee will be postponed to a prior equitable mortgagee if he does not make the proper investigations of title, when such investigations, if made, would have disclosed the prior incumbrance (*b*). But see the limitations of this doctrine suggested by the Lord Chancellor in *Hunter* v. *Walters* (*c*), namely, that it would not apply in case of an omission to investigate the title to a small part of the property.

In the case of *Clarke* v. *Palmer* (*d*), cited by *Fry*, L. J., in *Northern Counties, &c.* v. *Whipp* (supra), P. mortgaged estates to M., and was allowed to retain possession of the title-deeds. He, P., subsequently mortgaged one of the estates to A. B., who obtained possession of the deeds, and all the estates to C., who advanced his moneys after ascertaining the position of the deeds, and upon the faith that A. B. was the only prior mortgagee. Held, that M., by not obtaining possession of the deeds, enabled P. to deal with his estates as an unencumbered owner; that A. B., having been diligent in obtaining the deeds, acquired priority; and that C. also having been diligent in ascertaining that A. B. had the deeds, apparently as first mortgagee, the same principle extended to him, and he also had priority over M.

And the result is the same where, although the legal mortgagee is innocent, a fraudulent deposit has been made by his agent, whom, by the trust he placed in him, he enabled to commit a fraud (*e*).

Postponing the Equitable Mortgagee.—The judgment in *Northern Counties, &c., Co.* v. *Whipp* (supra) expressly distinguished the case of what may give priority between two equities from that of postponing a legal mortgage (*f*), but it is not clear what the difference is. *Kay*, J., in *Taylor* v. *Russell* (*g*), denied that a lesser degree of negligence would suffice for the postponement of an equitable

(*a*) See Burgis *v.* Constantine, supra.

(*b*) Oliver *v.* Hinton, (1899) 2 Ch. 264; Berwick & Co. *v.* Price, (1905) 1 Ch. 632; Perham *v.* Kempster, (1907) 1 Ch. 373; Robson *v.* Flight, 4 De G. J. & S. 608, per Lord *Westbury*; see per *Turner*, L. J., Wilson *v.* Hart, L. R. 1 Ch. 463, 467; per Lord *Hatherley* in Parker *v.* Whyte, 1 Hem. & M. 167; per *Jessel*, M. R., in Patman *v.* Harland, 17 C. D. 353; and *North*, J., in Gainsborough *v.* Watcombe, &c. Ltd., 53 L. T. 116; see also Le Neve *v.* Le N., notes, post.

(*c*) L. R. 7 Ch. 75; see p. 83.

(*d*) 21 C. D. 124; cf. Walker *v.* Linom, (1907) 2 Ch. 104.

(*e*) Hunter *v.* Walters, 11 Eq. 292, L. R. 7 Ch. 75; cf. King *v.* Smith, (1900) 2 Ch. 425.

(*f*) 26 C. D. 487.

(*g*) (1891) 1 Ch. at pp. 14—17.

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incumbrance than that required to postpone a legal mortgage, and reviewed the authorities on the point at length. The Court of Appeal, in reversing his decision on the ground that the second mortgagee was entitled to the protection of the legal estate which he had got in, expressed no opinion on this point, but Lord *Macnaghten*, in his speech on the appeal to the House of Lords, expressed himself as not convinced of the correctness of the view expressed by *Kay*, J., that negligence necessary to postpone a prior equitable mortgagee (in such a case as that before him) must be so gross as to render him responsible for the fraud committed on the (subsequent) mortgagee, and that, in fact, it is immaterial in such cases whether the prior mortgagee has or has not the legal estate (*a*). In *Taylor* v. *London & County Banking Co.* (*b*) *Stirling*, L. J., notices the question, but expresses no opinion upon the point. The rule as generally stated is that as between equitable interests *qui prior est tempore potior est jure* (*c*). This rule, as was laid down by V.-C. *Kindersley* in the leading case of *Rice* v. *R.* (*d*), should be stated in some such form as this: "As between persons having only equitable interests, if their equities are *in all other respects equal*, priority of time gives the better equity; or, *qui prior est tempore potior est jure*. . . . And I think the meaning is this, that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to" (*e*).

In *National Provincial Bank of England* v. *Jackson* (*f*), *Cotton*, L. J., said, as between equitable claims, the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other.

As in some cases a legal mortgagee not getting or giving up the deeds may be postponed (see ante, pp. 106, 107), so, *à fortiori*, where an equitable mortgagee, either by neglecting to get (*g*), or by giving up (*h*), the title-deeds, or otherwise by fraud or gross and wilful

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(*a*) (1892) A. C. at p. 262.

(*b*) (1901) 2 Ch. 231, at p. 260.

(*c*) See as to equitable mortgages Roberts *v.* Croft, 24 B. 223, 2 De G. & J. 1.

(*d*) 2 Dr. 73; see p. 78; and see Bailey *v.* Barnes, (1894) 1 Ch. at p. 36 cited infra, p. 126; Bourke *v.* Lee, (1904) 1 Ir. R. 280; Capell *v.* Winter, (1907) 2 Ch. 376.

(*e*) But see Taylor *v.* Russell, per *Kay*, J., (1891) 1 Ch. 8, at p. 17, also *Re* Vernon, Ewens & Co., 33 C. D. 402, 408; Union Bank, &c. *v.* Kent, 39 C. D. 238, 245.

(*f*) 33 C. D. 1; see p. 13; and see Farrand *v.* Yorkshire Banking Co., 40 C. D. 182, and Peat *v.* Clayton, (1906) 1 Ch. 659.

(*g*) Layard *v.* Maud, 4 Eq. 397.

(*h*) Waldron *v.* Sloper, 1 Drew. 193; cf. Rimmer *v.* Webster, (1902) 2 Ch. 163.

negligence, enables another to create a subsequent equitable mortgage, he may be postponed to such subsequent equitable mortgagee (*a*). These cases of postponement are sometimes treated as instances of estoppel *in pais* (*b*).

But an equitable mortgagee will not be postponed by reason of his not giving notice which he was not bound to give in order to perfect his security. Thus in *Union Bank of London* v. *Kent* (*c*) a company holding a building agreement, on an advance by the plaintiffs, handed over the building agreement with a covenant to give a mortgage of the leases when granted. The plaintiffs gave no notice to the proposed lessors. The lessors granted the leases to the mortgagor company, who fraudulently deposited them by way of equitable mortgage with mortgagees who had no notice of the plaintiffs' mortgage. Held, that, as priority as to land does not depend upon notice, and by the terms of the mortgage covenant the plaintiffs were not entitled to intercept the legal estate, there was no negligence on their part postponing them to the subsequent mortgagees of the leases. *Fry*, L. J., refers first to the judgment of Lord *Cairns* in *Shropshire Union Ry. Co.* v. *Reg.* (*d*), that to postpone a pre-existing equitable title there must be something tangible and distinct, and divides the cases into two classes. "One class is where a mortgagee knows that a mortgagor has not fulfilled his obligations, and yet does nothing (*e*). The other is where the mortgagee does not know that the mortgagor has failed to fulfil his obligations, but knows only that there are obligations which he may in the future fail to fulfil, and yet takes no precautions against the consequences of his doing so. . . . I know of no decided case in which a mortgagee has been postponed on the ground that he did not take precautions against a future fraud by the mortgagor."

(*a*) Waldron *v.* Sloper, 1 Drew. 193; cf. *Re* Vernon, Ewens & Co., 33 C. D. 402; see Adsetts *v.* Hives, 33 B. 52; and as to legal mortgages Clarke *v.* Palmer, 21 C. D. 124; Perry-Herrick *v.* Attwood, 2 De G. & J. 37; Rimmer *v.* Webster, (1902) 2 Ch. 163.

(*b*) Per *Farwell*, J., in Rimmer *v.* Webster, (1902) 2 Ch., at p. 173, where Rice *v.* R., 2 Dr. 73, is treated as a case of estoppel; but cf. per *Parker*, J., in Capell *v.* Winter, (1907) 2 Ch., at p. 382, where Rice *v.* R. and Lloyds Bank *v.* Bullock, supra, are said not to depend on estoppel. See article, Law Quarterly Review, January, 1897, and Pickard *v.* Sears, 6 A. & E. 469; Savage *v.* Foster, vol. 1, ante.

(*c*) 39 C. D. 238; see Taylor *v.* London & County Banking Co., (1901) 2 Ch. 231.

(*d*) L. R. 7 H. L. 496, 506; cf. Rimmer *v.* Webster, (1902) 2 Ch. 163.

(*e*) See e.g. Layard *v.* Maud, 4 Eq. 397.

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The rule that as between equitable mortgagees the first in date will have priority, has been applied where the prior in date of equitable mortgagees of shares had a deposit of the certificates, though he gave no notice to the company.

In *Société Générale de Paris* v. *Tramways Union Co.* (*a*), M. deposited with S. as security certificates of shares in a company incorporated under the Act of 1862 and a blank transfer. Afterwards he fraudulently executed a blank transfer to the appellants and deposited it with them, alleging the certificates were lost. The appellants filled up the blanks in the transfer, had it executed by the manager as transferee, and sent it to the company. Subsequently the executors of S., who had died, gave notice of their deposit to the company. The company's regulations required the transfers to be by deed. It was held that the executors of S. had priority.

Floating Charges and Subsequent Mortgages.

The nature of a floating charge is stated, and the cases bearing on the priorities of debentures and subsequent specific mortgages, legal or equitable, are referred to in the notes to *Ryall* v. *Rowles*, Vol. I., ante, at p. 110 (*b*).

In a recent case, *Wilson* v. *Kelland* (*c*), debentures were secured by a trust deed. Both the debentures and the trust deed charged the present and future property of the company, and prohibited the creation of any charge upon that property ranking in priority to or *pari passu* with the debentures. The debentures, however, contained a condition that nothing *therein* contained should prevent the creation of a specific mortgage upon after-acquired freehold or leasehold property. It was held (apart from any question of notice (*d*)) that the security created by the trust deed and the debentures was cumulative, and that the company had no power to make a subsequent specific mortgage of after-acquired property having priority to the debentures, the condition in the debentures being controlled by the trust deed. The mortgage to which priority was refused was a second mortgage, but the second mortgagees had acquired the first legal mortgage, which it was decided, had priority over the debentures.

(*a*) 14 Q. B. D. 424, 11 A. C. 20.

(*b*) See the cases cited in notes (*f*), (*g*) and (*h*), and also *Re* Standard Rotary Machine Co., 95 L. T. 829; Cox *v.* Dublin City, &c. Co., (1906) 1 Ir. R. 446.

(*c*) (1910) 2 Ch. 306. *Sed qu.* whether the trust deed could as to after-acquired property operate otherwise than an equitable assignment, and whether in the absence of notice, this decision can be supported.

(*d*) As to notice, see this case cited, infra, in notes to Le Neve *v.* Le Neve.

8. Privileges and Remedies of Equitable Mortgagees.

A mere depositee of a lease cannot be compelled to take a legal assignment so as to enable the lessor to sue him at law on the covenants in the lease, nor is he liable on them until he has made himself *legal* assignee (*a*); nor will the case be altered by his having entered into possession of the premises and paid the rent (*b*). In such case, however, though not liable for rents and covenants he would be liable in respect of his occupancy as tenant (*c*).

Sale, foreclosure, &c.—Considerable doubt having arisen whether the remedy of a mortgagee by deposit of deeds with or without a memorandum was confined to sale or extended to foreclosure, it is now settled that the remedy by foreclosure is available (*d*).

In *Carter* v. *Wake* (*e*), *Jessel*, M. R., says, "when there is a deposit of deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage." Where a certificate of shares is deposited as security for a debt and interest without a transfer or memorandum, the remedy of the lender against the shares is an order for transfer and foreclosure (*f*).

An equitable mortgagee may obtain a receiver (*g*), and he will be entitled to one on motion before the hearing on shewing the possession of deeds, which raises a *primâ facie* presumption that the

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(*a*) Moores *v.* Choat, 8 Si. 508, and cases there cited; and Moore *v.* Greg, 2 De G. & Sm. 304, 2 Ph. 717, overruling Lucas *v.* Comerford, 1 V. 235, and Flight *v.* Bentley, 7 Si. 149.

(*b*) Moore *v.* Greg, 2 De G. & Sm. 304, 2 Ph. 717; Newry Railway Co. *v.* Moss, 14 B. 64; Walters *v.* The Northern Coal Mining Co., 5 De G. M. & G. 629; Cox *v.* Bishop, 8 De G. M. & G. 815; Wright *v.* Pitt, 12 Eq. 408; Friary Holroyd & Healey's Breweries, Ltd. *v.* Singleton, (1899) 1 Ch. 86, reversed on the facts (1899) 2 Ch. 261; Ramage *v.* Womack, (1900) 1 Q. B. 116; Hand *v.* Blow, (1901) 2 Ch. 721; Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., (1902) 1 Ch. 146.

(*c*) Dav. Conv. vol. ii., pt. 2, p. 121, 4th edit. (n.). As to his rights to rent and possession, see supra, p. 87.

(*d*) Seton (1901), p. 2052; James *v.* J., 16 Eq. 153, 21 W. R. 522, and authorities there collected; Backhouse *v.* Charlton, 8 C. D. 444; York Union Banking Co. *v.* Artley, 11 C. D. 205. When an order directs the mortgagor to convey, the conveyance is within the Stamp Act, 1891, s. 54; Huntington *v.* Commissioners, &c., (1896) 1 Q. B. 422.

(*e*) 4 C. D. 606. See 11 T. L. R. 481.

(*f*) Harrold *v.* Plenty, (1901) 2 Ch. 314. As to the mortgagee's power of sale on deposit of share certificates, see supra, p. 88.

(*g*) Shakel *v.* Duke of Marlborough, 4 Madd. 463. As to appointment on ex parte application, see London & County Banking Co. *v.* Lewis, 21 C. D.

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deposit was made for the purpose of securing an advance of money (*a*).

The position and remedies of an equitable mortgagee, since the Judicature Acts, when the mortgagor has died and his estate is insolvent, are similar to those in the case of a legal mortgage, as to which see notes to *Howard* v. *Harris*, supra.

In cases, however, where the mortgagor died before the Act came into operation, it was held that the mortgagee was entitled, without prejudice to his security, to prove for and take a dividend upon the entire debt, so that he did not ultimately receive more than twenty shillings in the pound from all sources (*b*).

It has been held in Ireland that an equitable mortgagee by deposit of a lease relating to lands there, where the lessee had been evicted for nonpayment of rent, under the Irish Ejectment Acts, might file a bill for redemption against the landlord (*c*).

Where there has been a mere equitable mortgage of a policy of assurance on the life of the mortgagor, the assurance company are upon his death justified in refusing to pay the policy moneys to the mortgagee save with the consent of the legal personal representative of the mortgagor (*d*); and if there be none the mortgagee himself could take out administration to the deceased debtor (*e*); he might, however, obtain an order for payment of the policy moneys by action in the Chancery Division, and in one case he was allowed to do so in the absence of the legal personal representative of the mortgagor (*f*). In a subsequent case the Court of Appeal expressed surprise that such a decree should have been made in the absence of such representative (*g*).

And it has been held that, in such cases, where the default or delay in payment of the policy moneys was caused, not by the company, but by the mortgagee's neglect to clothe himself with a legal title

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490; Spiller *v.* S., 3 Swans. 556; Hadley *v.* London Bank of Scotland, 3 De G. J. & S. 63.

(*a*) Bodger *v.* B., 11 W. R. (V.-C. K.) 160.

(*b*) Rhodes *v.* Moxhay, 10 W. R. (V.-C. S.) 103.

(*c*) Malone *v.* Geraghty, 3 Dr. & War. 239, 1 H. L. Cas. 81.

(*d*) Crossley *v.* City of Glasgow Life Assurance Co., 4 C. D. 421; Webster *v.* British Empire Mutual Life Assurance Co., 15 C. D. 169.

(*e*) Webster *v.* British Empire Mutual Life Assurance Co., 15 C. D. 177.

(*f*) Crossley *v.* City of Glasgow Life Assurance Co., 4 C. D. 421.

(*g*) Webster *v.* British Empire Mutual Life Assurance Co., 15 C. D. 169, 180; sed vide Curtius *v.* Caledonian Fire and Life Insurance Co., 19 C. D. 534; and see Annual Practice (1911), Order XVI., r. 46, pp. 223 et seq.; and *Re* Richerson, (1893) 3 Ch. 146.

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to the money, interest will not commence to run till the order for payment of the principal has been made (*a*).

By a statute of 1896 (*b*) life assurance companies are enabled to pay policy moneys into Court when in the opinion of the board of directors no sufficient discharge can otherwise be obtained.

An equitable mortgagee by deposit of deeds is not deprived of his right to recover his debt by his inability to produce either the deeds deposited or the memorandum of deposit, when the Court believes that there was such a deposit, and that the deeds have been really lost (*c*); but he may lose his lien by voluntarily parting with the deeds (*d*).

As to a vesting declaration under the Trustee Act, 1893, s. 12, by an equitable mortgagee where the mortgagor has declared himself a trustee of the legal estate, see *London & County Banking Co.* v. *Goddard* (*e*).

An equitable mortgagee by deposit may on the bankruptcy of the depositor seek relief either in the Court of Bankruptcy or in Chancery (*f*).

A mortgagee, whether legal or equitable, is a secured creditor within the meaning of the Bankruptcy Acts, 1883—1890, and the Rules made under these Acts.

In the second schedule to the Act of 1883, Rules 9 to 17 relate to the proof of debts by secured creditors. These rules are thus summarised in Williams' Bankruptcy (edition 1908), pp. 413, 420: 'The following courses are open to a secured creditor:—

"(1) He may rely on his security and not prove.

"(2) He may realise his security and then prove for the balance (Rule 9).

"(3) He may surrender his security and prove for the whole debt (Rule 10).

"(4) He may state in his proof the particulars of his security, &c.," and then set a value on it and prove for the balance.

In this case (4) the trustee may elect to redeem the security at the

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(*a*) Webster *v.* British Empire Mutual Life Assurance Co., 15 C. D. 169, overruling on this point Crossley *v.* City of Glasgow Life Assurance Co., 4 C. D. 421.

(*b*) 59 Vict. c. 8.

(*c*) Baskett *v.* Skeel, 11 W. R. (V.-C. W.) 1019.

(*d*) *Re* Driscoll, 1 Ir. R. Eq. 285.

(*e*) (1897) 1 Ch. 642.

(*f*) *Ex p.* Hirst, *Re* Wherly, 11 C. D. 278; White *v.* Simmons, L. R. 6 Ch. 555; Waddell *v.* Toleman, 9 C. D. 212.

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value so set or require it to be realised, and if he does not elect the secured creditor, on the other hand, may give notice requiring the trustee to elect; and if he does not so elect within six months the mortgagee becomes entitled to the property free from redemption. But when a secured creditor presents a bankruptcy petition against his debtor and adjudication follows, there is nothing in the Bankruptcy Act, 1883, or the Rules thereunder that entitles the trustee in bankruptcy to redeem the petitioning creditor's security at the value he places on it in his petition (*a*).

(5) There is another remedy, often the most convenient for the mortgagee, which has been adopted in all Bankruptcy Acts since what is referred to as Lord Loughborough's order of 8th March, 1794 (*b*), and which is now practically embodied in Rules 73 to 77 of the Bankruptcy Rules of 1886 and 1890, similar to Rules 65 to 69 of 1883. These empower a mortgagee to apply to the Court to have his security realised. Accounts are then to be taken and sale ordered, the conduct being in the discretion of the Court, the proceeds applied in payment of what may be found due to the mortgagee, and if not sufficient he may prove for the balance. But the general rule in bankruptcy applies, that no interest is given after the date of the bankruptcy (*c*).

When an equitable mortgagee by deposit applies to the Court of Bankruptcy to realise his security, the conduct of the sale is in the discretion of the Court. As a general rule where the security is sufficient the conduct of the sale will be given to the trustee, but where the security is insufficient the conduct of the sale will be given to the mortgagee; in either case, the costs, charges, and expenses of the trustee properly incurred, will be a first charge upon the proceeds of the sale (*d*).

No order for a sale will be made if the deposit of deeds were made for improper purposes, as, for instance, under the old law to secure future costs to a solicitor (*e*), especially if made shortly before the bankruptcy (*f*), or if the money were advanced to a trustee with the

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(*a*) *Re* Vautin, *Ex p.* Saffery, (1899) 2 Q. B. 549; cp. *Re* Button, (1905) 1 K. B. 602.

(*b*) *Ex p.* Badger, 4 V. 165; *Ex p.* Ramsbottom, 2 Mont. & A. 79; *Ex p.* Penfold, 4 De G. & Sm. 282.

(*c*) *Re* London, &c. Co., (1892) 1 Ch. 639.

(*d*) *Re* Jordan, *Ex p.* Harrison, 13 Q. B. D. 228.

(*e*) *Ex p.* Wake, 2 Deac. 352, 3 Mont. & A. 329.

(*f*) Ibid.

knowledge that he was about to commit a breach of trust, by applying it for his own purposes (*a*); or when the bankruptcy closely followed upon the deposit so as to raise a presumption of fraudulent preference (*b*).

In the case of a stale demand, as where there was no memorandum, the deposit of deeds had been made twelve years before, and the bankrupt was dead, the Court has refused to make the usual order for a sale (*c*), but an inquiry has been directed as to the circumstances attending a doubtful deposit (*d*).

In bankruptcy, an equitable mortgagee, except where he has actually received the rents (*e*), when he will not be required to refund (*f*), is entitled to them from the time only of the order for sale, which is considered equivalent to the appointment of a receiver (*g*). Notice to the tenants to pay rent to the mortgagee does not alter the rule (*h*).

An equitable mortgagee is also entitled to the growing crops on land in the mortgagor's occupation from the date of his application for a sale (*i*).

As to a *sale* in *bankruptcy* of property comprised in an equitable mortgage, see case cited in note (*k*).

Where a trustee had been appointed under the Act of 1869, it was held that an equitable mortgagee might, instead of applying in bankruptcy, proceed in Chancery against the trustee for the purpose of having the security realised, the jurisdiction in Chancery not being taken away by the Bankruptcy Act, 1869 (*l*), and that a second equitable mortgagee may commence an action against the liquidation trustee of the mortgagor, and the first mortgagees, claiming an

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(*a*) *Ex p.* Turner, 9 Mod. 418.

(*b*) *Ex p.* Dewdney, 4 D. & C. 181; *Ex p.* Morgan, 1 Mont. D. & De G. 116; *Ex p.* Clouter, 3 Mont. D. & De G. 187; *Ex p.* Wake, 2 Deac. 352; *Ex p.* Ainsworth, 2 Deac. 563; sed vide *Ex p.* Heathcoate, 2 Mont. D. & De G. 711.

(*c*) *Ex p.* Jones, 3 M. & A. 152.

(*d*) *Ex p.* Clouter, 7 Jur. 135.

(*e*) *Ex p.* Williams, 13 W. R. (Bkcy.) 564.

(*f*) Sumpter *v.* Cooper, 2 B. & Ad. 223; Garry *v.* Sharratt, 10 B. & C. 716; Pope *v.* Biggs, 4 Man. & Ry. 193, 9 B. & C. 245.

(*g*) *Ex p.* Bignold, 2 M. & A. 16; *Ex p.* Carlon, 3 M. & A. 328, 2 Deac. 333; *Ex p.* Thorpe, 3 Deac. 85, 3 M. & A. 441. See Robson, Bankruptcy (1894), p. 352.

(*h*) *Ex p.* Burrell, 3 M. & A. 439; *Ex p.* Scott, ibid., 592.

(*i*) *Ex p.* Bignold, 2 G. & J. 273, sed vide *Ex p.* Alexander, ibid., 275.

(*k*) *Re* Jordan, *Ex p.* Harrison, 13 Q. B. D. 228.

(*l*) White *v.* Simmons, L. R. 6 Ch. 555; *Ex p.* Pannell, 6 C. D. 335; Waddell *v.* Toleman, 9 C. D. 212.

equitable charge on the property, redemption against the first mortgagees, and, if necessary, foreclosure (*a*), but that the trustee ought not to raise objections to the exercise of jurisdiction by the Court of Bankruptcy if the mortgagee is willing to submit to it (*b*).

It has been held that a proviso making void a lease upon an assignment does not apply to a mere deposit of it (*c*).

And upon a petition in bankruptcy by the equitable mortgagee by deposit merely of a lease granted to the bankrupt, *his executors, administrators, and permissive assigns*, with a covenant on the part of the lessee not to assign without licence of the lessors, the usual order for sale was made (*d*).

A judgment registered in Ireland as a statutory mortgage does not merge a prior equitable mortgage by deposit of title-deeds. Hence, although such statutory mortgage may have been avoided under sect. 331 of the Irish Bankrupt and Insolvent Act, 1857 (*e*), by reason of a petition having been filed within three months against the judgment debtor, under which he was adjudicated bankrupt, it has been held that the mortgage by deposit of deeds still remained a security unmerged as an equitable security (*f*).

(*a*) *Ex p.* Hirst, *Re* Wherly, 11 C. D. 278.

(*b*) *Ex p.* Fletcher, *Re* Hart, 9 C. D. 381.

(c) Doe *v.* Hogg, 4 Dow. & Ry. 226; Ry. & M. 36.

(*d*) *Ex p.* Drake, 1 Mont. D. & De G. 539.

(e) 20 & 21 Vict. c. 60.

(*f*) *Re* Estate of Assignees of Elliott, 8 Ir. R. Eq. 565; and see *Re* Keane, (1899) 2 Ir. R. 798.

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1670. 2 Ventris, 337 (*a*).

Tacking Incumbrances.

If a third mortgagee, having advanced his money without notice of a second mortgage, afterwards buy in a first mortgage or statute, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee, having obtained the first mortgage or statute, and having the law on his side, and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.

A Bill in Chancery was brought by Marsh, and an answer put in thereto.

The case was thus:—One English, being seised of the manor of Wicksall and of the manor of Monfield, in 1649 mortgages part of the manor of Wicksall to Burrell for 1,000*l.* Afterwards, in 1655, he acknowledges a statute to Burrell of 800*l.*, for the payment of 400*l.*

Afterwards, in 1662, English mortgages both these manors to Mrs. Duppa for 7,000*l.*

Afterwards, in 1665, English mortgages the manor of Wicksall to Lee for 2,000*l.*, Lee *having no notice of the former mortgages.*

[(*b*) After Mrs. Duppa's death, her executors brought actions of ejectment against English and filed their bill of foreclosure against him. In Michaelmas Term, 1667, English suffered judgment in ejectment against him at the suit of the executors, with a *cesset executio* until May, 1668. The *cesset executio* having expired, English obtained an injunction against the proceedings at law upon the judgment in ejectment, until hearing or another order; and on the 5th of June, 1668, a decree was made, that English should redeem within a twelvemonth, or be foreclosed. On the 26th of

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(*a*) S. C., 1 Ch. Ca. 162, 3 Ch. R. 62.

(*b*) This statement within brackets is drawn up from 1 Ch. Ca. 162, where the proceedings in the case are fully given.

November, 1668, the Master reported, that 8,530*l.* 14*s.* would be payable to the plaintiffs on the 6th of June, 1669.

On the 27th of November, 1668, Lee, by the advice of counsel, purchases in the two incumbrances to Burrell, viz. the mortgage of part of the manor of Wicksall, and the statute.

On the 5th of February, 1669, the Master's report was confirmed. And now Marsh, executor of Duppa, sues Lee, who pleads this whole matter.]

My Lord Keeper, Sir *Orlando Bridgeman*, assisted by *Hale*, Chief Baron, and Justice *Rainsford*, held, that Lee might make use of these incumbrances to protect his own mortgage. For they said, that *he had both law and equity for him.*

First, he had law; for that he had a precedent mortgage in 1649 (which, indeed, was but upon part), and also the statute in 1655; so that, while these remained in force, Marsh could not come in.

Next, he had equity; for he having a subsequent mortgage, yet, it *being without notice*, he ought to be relieved in this Court. And, therefore, my Lord Chief Baron put the case, as if the first mortgage had been of the manor of Wicksall to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, *not having notice;* if afterwards Lee bought in Burrell's mortgage, he shall hold the estate against Duppa, until he be satisfied for both the money which he paid Burrell and also his own money lent upon the last mortgage: and for that he said, that it had been so adjudged in Camera Scaccarii, in the Court of Equity, since the King came in, in one *Shelley's Case.*

Next he put the case of the statute, which English entered in to Burrell, in 1655, and was afterwards bought by Lee from Burrell. He held that Duppa shall not bring Lee to any account upon this statute here in equity, any otherwise than he may do at common law.

Nota. It was agreed that the lands were extended upon the statute at the third part of the true value. Now, at common law, the conusor, or he that claims under him, must bring a *scire facias ad computand'* as in the 4 Co. 69 b. But then the conusee shall not account according to the true value, but according to the extended value, and also for the whole statute: and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind, with damages, he shall also recover. But if the conusor will sue the conusee in a Court of equity, then he shall bring him to account for what he hath received of the profits above the extended value.

Now then our case here is somewhat more, for Lee has also equity on his side, and therefore Duppa shall not bring him to account for what he has received above the extended value, unless he has also received enough to satisfy his own mortgage of 2,000*l.*, as well as the statute; and therefore, if Marsh will take off this statute by a suit in this Court, he must be content that Lee doth account upon the extended value for the whole 800*l.* and damages.

Secondly, they held, that whereas part of the manor of Wicksall was mortgaged to Burrell, but now the whole manor was mortgaged to Lee, yet the first mortgage should not extend to protect more than that part of the manor which was first mortgaged to Burrell.

And my Lord Chief Baron *Hale* put the case thus:—If a man is seised of sixty acres, and mortgages twenty to A., and then mortgages the whole to B., and then mortgages the whole to C., and afterwards C. purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect those twenty acres so as B. shall never recover that, until he pay C. all the money upon the first and last mortgage.

But *Hale* said, that he thought that in this case, inasmuch as the mortgage to Lee (*a*) was only of part of Wicksall, therefore Marsh might bring Lee to an account upon the extended value, whereupon these two manors were extended upon the statute; and if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if she will pay down the residue of the money due upon the statute, or if she will pay down so much as the proportion will come to for Monfield, then she may discharge the manor of Monfield.

But then my Lord Keeper asked him how he would have it appointed (*b*), and how much should be laid upon Monfield, and how much upon Wicksall? for that part of Wicksall is under that extent.

(*a*) That is to say the mortgage which Lee took as assignee of Burrell.

(*b*) Qy. "Apportioned."

To which *Hale* answered, that if Marsh did sue Lee for the discharge of this statute from Monfield, Monfield should be discharged by her paying down as much as the proportion comes to, or when Lee shall have received so much according to the extended value, and that he thought there might be a proportion found out by the Court.

Nota. Sir *H. Finch* (*a*), counsel for Lee, cited *Primate and Jackson's Case* (*b*), *Grove and Grove's Case* (*c*), and *Mrs. Calamy's Case* (*d*), all which were resolved in this Court—That a purchaser or mortgagee coming in upon a valuable consideration, without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, though before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage.

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(*a*) Afterwards Earl of Nottingham.

(*b*) Hardres Rep. p. 318 nom. Hedworth *v.* Primate.

(*c*) Churchill *v.* Grove, Nels. Rep. 89, 1 Ch. Ca. 35.

(*d*) Higgon *v.* Syddal, Calamy, and Others, 1 Ch. Ca. 149.

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1. Generally.

The rules regulating "tacking," sometimes called the creditor's *tabula in naufragio*, are closely related to the rules governing the defence of purchase of the legal estate without notice, but the two bodies of rules are distinct. In cases of tacking by an equitable mortgagee or purchaser, a mortgagee or purchaser (*a*) obtaining an equitable interest at the time of the advance or payment made by him *subsequently* acquires the legal estate; the rule that Courts of equity would not interfere with one who had acquired the legal estate without notice of prior equitable rights applies where the purchaser or mortgagee has furnished value at the time that he acquired the legal estate (*b*). The importance of distinguishing between the two bodies of rules appears in cases where the legal estate that is got in is a trust estate (*c*). Cases in which a legal mortgagee adds a subsequent equitable incumbrance to his legal mortgage under the rules of tacking are free from this danger of confusion.

The doctrine of "tacking" has been the subject of unfavourable comment, both in modern and old cases; but it has always been treated as established, subject to certain distinctions as to the circumstances affecting the legal estate which involve some nicety (*d*).

The foundation for the doctrine is thus explained in *Wortley* v. *Birkhead* (*e*), where *Hardwicke*, C., after stating that the equity was established in *Marsh* v. *Lee* by Lord *Hale*, and that he gave it the term of the "creditor's *tabula in naufragio*," proceeded: "That is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and, I believe, was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different Courts, and creates different kinds of rights in estates; and, therefore, as Courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity on one side, this

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(*a*) See Bailey *v.* Barnes, (1894) 1 Ch. 25 (C. A.).

(*b*) See notes to Basset *v.* Nosworthy, infra. For the limitation of the operation of this defence caused by the Judicature Act, 1873, ss. 24, 25, see Ind, Coope, & Co. *v.* Emmerson, 12 A. C. 300.

(*c*) See infra, pp. 127, 128, and especially Taylor *v.* Russell, (1891) 1 Ch. 8, at p. 28.

(*d*) See remarks of Lord *Blackburn* in Jennings *v.* Jordan, 6 A. C. 698; see per *Lindley*, L. J., in Bailey *v.* Barnes, (1894) 1 Ch. 36.

(*e*) 2 Ves. Sen. 571.

Court never thought fit that, by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for, if the law and equity are administered by the same jurisdiction, the rule *qui prior est tempore potior est jure*, must hold" (*a*). The rule applies as fully to mortgages of personal as to mortgages of real estate (*b*).

Although, under the Judicature Act, law and equity are now administered together in the High Court; yet in all cases the rules of equity are to prevail (*c*), and the law of tacking has not been altered by that statute.

Statutory Alterations.—By the Yorkshire Registries Act, 1884 (*d*), tacking is abolished as to lands in Yorkshire.

As to other lands in England, tacking was temporarily abolished by sect. 7 of the Vendor and Purchaser Act, 1874 (*e*), from the commencement of the Act, *i.e.*, 7th of August, 1874, but this was repealed as to England by the Land Transfer Act, 1875, s. 129 (*f*), as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of the latter Act, *i.e.*, 1st of January, 1876; and as to Ireland it was repealed by sect. 73 of the Conveyancing and Law of Property Act, 1881 (*g*).

Tacking has no application to registered charges under the Land Transfer Acts, 1875 and 1897 (*h*); for a puisne chargee would necessarily have notice of any intermediate registered charge, as would also a prior registered chargee, lending money on a further registered charge (*i*).

2. Rules as to Tacking in Brace v. Duchess of Marlborough (*k*).

These rules are stated by *Jekyll*, M. R., in the above case, and so far as now material are set out in the following note.

(*a*) See the remarks of *Page-Wood*, V.-C., in Rooper *v.* Harrison, 2 K. & J. 108, 109. And cf. *Kindersley*, V.-C., in Rice *v.* R., 2 Drew. 73, cited in Mackreth *v.* Symmons, post, and supra, p. 109.

(*b*) See e.g. Coleman *v.* Winch, 1 P. W. 775.

(*c*) See Judicature Act, 1873, ss. 24, 25.

(*d*) 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26, s. 5.

(*e*) 37 & 38 Vict. c. 78.

(*f*) 38 & 39 Vict. c. 87.

(*g*) 44 & 45 Vict. c. 41.

(*h*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*i*) See Land Transfer Act, 1897, s. 8 (1), but see and cf. Cator *v.* Cooley, 1 Cox, 182.

(*k*) 2 P. W. 491.

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First Rule.—The *first* rule laid down, within which, indeed, the principal case falls, is, "that if a third mortgagee [without notice of the second mortgage when he advanced his money (*a*)] buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice *Hale* called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*."

This rule was also held applicable where a third mortgagee, having advanced his money without notice of the second mortgage, purchases and takes an assignment of a precedent statute or judgment, for as long as these are in force the mesne incumbrancer, as is laid down in the principal case, "cannot come in" (*b*).

It was even held that such legal advantage might be obtained by dishonest means, as by a purchase of the legal title at a fraudulent undervalue from persons ignorant of their rights (*c*), or by the theft of a statute (*d*); and though these cases would not now be followed (*e*), it has always been treated as clear that the purchaser may take the legal estate *after notice* of the mesne incumbrance, with the exceptions hereinafter mentioned in certain cases of trust, provided he *paid his money before notice*, and that "by lending the money without notice he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced, and therefore, when that danger is first discovered to him (whether it be by a suit in equity, or by any extra judicial means), as the honesty of his debt is not affected by the discovery, so the rights of protecting that debt, and the efficacy of such protection, are not prejudiced. Hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*" (*f*).

Notice, moreover, of his advance, given by the second to the first

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(*a*) See Sixth Rule, infra.

(*b*) Higgon *v.* Syddal, 2 P. W. 492, cited; Edmunds *v.* Povey, 1 Vern. 187.

(*c*) Culpepper's Case, cited in Sanders *v.* Deligne, Freem. Ch. Rep. 123.

(*d*) Sir John Fagg's Case, 1 Vern. 52, cited; S. C., nom. Sherly *v.* Fagg, 1 Ch. Ca. 68, 2 Vern. 159, cited; and see Siddon *v.* Charnells, Bunb. 298.

(*e*) Carter *v.* C., 3 K. & J. at p. 636; see also Huntington *v.* Greenville, 1 Vern. 49; Mocatta *v.* Bell, 24 B. 585.

(*f*) Per Lord Keeper *Henley*, in Belchier *v.* Butler, 1 Eden, 529; and see Wortley *v.* Birkhead, 2 Ves. Sen. 574; Huntington *v.* Greenville, 1 Vern. 49; Turner *v.* Richmond, 2 Vern. 81; Robinson *v.* Davison, 1 Bro. Ch.

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mortgagee, will not prevent the third mortgagee, who lends his money without notice thereof, from obtaining a transfer of and tacking his mortgage to the first, when the first is a subsisting and not a satisfied mortgage (*a*).

Where the person claiming to tack is a subsequent incumbrancer who advanced his money without notice of the incumbrance that he claims to oust, it has been held that he may rely on the legal estate acquired after a suit for foreclosure or for settling priorities has been commenced, if no decree has been made, though the first mortgagee may have by answer in the suit submitted to assign to the plaintiff on payment (*b*), but not if the legal estate be acquired after decree (*c*).

And though it is necessary and is expressed in the rule that the person claiming to tack must in the first instance have advanced his money without notice, still a purchaser or incumbrancer for valuable consideration, *with notice*, from or under a person who bought *without notice*, may shelter himself under the first purchaser, for otherwise a *bonâ fide* purchaser would be unable to deal with his property fully (*d*).

And it seems that where a person has lent his money upon the security of land, although the security taken is in the form of a conveyance *upon trust to sell and pay the sum advanced and a first mortgage and other debts*, he may by obtaining a transfer of the first mortgage gain priority over an intermediate undisclosed incumbrance (*e*).

But where a first mortgagee, having notice of a second equitable mortgage, on the sale of the mortgaged property with the concurrence of the mortgagor, pays the balance of the purchase-moneys after deducting his principal, interest, and costs to the mortgagor, he will be liable to the second mortgagee to the extent of such balance (*f*).

The doctrine of tacking has been recognised and applied to the

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63; Bates *v.* Johnson, John. 304; *Re* Russell Road Purchase-Moneys, 12 Eq. 78; and see Sharpe *v.* Foy, L. R. 4 Ch. 35.

(*a*) Peacock *v.* Burt, 4 L. J. Ch. 33; overruling the doubt thrown out by Lord *Eldon* in Mackreth *v.* Symmons, 15 V. 335; and see Bates *v.* Johnson, John. 304; West London Commercial Bank *v.* Reliance Permanent Building Society, 29 C. D. 954.

(*b*) Belchier *v.* Butler, 1 Eden, 523, 5 Bro. P. C., p. 292.

(*c*) Wortley *v.* Birkhead, 2 Ves. Sen. 571.

(*d*) Lowther *v.* Carlton, 2 Atk. 242; Sweet *v.* Southcote, 2 Bro. Ch. 66; Wilkes *v.* Spooner, (1911) 2 K. B. 473 (C. A.); McQueen *v.* Farquhar, 11 V. 478, 8 R. R. 212; as to such a purchaser enforcing a contract of sale against a purchaser from himself, see Freer *v.* Hesse, 4 De G. M. & G. 495; *Re* Handman & Wilcox's Contract, (1902) 1 Ch. 599; and see infra, pp. 128 & 146.

(*e*) Spencer *v.* Pearson, 24 B. 266.

(*f*) West London Commercial Bank *v.* Reliance Permanent Building Society, 27 C. D. 187; on appeal, 29 C. D. 954.

fullest extent in many modern cases: in *Bates* v. *Johnson* (*a*) a mortgagor, fraudulently concealing a trust, mortgaged to A. by a legal first mortgage and to B. by an equitable second mortgage: a suit being commenced by the *cestui que trusts* to establish the trust, B. not only with notice of the trust but *pendente lite* paid off the first mortgagee and took a transfer of his mortgage, and it was held that B. was entitled to tack his second mortgage to the first and hold both against the trust. *Taylor* v. *Russell* (*b*), the facts in which are hereinafter set out with reference to another point, is a decision to the same effect in the House of Lords. The principle has been extended to a purchase of the equity of redemption as well as to a mortgage of it. In *Bailey* v. *Barnes* (*c*), B., a legal mortgagee, had fraudulently sold certain freeholds under the statutory power to H. M. H. M. then mortgaged them for 6,000*l.* H. M.'s devisee sold the equity of redemption to L., subject to the legal mortgage for 6,000*l.* L. had no notice, actual or constructive, of any irregularity in the previous sale by B. Subsequently the creditors of the mortgagor to the original mortgagee B., by action against B. and the devisee of H. M., the first purchaser, L. not being a party, obtained a judgment which set aside the sale by B. and declared that the creditors were entitled to redeem, on the ground that it was a fraudulent execution of the power of sale. After this, L., the purchaser of the equity of redemption, having notice of the creditors' judgment, paid off, and took a transfer of, the legal mortgage for 6,000*l.*, and the Court of Appeal, affirming *Stirling*, J., held that he was entitled in respect of the legal estate so obtained to hold the property free from the judgment obtained by the creditors. The case is not strictly a case of tacking two mortgages, and it was decided by *Stirling*, J., on the ground that the purchaser under the power of sale was entitled to the benefit of the statutory provisions for protecting purchasers from mortgagees exercising their statutory power of sale (*d*), but *Lindley*, L. J., delivering the judgment of the Court of Appeal, applied the principle of tacking. He says (*e*), "The maxim *qui prior est tempore potior est jure* (*f*), is in the plaintiffs' favour, and it seems strange that they should without any default of their own lose a security which they once possessed. But the above maxim is in our law subject to an important qualification, that, where equities are

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(*a*) John. 304.

(*b*) (1891) 1 Ch. 22; (1892) A. C. 244.

(*c*) (1894) 1 Ch. 25.

(*d*) Conveyancing Act, 1881, s. 21, sub-s. (2).

(*e*) (1894) 1 Ch. at p. 36.

(*f*) See as to this maxim note (*a*), p. 123, supra.

equal, the legal title shall prevail. Equality here does not mean or refer to priority in point of time, as is shown by the cases of tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants and makes it less meritorious than that of the other. Equitable owners who are in an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better position than he who has equity only. The reasoning is technical and not satisfactory, but as long ago as 1728, the law was judicially declared to be well settled and only alterable by Act of Parliament." So in the case of *Blackwood* v. *London Chartered Bank of Australia* (*a*), it was laid down by the L. C., delivering the judgment of the Privy Council, as a clear principle "there is nothing more familiar than the doctrine of equity that a man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title if he can and may hold it, though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself."

Where the Legal Estate is affected by a Trust.—The cases of *Mumford* v. *Stohwasser* (*b*) and *Harpham* v. *Shacklock* (*c*), hereinafter referred to, are modern cases in which the doctrine of tacking is recognised; but the application of it was disallowed, because the person taking the legal estate took it affected with, and *with notice of, a trust.* This makes it necessary to consider the principal distinction between the cases discussed in this note, where the legal estate is obtained *subsequently* to the payment, and the cases discussed in the note to *Basset* v. *Nosworthy*, where the payment and the acquisition of the legal estate are *contemporaneous.*

The cases of *Pilcher* v. *Rawlins* (*d*), *Lloyd* v. *Attwood* (*e*), *Jones* v. *Powles* (*f*), are cases of the latter class, where the legal estate was acquired by a purchaser or mortgagee at the time that he paid his money, and the legal estate was allowed to be a protection against prior equitable claims, though the person conveying it was consciously committing a fraud. So in *Young* v. *Y.* (*g*), a mortgagee

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(*a*) L. R. 5 P. C. 111.

(*b*) 18 Eq. 556.

(*c*) 19 C. D. 207.

(*d*) L. R. 7 Ch. 260.

(*e*) 3 De G. & J. 614.

(*f*) 3 My. & K. 581.

(*g*) 3 Eq. 801. This would appear to be a case not of tacking proper, but of the acquisition of the legal estate without notice.

who paid off and took a transfer of a legal mortgage, and at the same time made an advance to a person who fraudulently represented that he was entitled as heir of the mortgagor, was allowed to tack his advance to the mortgage. So in the cases as to payment of building society mortgages, under the rule with respect to the effect of the statutory receipt established by the House of Lords in *Hosking* v. *Smith* (*a*), where the legal estate was obtained from the society contemporaneously with a further advance to the mortgagor, and the mortgagee was allowed to tack the further advance to the moneys paid to the society.

It may be taken as settled that when the legal estate is obtained contemporaneously with the payment of consideration, it is only necessary that the purchaser should not have notice, actual or constructive, of the trust : it does not affect his title that the trustee or person conveying the estate had notice, and was committing consciously a fraud. Where, however, as in the principal case of *Marsh* v. *Lee*, the legal estate is obtained after the advance of the money, there is more difficulty if the legal estate is in any way affected with a trust. It is, of course, clear that the purchaser or mortgagee claiming the benefit of the doctrine must have paid the consideration for the equitable interest he claims to tack without notice of the prior incumbrance or equity which he claims to oust; it is clear also that he may obtain and protect himself by the legal estate after he has notice of such prior incumbrance or equity, if he obtains it from an unsatisfied mortgagee or person not affected by a trust. It is clear also " that a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up " (*b*). So far the law is clear, but a difficulty arises in determining what notice of a trust or equity affecting the legal estate is sufficient to affect the purchaser getting it in, and whether notice to the trustee or notice to the purchaser is material. The authorities do not seem sufficiently clear to justify a decided conclusion being drawn (*c*). It is considered better to give

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(*a*) 13 A. C. 582; and see Crosbie-Hill *v.* Sayer, (1908) 1 Ch. 866. See the cases discussed in the notes to Basset *v.* Nosworthy, post.

(*b*) See Taylor *v.* Russell, (1891) 1 Ch., per Fry, L. J., delivering judgment of Court of Appeal, at p. 29; S. C., (1892) A. C., per Lord Herschell, at p. 253; and see per Stirling, L. J., in Taylor *v.* London & County Banking Co., (1901) 2 Ch. at p. 256.

(*c*) See observations of Lindley,

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the effect of the leading decisions bearing on the subject. First, in the case where the person claiming the benefit of the doctrine knows that the legal estate is subject to a trust. In delivering judgment in the case of *Pilcher* v. *Rawlins* (*a*), *James*, L. J., seems to treat it as settled that in this case he can still obtain protection. He says that "those cases where the person seeking conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance; those cases involve a principle which I have never been able to understand." *James*, L. J., does not give the cases which he considers established the principle, and it seems to be inconsistent with modern decisions, excepting such a case as that of *Taylor* v. *Russell*, where the legal estate passed from the first mortgagee, who was not a trustee for the second mortgagee, through the mortgagor as a matter of pure form, the mortgage never having been affected by the trust (*b*).

An old case of *Saunders* v. *Dehew* (*c*) is commonly cited as a leading authority, and is referred to by *Jessel*, M. R., in *Mumford* v. *Stohwasser*, infra, p. 132. The case is thus stated in the report (*c*):—"Anne Bayly, being possessed of a term for years, makes a voluntary settlement thereof in trust for herself for life, remainder to her daughter, Isabella Barnes, for life, remainder to the children of Isabella, by Mr. Barnes, her then husband. Isabella, for 200*l.*, mortgages the lands in question to the plaintiff, who pretends he had no notice of the settlement; Isabella in the mortgage deed being called the daughter and heir of John Bayly. The plaintiff, hearing of it, gets an assignment of the term from the trustees. *Per cur.*, Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust. And the plaintiff's bill being brought against the children of Isabella to foreclose them, the Court refused so to do, saying, if he might be suffered to protect himself, by thus getting in

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L. J., in Bailey *v.* Barnes, (1894) 1 Ch. at p. 37.

(*a*) L. R. 7 Ch. 269, supra.

(*b*) Cf. Bailey *v.* Barnes, (1894) 1 Ch. 25.

(*c*) 2 Vern. 271; and see Willoughby *v.* W., 1 T. R. at p. 771; Allen *v.* Knight, 5 Ha. 272; Perham *v.* Kempster, (1907) 1 Ch. 373.

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the legal estate, they would not carry it on by a decree in equity to foreclose."

In *Allen* v. *Knight* (*a*), a mortgagee obtaining the legal estate was, under the circumstances of the case, held not entitled to protection, but the facts were too special to be taken as establishing a rule. In *Prosser* v. *Rice* (*b*), it was laid down that a subsequent mortgagee getting the legal estate from a *bare trustee* (*c*) conveying *without consideration* was not entitled to tack.

In the case of *Bates* v. *Johnson*, Lord *Hatherley* says (*d*), "The authorities (up to that date) only decided that any person having an unsatisfied mortgage might transfer to the third incumbrancer; but in the case of a satisfied mortgage, where the mortgagee would hold simply on trust for the original mortgagor, or in the case of a trustee of a satisfied term, which are the cases put by Lord *Eldon* in *Maundrell* v. *M.* (*e*), *Ex p. Knott* (*f*), I do not find any authority * * * to show that he can give to a third party a security which could only be acquired through the incidents of a breach of trust on his part. It is true I do not find any authority which expressly determines the contrary; *Saunders* v. *Dehew* (*g*), and *Allen* v. *Knight* (*h*), which came first before *Wigram*, V.-C., and afterwards before Lord *Cottenham*, have determined that when there is an express declaration of trust, the trustee cannot convey the property otherwise than in the condition in which he holds it; namely, fettered by the trusts declared by the deed."

In *Peacock* v. *Burt* (*i*), the first mortgagee had notice of the second mortgage, and after such notice made further advances to the mortgagor, and then transferred to a third mortgagee without giving him notice of the second. The third mortgagee, having no notice,

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(*a*) (1846) 5 Ha. 272, affirmed 16 L. J. Ch. 370, 11 Jur. 527.

(*b*) (1859) 28 B. 68 (a case of a building society mortgage); and see Harpham *v.* Shacklock, 19 C. D. 207; Ortigosa *v.* Brown, 47 L. J. Ch. 168; De Winton *v.* Mayor of Brecon, (1858) 26 B. 533.

(*c*) "A person who has no pecuniary interest, and who is therefore a bare trustee with duties to perform": per Romilly, M. R., ibid., at p. 74. See as to the term "bare trustee," Re Cunningham & Frayling, (1891) 2 Ch. 567; Morgan *v.* Swansea, &c. Authority, 9 C. D. 582; Re Docwra, 29 C. D. 693.

(*d*) (1859) John. 304, at pp. 315, 316.

(*e*) 10 V. 246; 7 R. R. 393.

(*f*) 11 V. 614; 8 R. R. 254.

(*g*) 2 Vern. 271.

(*h*) 5 Ha. 272; S. C., on appeal, 16 L. J. Ch. 370.

(*i*) 4 L. J. Ch. 33, and see Bates *v.* Johnson, John. 304, supra; but see West London Commercial Bank *v.* Reliance, &c. Building Soc., 29 C. D. 954.

was held entitled to tack not only his advances, but the further advances made by the first mortgagee after notice.

In 1863 it was laid down that the priorities of several successive equitable mortgagees cannot be altered by the subsequent transfer, by the mortgagor, of the legal estate to any one of them, the mortgagor being a trustee of the legal estate for all such incumbrancers: see *Sharples* v. *Adams* (*a*), where Lord *Romilly*, M. R., observed, "If the owner in fee simple, having the legal estate, creates an equitable charge in favour of A., and afterwards a second equitable charge in favour of B., and then a third equitable charge in favour of C., I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to C., the owner of the third equitable charge, would not affect the rights of the first or the second. * * * And when the person having the legal estate, holds it in the character of trustee for them all, he cannot prefer either or create a priority by giving the legal estate to anyone in particular."

In *Maxfield* v. *Burton* (*b*), L. deposited title-deeds with his bankers to secure the balance of his account current and executed a memorandum whereby he agreed, at their request, to execute any deed or deeds necessary for legally carrying out the security. Subsequently, being about to be married, he agreed to settle the property, the solicitor acting for the wife having notice that the deeds were deposited at L.'s bankers'. The solicitor made no inquiry as to the deeds. After the marriage L. conveyed the property to the trustee of the marriage articles upon the trusts therein contained, being for the benefit of the wife and the issue of the marriage. It was held by *Jessel*, M. R., that the bankers had priority on the ground that the wife had constructive notice of the bankers' mortgage. The M. R. then said, "I prefer to decide the case on that ground, but I do not think I should be at liberty to disregard the fact that there was in this case a contract to convey for value, as well as a deposit, and I should not be the first to hold that a man who had entered into such a contract could subsequently, at his option, squeeze out the person who was entitled to the benefit of that contract by conveying the legal estate to a person with whom he has entered into a subsequent contract for value, even although that person should be a purchaser without notice. If it were necessary to resort to that, I should decide in favour of the plaintiffs even on that ground.

(*a*) 32 B. 213, at p. 216.

(*b*) 17 Eq. 15. See this case explained per North, J., in Garnham *v.* Skipper, 55 L. J. Ch. 263.

I wish to state so distinctly, because I am not quite sure that, without further authority, I should go quite so far as my predecessor did in the case of the illustration he gave in *Sharples* v. *Adams*."

In the case of *Heath* v. *Crealock* (*a*), which is often referred to as an authority on this question, the actual conveyances to the purchaser without notice were made by the mortgagor before the legal estate had been reconveyed to him. Eleven years afterwards it was reconveyed to him, and the claim to it by the purchasers appears to have been that it passed by estoppel. It was held that estoppel did not operate and that they had in effect only purchased an equity of redemption, so that the decision that the reconveyance obtained by fraud must be cancelled does not on the facts appear to be a decision against a purchaser for value who had the legal estate.

The case is discussed in the notes to *Basset* v. *Nosworthy*, post, with reference to the refusal to order the purchasers to deliver up the deed which they had obtained.

In *Mumford* v. *Stohwasser* (*b*), the conflict was between an incumbrancer and the holder of a prior agreement for a lease. The incumbrancer had advanced his money without notice. Subsequently without any further advance he got the legal estate conveyed to him. *Jessel*, M. R., held that he had through the occupation of a tenant constructive notice of a trust and was consequently postponed to the *cestui que trust* (*c*). He said the case was covered by *Saunders* v. *Dehew* (*d*), and further that if the case arose he should hold "that a person knowing he is a trustee cannot, without receiving value *at the time*, by committing a breach of trust, deprive his own *cestui que trust* of his rights" (*e*).

In *Harpham* v. *Shacklock* (*f*), the Court of Appeal decided that a mortgagee (or purchaser) cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after the mortgagee has received notice of a prior equitable claim. *Jessel*, M. R., said, "Nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim" (*g*). In this case the defendants had got in the legal estate from P., who was a trustee for S., who was in turn a trustee for the plaintiffs.

(*a*) (1874) 18 Eq. 215, L. R. 10 Ch. 22.

(*b*) 18 Eq. 556.

(*c*) Disapproved as to notice, Hunt *v.* Luck, (1902) 1 Ch. 428.

(*d*) 2 Vern. 271.

(*e*) See Perham *v.* Kempster, (1907) 1 Ch. 373.

(*f*) (1880) 19 C. D. 207.

(*g*) Ibid., at p. 214.

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The defendants were accordingly attempting to set up the legal estate against the equity of the *cestui que trust* himself. Had the equity affecting the legal estate been that of a third person, the legal estate could have been set up against the equitable mortgagee (*a*).

In *Newman* v. *N.* (*b*), it was held that a trustee who holds the legal estate as trustee, on taking from a *cestui que trust* an assignment of an equitable interest by way of security for an advance, may claim the protection of the legal estate against a prior incumbrance of which he had no notice.

In *West London Commercial Bank* v. *Reliance Permanent Building Society* (*c*), a mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sold the property. Upon completion, the balance of the purchase-money, after payment of the first mortgagees, was handed to the mortgagor. In an action by the second mortgagees against the mortgagor (who did not appear) and the first mortgagees, it was held by the Court of Appeal (affirming *Bacon*, V.-C.) that the first mortgagees were liable to make good to the plaintiffs the amount of their security to the extent of the balance of the purchase-money. The Court of Appeal said that the doctrine in *Peacock* v. *Burt* (*d*) will not be extended, and *Cotton*, L. J., expressed a doubt whether the dictum of *Wood*, V.-C., in *Bates* v. *Johnson* (*e*), as to the right of a first mortgagee to transfer to a third mortgagee in preference to the second, would be supported.

In the same case *Cotton*, L. J., in delivering judgment (*f*), says, "It is established by the cases that where there are first, second, and third mortgagees, the first mortgagee, even though he has notice of the second mortgage, can transfer the legal estate to the third mortgagee, if he had no notice when he took his security of the second mortgage, so as to give the third mortgagee priority over the second; that is to say, the first mortgagee can transfer his security to the third mortgagee, though the result may be to oust a person who would otherwise have had priority over the third mortgagee.

"Whether this is right, or whether we should so decide if such a case came before us, or whether the third mortgagee should, under such circumstances, be held liable to the second mortgagee, I give no opinion." In the same case *Lindley*, L. J., says, "Then another

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(*a*) Taylor *v.* Russell, (1891) 1 Ch. 8, p. 29.

(*b*) (1885) 28 C. D. 674.

(*c*) (1885) 29 C. D. 954.

(*d*) 4 L. J. Ch. 33.

(*e*) John. 304, 313, 314.

(*f*) 29 C. D., at p. 961.

argument was addressed to us based upon *Peacock* v. *Burt* (*a*), and that class of cases, which have established the law as stated by Lord Justice *Cotton*; but in my opinion they are cases which certainly ought not to be extended. *Peacock* v. *Burt* looks very like a conspiracy between the first and third mortgagees to cheat the second, which cannot be right. That, however, is the aspect which many of the old cases on the subject bear; still I am not at liberty to question those decisions, for, although they are opposed to my ideas of morality, they are nevertheless law. However, I am not going to make them the pretext for doing further wrong" (*b*).

From the cases of *Mumford* v. *Stohwasser*, and *Harpham* v. *Shacklock*, supra, as qualified by *Taylor* v. *Russell*, it would seem that if the person having the legal estate was trustee either expressly or by construction of law for the mesne incumbrancers whom the purchaser claimed to oust, and either the trustee or the several purchasers had notice of this, such purchaser not paying value could obtain no protection by the legal estate so acquired (*c*).

In *Taylor* v. *Russell* (*d*), the facts were peculiar; there the third mortgagee, the person claiming the protection of the legal estate, had after notice of a prior incumbrance got in the legal estate from mortgagees whose mortgage was not satisfied but who, having other lands of ample value subject to their security, consented without any further advance to reconvey to the mortgagor on the express condition that he should convey it to the third mortgagee. It appears from the judgments in the House of Lords that the Court held that there was no evidence to shew that the first mortgagees had any notice of the second mortgage, and the Court held that as the mortgagor only took the conveyance on the express condition that he should immediately convey to the third mortgagee, the fact that it passed through him made no difference, and the third mortgagee took it without being affected by any trust. The person taking the legal estate had notice of the second mortgage. But, as the mortgage was not satisfied, the case may be treated as standing on the same footing as a transfer by a first mortgagee of his security to a second on payment of the amount due.

The law is thus summed up as late as 1893 by *Wright*, J., in *Powell* v. *London & Provincial Bank* (*e*):—

(*a*) 4 L. J. Ch. 33.

(*b*) 29 C. D., at p. 963.

(*c*) See Perham *v.* Kempster, (1907) 1 Ch. 373.

(*d*) (1891) 1 Ch. 8; (1892) A. C. 244.

(*e*) (1893) 1 Ch., p. 615, affirmed (1893) 2 Ch. 558.

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"A transferee or incumbrancer taking a merely equitable interest takes in general only what his transferor could equitably give him, as is laid down in the case of *Shropshire Union Railways and Canal Co.* v. *Reg.* (*a*). In particular cases, however, he may on special grounds be entitled to priority over some previous equitable incumbrancer, as, for example, in case of laches on the part of that incumbrancer. A transferee or incumbrancer taking in the first instance for valuable consideration the whole legal estate takes it free from any equity which bound the transferor, unless in the case of negotiable instruments the transferee knew of or wilfully shut his eyes to that equity, and in other cases unless he knew or shut his eyes or neglected to make inquiries which the facts before him or his agent required him in reason to make. A transferee or incumbrancer for valuable consideration who takes in the first instance a merely equitable interest, without notice of any prior interest, can subsequently perfect his title, even after notice of the prior interest, by acquiring the legal estate, subject to the exceptions suggested in *Taylor* v. *Russell* (*b*); *Mumford* v. *Stohwasser* (*c*); *Harpham* v. *Shacklock* (*d*), and other cases, which may perhaps be stated as follows: The transferee must not get in the legal estate from a person whom he knows or ought to know to be a trustee of the estate upon express trusts for a prior incumbrancer (*e*). There are some expressions which carry the exception further, and suggest that a satisfied mortgagee is in the position of a trustee for this purpose for his mortgagor, and also that the legal estate cannot be effectually got indirectly from a person who is in fact a trustee on express trusts, even though the transferee has no knowledge of the fact, unless perhaps when value is given to the trustee at the time. These expressions do not, however, appear to have been as yet stated or accepted as established or developed law" (*f*).

What legal Interest is sufficient for Protection.—With regard to the nature of the legal interest sufficient to afford protection, it is not necessary to have the entire fee—a partial interest, as a term of years, and under the old law a statute or a judgment (*g*), was sufficient,

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(*a*) L. R. 7 H. L. 496.

(*b*) (1892) A. C. 253, 259.

(*c*) 18 Eq. 563.

(*d*) 19 C. D. 214; and see Perham *v.* Kempster, (1907) 1 Ch. 373.

(*e*) See Taylor *v.* London & County Banking Co., (1901) 2 Ch. 231.

(*f*) See, e.g., Prosser *v.* Rice, 28 B. at p. 74; observations of Lord *Macnaghten* in Taylor *v.* Russell, (1892) A. C. at p. 259; Hitchcock *v.* Sedgwick, 2 Vern. 156; Willoughby *v.* W., 1 T. R. 773; Maundrell *v.* M., 10 V. at p. 270; Evans *v.* Bicknell, 6 V. 185.

(*g*) Brace *v.* Duchess of Marlborough, 2 P. W. 491.

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and now it is presumed a judgment under which the lands have been delivered in execution, the writ being duly registered (*a*), would be sufficient.

In *Re Russell Road Purchase-Moneys* (*b*), A. having a legal term of 99 years in a house, mortgaged it to B. by sublease, reserving two days. A. then made an equitable charge by memorandum to C. Then A. assigned the whole original term to D. to secure a further advance. D. had notice of B.'s incumbrance but not of C.'s. C. registered in Middlesex, but D. did not search the register, and was not therefore affected with notice. It was held by the V.-C. that the reversion of two days which D. acquired by the assignment of the term was a legal estate which entitled him to priority. On appeal the Lords Justices, after hearing the question argued, expressed themselves not prepared to affirm this view, but the matter was compromised before they delivered judgment.

A person who takes a partial interest in the legal estate will be postponed to an earlier legal interest carved thereout and vested in another. Thus, where the inheritance is mortgaged subject to a term, the mortgagee will be postponed to an incumbrancer who has got in the term (*c*); and an incumbrancer getting in a later term will be postponed to one having an earlier one. So it has been held that a term created by a tenant for life to secure an incumbrance on his life interest, will have priority over a subsequent reversionary term, though limited by him out of the inheritance, under a power contained in the will under which he took (*d*).

Where, however, as was decided in the principal case, a puisne incumbrancer on the whole of an estate, gets in the legal estate of a *part* thereof, the puisne incumbrance will only be protected to the extent of that part. Thus in the case put by *Hale*, C. B.: "If a man is seised of sixty acres, and mortgages twenty to A., and then mortgages the whole to B., and then mortgages the whole to C., and afterwards C. purchases in the first mortgage, that shall not protect more than the twenty acres."

It seems not clear that he was right when he stated "that the twenty acres should be protected so as B. shall never recover that until he pay C. all the money upon the first and last mortgage," though this would be the case where two estates mortgaged separately

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(*a*) 51 & 52 Vict. c. 51, s. 6.

(*b*) 12 Eq. 78.

(*c*) *Ex p.* Knott, 11 V. 609.

(*d*) Hurst *v.* H., 16 B. 372.

were vested in one person under the doctrine of the Consolidation of Securities (*a*).

The Securities must be held in the same right.—The rule does not apply if the two securities are not held in the same right. For instance, if a prior mortgagee takes an assignment of a third mortgage, *as a trustee only for another person*, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers. If this were permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers (*b*).

So a mortgage could be tacked to a judgment only where the same person had both judgment and mortgage in the same right, and not where he had the judgment in his *own right*, and the mortgage in another right as a trustee only (*c*).

So also, upon the same principle, it was held that the executors of a first mortgagee of a leasehold, who had the *legal estate in his own right*, could not, as against a mesne incumbrancer, tack a mortgage of the equity of redemption which had vested in their testator *as the executor of another* (*d*).

But where a person has a debt secured under a deed, although it contains trusts for others, he may by taking a transfer of a first mortgage tack so as to gain priority over a mortgagee who had taken his security before the deed (*e*).

So it seems that a person entitled to one security in his own right, and to another as executor or administrator, may nevertheless tack, if he is entitled to the beneficial interest in the latter security (*f*).

Second Rule.—The *second* rule laid down in *Brace* v. *Duchess of Marlborough* (*g*), is: "If a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference."

(*a*) See Bovey *v.* Skipwith, 1 Ch. Ca. 201.

(*b*) Per Lord *Hardwicke*, in Morret *v.* Paske, 2 Atk. 52. See also Shaw *v.* Neale, 6 H. L. Cas. 581; but see Newman *v.* N., 28 C. D. 674.

(*c*) Per Lord *Hardwicke*, L. C., in Morret *v.* Paske, 2 Atk. 53.

(*d*) Barnett *v.* Weston, 12 V. 130. See and consider Wilmot *v.* Pike, 5 Ha. 14; Rooper *v.* Harrison, 2 K. & J. 86.

(*e*) Spencer *v.* Pearson, 24 B. 266; and see Newman *v.* N., supra.

(*f*) Price *v.* Fastnedge, Amb. 685; Blackwell *v.* Symes, ibid., cited. See also *Re* Raggett, 16 C. D. 117, as to a claim for consolidation.

(*g*) Supra; 2 P. W. 491.

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The reason given for the rule is "that one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem*, and, therefore, though he releases all his right to the land, he may extend it afterwards. All that he has by the judgment is a lien upon the land, but *non constat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the body, and then, during the defendant's life, he can have no other execution (*a*); besides, the judgment creditor does not lend his money upon *the immediate view or contemplation of the cognizor's real estate*, for the land afterwards purchased may be extended on the judgment, nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate, whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another" (*b*).

Upon the same principle, a person who advances money to the vendor of an estate contracted to be sold, upon the security of an assignment of the *purchase-money merely*, and not of the land, cannot, by getting in the first mortgage, tack to that the sum he has so advanced. Thus, in *Lacey* v. *Ingle* (*c*), A., having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances; part of the purchase-money was to be paid down, and the rest on the completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase-money, and, having also raised a further sum from E. on *the security of his contract*, without giving him notice of C.'s mortgage, became insolvent and absconded. D. thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due, and E., to secure himself, took an assignment of B.'s mortgage. But the balance of purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B., Lord *Cottenham*, C., reversing the judgment of the Vice-Chancellor *Knight Bruce*, held, that E. was not entitled to tack his security to B.'s mortgage, first, because he not

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(*a*) This was the old rule. Now, by s. 5 of the Debtors Act, 1869, "no imprisonment under this section shall * * * deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place."

(*b*) 2 P. W. 491. And see Anon., 2 Ves. Sen. 662; *Exp.* Knott, 11 V. 617.

(*c*) 2 Ph. 413.

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only did not deal *upon the faith of the land*, or contract for any interest in it, but, as appeared upon the face of the contract, relied upon and advanced his money upon the faith of a fund which could only arise and have existence upon the supposition that the party to whom he advanced the money would not have, and at that time had not, any interest in the land; and, secondly, because, although E., at the time he advanced his money, had no notice of any particular incumbrance on the estate except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject, and therefore, the equities of D. and E. were not equal.

There is apparently an exception to this rule where the first incumbrancer by judgment has likewise a mortgage upon the estate; notwithstanding there is another judgment, prior in time to the mortgage, yet if the mortgagee had no notice of such judgment, the creditor upon the second judgment will not be allowed in an action to pray a sale of the estate so mortgaged without paying off principal and interest both of the first judgment and mortgage. See *Smithson* v. *Thompson* (*a*), where Lord *Hardwicke*, L. C., observed, "that it would be very hard, if the defendant should be in a worse condition with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be in this Court," and his Lordship distinguished the case from that of *Churchill* v. *Grove* (*b*), where the defendant's purchase was subsequent to the plaintiff's statute.

The Judgments Act, 1838 (*c*), made a judgment duly registered *a charge upon the land;* but it was doubted whether this enabled the judgment creditor to tack any more than he could previously (*d*).

Under 27 & 28 Vict. c. 112, s. 1, "no judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been *actually delivered in execution* by virtue of a writ of *elegit or other lawful authority*, in pursuance of such judgment, statute, or recognizance."

(*a*) 1 Atk. 521.

(*b*) 1 Ch. Ca. 35.

(*c*) 1 & 2 Vict. c. 110.

(*d*) See Kinderley *v*. Jervis, 22 B. 1; Whitworth *v*. Gaugain, 3 Ha. 416; Beavan *v*. Lord Oxford, 6 De G. M. & G. 507; Pickering *v*. The Ilfracombe Railway Co., L. R. 3 C. P. 235; Robinson *v*. Nesbitt, ibid., 264; overruling Watts *v*. Porter, 3 Ell. & Bl. 743; and see and consider Benham *v*. Keane, 1 John. & H. 697.

And by the Land Charges Registration and Searches Act, 1888 (*a*), s. 5, every writ and order affecting land for the purpose of enforcing any judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land may be registered in the Office of Land Registry; and by sect. 6, every such writ and order, delivery in execution, or other proceeding is to be void against a purchaser for value, unless and until the writ or order is registered under the Act.

It seems that, as a judgment, statute, or recognizance shall not *affect land* until it shall have been actually delivered in execution, no judgment can be tacked until the land is delivered in execution. But it has been held that not only the issue of a writ of sequestration (*b*), but the appointment of a receiver of rents, although not perfected by giving security (*c*), is an actual delivery in execution of land by lawful authority within sect. 1 of 27 & 28 Vict. c. 112.

By the Judicature Act, 1873, s. 25, sub-s. (8), the Court has power to appoint a receiver in all cases in which it shall appear to the Court to be *just or convenient* that such order shall be made, and it is not now necessary for a judgment creditor who seeks to obtain equitable execution of the judgment debtor's equitable interest in land previously to sue out an *elegit*, as it will be sufficient for him for that purpose to obtain a receiver, and then he may tack his debt to a precedent mortgage. See *Ex p. Evans* (*d*), in which case it was held that a judgment creditor, who had become transferee of a precedent legal mortgage of leaseholds belonging to the judgment debtor, was entitled on the appointment of a receiver to hold the lands as a security for his judgment debt as well as for his mortgage debt. So where a receiver is appointed of the rents, profits, and moneys receivable in respect of a judgment debtor's reversionary interest in land, this amounts to a delivery in execution within the Judgments Act, 1864, and gives the Court jurisdiction to make an order for inquiries and a sale (*e*).

Equitable execution is a process which the Court allows for the purpose of enabling a judgment creditor to obtain payment of his debt, where the position of the real estate is such that ordinary execution will not reach it. The appointment of a receiver is a

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(*a*) 51 & 52 Vict. c. 51, s. 5.

(*b*) *Re* Rush, 10 Eq. 442.

(*c*) *Ex p.* Evans, 13 C. D. 252.

(*d*) 13 C. D. 252, S. C., 11 C. D. 691; Cp. Hatton *v.* Haywood, L. R. 9 Ch. 229; Anglo-Italian Bank *v.* Davies, 9 C. D. 275; *Re* Shephard, 43 C. D. 131.

(*e*) *Re* Jones, &c., (1895) W. N. 123.

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form of equitable execution, but he is appointed receiver of the judgment debtor's interest and nothing else (*a*). It is a taking out of the way a hindrance which prevents execution at common law. The appointment of a receiver of the interest of a judgment debtor in real estate, though sometimes termed equitable execution, is not a mere form of execution, but it is relief producing the same benefit as execution properly so called but obtainable only by means of an order of the Court in that behalf based on the fact that execution at law cannot be had (*b*). In *Cadogan* v. *Lyric Theatre* (*c*), it was held by the Court of Appeal that in the case of a judgment against a theatre company, whose theatre was subject to a mortgage and who were carrying on theatre business in it, a receiver by way of equitable execution could not be appointed of the earnings of the business, but that, as but for the legal mortgage the judgment creditor would have taken the theatre under an *elegit*, he was entitled to a receiver by way of equitable execution of the rents and profits.

Fourth Rule.—The fourth rule in *Brace* v. *Duchess of Marlborough* (*d*), is "that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee till both the mortgage and statute or judgment be paid" (*e*).

The reason given for this rule is that it is to be presumed that the mortgagee lent his money upon such subsequent security, as knowing he had hold of the land by the mortgage, and in confidence ventured a further sum on a security which, though it passed no present interest in the land, yet must be admitted to be a lien thereon (*f*).

A Security not being a Lien on Land cannot be tacked.—A security cannot be tacked unless *it be a lien* upon the land either specifically or generally; hence it was held that, as copyholds previous to 1 & 2 Vict. c. 110 were not liable to an extent upon a judgment, a judgment debt could not be tacked to a mortgage of copyholds. Thus in *Heir of Cannon* v. *Pack* (*g*), a bill was filed by the heir of the mortgagor to redeem a mortgage of copyhold lands

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(*a*) Wills *v.* Luff, 38 C. D. 200; Levasseur *v.* Mason, (1891) 2 Q. B. 77; see *Re* Marquis of Anglesey, (1903) 2 Ch. 727.

(*b*) *Re* Shephard, 43 C. D. 135; see Thompson *v.* Gill, (1903) 1 K. B. 760.

(c) (1894) 3 Ch. 338.

(*d*) Supra, 2 P. W. 494.

(*e* See also Shepherd *v.* Titley, 2 Atk. 348; Anon., 2 Ves. Sen. 662.

(*f*) Brace *v.* Duchess of Marlborough, 2 P. W. 493.

(*g*) 6 Vin. Abr. 222, pl. 6.

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upon payment of principal and interest. The defendant insisted upon having a judgment, which had been assigned to him, satisfied before the plaintiff should redeem. *Harcourt*, C., however, allowed the plaintiff to redeem without satisfying the judgment, observing that copyhold lands are not liable to an execution on a judgment, *ergo* the judgment shall not be tacked to the mortgage in this case.

Upon the same principle a prior mortgagee has never been permitted to tack a bond debt against *mesne incumbrances*, other specialty creditors, or even against the mortgagor himself; but only, as we shall hereafter more fully show, against the mortgagor's heirs or devisees, to avoid circuity of action. See infra, pp. 143—145.

Hence, in a suit of foreclosure, the mortgagee being entitled to only six years' arrears of interest against the land, under 3 & 4 Will. 4, c. 27, s. 42, but to twenty years' arrears under a covenant for payment in a bond, by 3 & 4 Will. 4, c. 42, s. 3, it was held that he could not, as the covenant or bond created no charge *or lien* upon the land, tack the covenant or bond against mesne incumbrancers or even the mortgagor, though, as we shall hereafter see, he may do so as against the heir or beneficial devisee of the mortgagor (*a*). See now sect. 8 of the Real Property Limitation Act, 1874.

In *Baker* v. *Harris* (*b*) the bankruptcy of the debtor did not prevent the first mortgagee tacking a subsequent judgment as against a subsequent incumbrance. There tacking was allowed, where the judgment was docketed, although no execution was issued at the time of the bankruptcy.

But as, by 27 & 28 Vict. c. 112, s. 1, a judgment will not affect any land until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, tacking by the first mortgagee will only be allowed to take place, provided such execution be prior to the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor (*c*).

Where the mortgage has been satisfied before judgment recovered,

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(*a*) See Hunter *v.* Nockolds, 1 Mac. & G. 640; Sinclair *v.* Jackson, 17 B. 405; Elvy *v.* Norwood, 5 De G. & Sm. 240; see *Re* Lloyd, (1903) 1 Ch. 385 (overruling *Re* Slater's Trust, 11 C. D. 227) as to the distinction in the matter of arrears of interest, between an action for foreclosure, and an action for redemption; *Re* Hazeldine's Trusts, (1908) 1 Ch. 34.

(*b*) 16 V. 397.

(*c*) See *Ex p.* Boyle, 3 De G. M. & G. 515, and Bankruptcy Act, 1883, ss. 45, 46.

even although there has been no reconveyance, the judgment cannot be tacked to the mortgage (*a*).

As against whom debts, being a lien on land, can be tacked.—Debts which are a lien on the estate, as for instance, a mortgage debt (and under the old law a statute or judgment), may be tacked by the first mortgagee as against the mortgagor (*b*), and also all persons claiming under him, including mesne incumbrancers (*c*), the reason being that it is to be presumed that the creditor lent his money upon the statute or judgment as knowing that he had a hold of the land by the mortgage, and in confidence ventured a further sum on a security, which, though it passed no present interest in the land, yet must be admitted to be a lien thereon (*d*).

It seems, however, that a further advance cannot be tacked to a first mortgage as against a surety for the first mortgage debt (*e*).

Formerly a first mortgagee was entitled to tack, as against the assignees in bankruptcy of the mortgagor, a subsequent judgment docketed, though no execution had issued at the time of the bankruptcy (*f*), but it seems he could not now do so unless execution were completed by seizure and sale before the date of the receiving order, and before notice of the presentation of any bankruptcy petition, by or against the debtor, or of the commission of any available act of bankruptcy by the debtor (*g*).

Against whom a mortgagee may tack debts not being liens on the mortgaged property.—With regard to the right of a mortgagee to tack to his security debts not being liens upon the estate, it seems that in the case of a mortgagee of real estate he might as against the heir (*h*) and devisee (*i*) of the mortgagor, always tack *specialty*

(*a*) Mayor of Brecon *v.* Seymour, 26 B. 548.

(*b*) Brace *v.* Duchess of Marlborough, 2 P. W. 494; Anon., 2 Ves. Sen. 662; Shepherd *v.* Titley, 2 Atk. 348; *Ex p.* Knott, 11 V. 609, 8 R. R. 254; *Ex p.* Cox, 2 Mont. D. & De G. 486; Barnett *v.* Weston, 12 V. 130, 8 R. R. 319; Baker *v.* Harris, 16 V. 397.

(*c*) Ibid.

(*d*) Brace *v.* Duchess of Marlborough, 2 P. W. 493.

(*e*) See Bowker *v.* Bull, 1 Si. (N. S.) 29, 15 Jur. 4; Hopkinson *v.* Rolt, 9 H. L. Cas. 514; *Re* Kirkwood's Estate, 1 L. R. Ir. 108; Forbes *v.* Jackson, 19 C. D. 615; and see Nicholas *v.* Ridley, (1904) 1 Ch. 192; and see infra, notes to Dering *v.* Winchelsea.

(*f*) Baker *v.* Harris, 16 V. 397.

(*g*) See *Ex p.* Boyle, 3 De G. M. & G. 515, 17 Jur. 979, and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 45).

(*h*) Margrave *v.* Le Hooke, 2 Vern. 207; Anon., 2 Ves. Sen. 662; Morret *v.* Paske, 2 Atk. 53; Jones *v.* Smith, 2 V. 376; Elvy *v.* Norwood, 5 De G. & Sm. 240.

(*i*) Heams *v.* Bance, 3 Atk. 630; Coleman *v.* Winch, 1 P. W. 775; Du Vigier *v.* Lee, 2 Ha. 340; Dingle *v.* Coppen, (1899) 1 Ch. 726; *Re* Lloyd, (1903) 1 Ch. 385.

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debts, and under the Administration of Estates Act, 1833 (*a*), he may as against the heir or devisee of the mortgagor, tack simple contract debts (*b*), specialty debts, however, taking priority over simple contract debts prior to the passing of 32 & 33 Vict. c. 46, which made them payable *pari passu* (*c*).

In the case of a mortgage of personalty the mortgagee, as against the executor of the mortgagor, could always tack, not only bond and other specialty (*d*), but also simple contract debts (*e*).

The reason why tacking of debts by mortgagees has been allowed, is to prevent a circuity of action against persons in whose hands the equities of redemption of the mortgaged properties were assets for the payment of debts (*f*).

But a mortgagee cannot tack debts not being liens upon the mortgaged estate, whether they be bond or other specialty debts or simple contract debts, as against the mortgagor (*g*), or his creditors (*h*).

In the case of *Re Gregson* (*i*), G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mortgagees. After the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the mortgage. They claimed, in a creditors' action for administration, to set off arrears of the annuity granted by the deceased against the balance received in respect of the policy and due to the executor of the deceased. *North*, J., held they were not entitled to do so. He held, in the first place, that the case of *Re Raggett* (*k*) was fatal to the contention that they could consolidate the two securities, one of which, that as to the annuity, had ceased to exist, and that the same case was an authority that they could not tack the

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(*a*) 3 & 4 Will. 4, c. 104.

(*b*) Rolfe *v.* Chester, 20 B. 610; Thomas *v.* T., 22 B. 341.

(*c*) See *Re* Williams' Estate, 15 Eq. 270, distinguished in *Re* Bentinck, (1897) 1 Ch. 673.

(*d*) Anon., 2 Vern. 176.

(*e*) Coleman *v.* Winch, 1 P. W. 775; Eccles *v.* Thawill, Pr. Ch. 18.

(*f*) See Heams *v.* Bance, 3 Atk. 630; Lowthian *v.* Hasel, 3 Bro. Ch. 162; Langford *v.* Jackson (Anon.), 2 Ves. Sen. 662.

(*g*) Challis *v.* Casborn, Pr. Ch. 407; Archer *v.* Snatt, 2 Stra. 1107; Elvy *v.* Norwood, 5 De G. & Sm. 240.

(*h*) Coleman *v.* Winch, 1 P. W. 775; Heams *v.* Bance, 3 Atk. 630; Hamerton *v.* Rogers, 1 V. 513; Adams *v.* Claxton, 6 V. 225; Rolfe *v.* Chester, 20 B. 610.

(*i*) 36 C. D. 223.

(*k*) 16 C. D. 117.

one to the other, and further that they were not entitled to retain the balance on the ground of an equitable set-off (*a*).

For cases in which it has been held that a mortgagee cannot tack a debt not being a lien as against assignees for value of the mortgagor see infra (*b*), as against devisees in trust for payment of his debts (*c*), as against parties entitled to the benefit of a charge for payment of his debts (*d*), as against the assignee of his heir (*e*), executor (*f*), or devisee (*g*), or as against any mesne incumbrancers, whether by mortgage, judgment, or statute (*h*).

Upon the same principle a surety, who has paid off the first mortgagee, cannot tack the costs of defending an action by him as against a puisne mortgagee, inasmuch as such costs constitute only a simple contract debt (*i*).

Sixth Rule.—In all the above cases, as is laid down in the sixth rule in *Brace* v. *Duchess of Marlborough* (*k*), no subsequent incumbrancer will be allowed to tack his incumbrance to a prior legal estate, unless when he lent his money he had *no notice of* the mesne mortgage, statute or judgment; for being without notice is his sole equity (*l*).

The rule is the same with regard to a first mortgagee, who will not be allowed to tack a subsequent mortgage if he made the advance having notice of an intermediate incumbrance (*m*), and so where the

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(*a*) Following Talbot *v.* Frere, 9 C. D. 568; and see *Re* Gedney, (1908) 1 Ch. 804; but cf. Watkins *v.* Lindsay, 67 L. J. Q. B. 362; and see Judicature Act, 1875, s. 10, and Bankruptcy Act, 1883, ss. 38, 125.

(*b*) See Troughton *v.* T., 1 Ves. Sen. 86; Langford *v.* Jackson (Anon.), 2 Ves. Sen. 662; Adams *v.* Claxton, 6 V. 225; Talbot *v.* Frere, 9 C. D. 568; not following Spalding *v.* Thompson, 26 B. 637; *Re* Haselfoot's Estate, 13 Eq. 327; *Re* General Provident Assurance Co., *Ex p.* National Bank, 14 Eq. 507, 516; Gannon *v.* G., (1909) 1 Ir. R. 57 (C. A.).

(*c*) Heams *v.* Bance, 3 Atk. 630; Irby *v.* I., 22 B. 217.

(*d*) Price *v.* Fastnedge, Amb. 685.

(*e*) Coleman *v.* Winch, 1 P. W. 775; Bayly *v.* Robson, Pr. Ch. 89.

(*f*) Coleman *v.* Winch, 1 P. W. 775; Vanderzee *v.* Willis, 3 Bro. Ch. 21.

(*g*) Ibid.

(*h*) Morret *v.* Paske, 2 Atk. 52; Powis *v.* Corbet, 3 Atk. 556; Lowthian *v.* Hasel, 3 Bro. Ch. 162; Langford *v.* Jackson (Anon.), 2 Ves. Sen. 662.

(*i*) South *v.* Bloxam, 2 Hem. & M. 457; and see Dixon *v.* Steel, (1901) 2 Ch. 602.

(*k*) 2 P. W. 495.

(*l*) See also Willoughby *v.* W., 1 T. R. 767; Hiles *v.* Moore, 15 B. 181.

(*m*) Lloyd *v.* Attwood, 3 De G. & J. 614; Morret *v.* Paske, 2 Atk. 52; Willoughby *v.* W., 1 T. R. 763; Shepherd *v.* Titley, 2 Atk. 348; Bedford *v.* Backhouse, 2 Eq. Ca. Abr. 615; Mumford *v.* Stohwasser, 18 Eq. 556; Harpham *v.* Shacklock, 19 C. D. 207.

first mortgage was to three persons, A., B. and C., jointly, they being trustees, and one of them, B., a solicitor, had notice, at the time of a subsequent advance made by them jointly, of an intermediate incumbrance, it was held that the successors in title of A., B. and C. could not tack. Each of them was individually entitled as against strangers to the whole of the security and debt, and therefore notice to any one of them of the intermediate incumbrance availed as against all (*a*).

It is essential that the consideration for the equitable interest must have been paid without notice of the mesne incumbrance or equity, subject to the exception that a purchaser or incumbrancer with notice, if he takes from or under a person who bought without notice, will obtain the title of the purchaser without notice. Otherwise a *bonâ fide* purchaser would be unable to deal with his property fully: *Lowther* v. *Carlton* (*b*); and the converse case is the same, and if a purchaser who has notice sells to a *bonâ fide* purchaser without notice, the latter may protect his title (*c*). In *Re Stapleford Colliery Co.* (*d*), the Court of Appeal held that shares having been transferred to purchasers for value without notice of their not being fully paid up and being registered as fully paid up, such transferees could give a good title to them as fully paid up to a purchaser who had notice that they were not fully paid up (*e*). In fact, this rule seems really to follow from the principle laid down in *Pilcher* v. *Rawlins* (*f*), and the cases cited in the notes to *Basset* v. *Nosworthy*, post, that a purchaser for value, who both pays his money and gets his legal estate without notice, is thereby protected against all prior equities and equitable incumbrances.

Mortgage to secure further advances.—If however the first mortgagee make a subsequent advance without notice of an intermediate mortgage, he can tack, and demand the payment of the whole amount of his advances in the first place (*g*). *Secus* where, after having made a second advance without notice of a second

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(*a*) Freeman *v.* Laing, (1899) 2 Ch. 355.

(*b*) 2 Atk. 242; Wilkes *v.* Spooner, (1911) 2 K. B. 473 (C. A.); Harrison *v.* Forth, Pr. Ch. 51.

(*c*) Brandlyn *v.* Ord, 1 West. Rep. 512, 1 Atk. 571; Ferrars *v.* Cherry, 2 Vern. 383; Mertins *v.* Jolliffe, Amb. 313; Sweet *v.* Southcote, 2 Bro. Ch. 66; M'Queen *v.* Farquhar, 11 V. 467, 478; Kettlewell *v.* Watson, 26 C. D. 501, reversing S. C., 21 C. D. 685; and see Freer *v.* Hesse, 4 De G. M. & G. 495; *Re* Handman and Wilcox's Contract, (1902) 1 Ch. 599.

(*d*) 14 C. D. 432.

(*e*) Ledbrook *v.* Passman, 59 L. T. 306; *Re* Railway Time Tables Co., 42 C. D. 98.

(*f*) L. R. 7 Ch. 259.

(*g*) Bedford *v.* Backhouse, 2 Eq. Ca. Abr. 615; Calisher *v.* Forbes, L. R. 7 Ch. 109.

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mortgage, he foregoes part thereof, and afterwards, with notice of the second mortgage, he advances an amount equal to that which he has foregone, inasmuch as evidence is not admissible to shew the intention of the parties to continue the old debt (*a*).

And it has been held that, although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee made a further advance with notice of a *mesne incumbrance*, he will not be entitled to priority in respect of such further advance. Thus in *Shaw* v. *Neale* (*b*) an estate was mortgaged to A. to secure a sum of money and *further advances*. Afterwards Shaw, the plaintiff, obtained a charge on the estate by means of a judge's order. It was held by *Romilly*, M. R., reversing the old case of *Gordon* v. *Graham* (*c*), that further advances made to the mortgagor by A., after notice of the order, had no priority over Shaw's charge. His judgment was affirmed by the House of Lords (*d*), and was followed in *Hopkinson* v. *Rolt* (*e*), which is the case usually cited as establishing the rule, and this rule applies even though the further advances are made by the first mortgagee in pursuance of a covenant entered into at the time of the first mortgage (*f*).

The same principle is applied after notice of an absolute assignment by the mortgagor of all his remaining interest in the property; see *Union Bank of Scotland* v. *National Bank of Scotland* (*g*), which also shews that the principle of *Hopkinson* v. *Rolt* applies to Scotland.

In *Bradford Banking Co.* v. *Briggs & Co.* (*h*) the articles of association of a company, registered under the Companies Act, 1862, provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. Shareholders in

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(*a*) Shepherd *v.* Titley, 2 Atk. 350.

(*b*) 20 B. 157, 6 H. L. C. 581.

(*c*) 7 Vin. Abr. 53, pl. 3; 2 Eq. Ca. Abr. 598.

(*d*) 6 H. L. Cas. 581.

(*e*) 25 B. 461; 3 De G. & J. 177; S. C., 9 H. L. Cas. 514; London & County Banking Co. *v.* Ratcliffe, 6 A. C. 722; Bradford Banking Co. *v.* Briggs & Co., infra; Hughes *v.* Britannia Permanent Benefit Building Society, (1906) 2 Ch. 607, where the principle was applied to limit consolidation, see infra (p. 157); Deeley *v.* Lloyds Bank, (1910) 1 Ch. 648; cf. Gannon *v.* G., (1909) 1 Ir. R. 57.

(*f*) West *v.* Williams, (1899) 1 Ch. 132.

(*g*) 12 A. C. 53.

(*h*) 29 C. D. 149, 31 C. D. 19, 12 A. C. 29, in which Hopkinson *v.* Rolt was considered and applied. Cf. *Re* Brown & Gregory, Ltd., (1904) 1 Ch. 627, and *Re* Palmer's Decoration and Furnishing Co., (1904) 2 Ch. 743, in both of which cases *Re* Goy & Co., (1900) 2 Ch. 149, was distinguished.

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the company deposited certain certificates of shares in the company with the plaintiffs, their bankers, by way of equitable mortgage to secure advances on their current account. The plaintiffs gave the company notice of the deposit. The shareholders subsequently became indebted to the company. The certificates stated that the shares were held subject to the articles of association. It was held (reversing the judgment of the Court of Appeal and restoring that of *Field*, J.) that the company was not entitled to priority over the bankers in respect of moneys which became due to the company from the shareholders after notice of the deposit with the bank.

In *Daun* v. *City of London Brewery Co.* (*a*), on the 26th of March, 1858, a publican deposited the lease of his public-house with the defendants—a brewery company—with a memorandum, stating that the deposit was to secure payment of a sum of 202*l.*, and interest, *as well as any other sums* in which the depositor might become indebted to the brewery company on any account, not exceeding 500*l.* The brewery company on the 7th of July, 1865, made the publican a further advance of 100*l.* On the 11th of July, 1865, the publican signed to the plaintiffs—a firm of distillers—a memorandum whereby he declared that the documents deposited with the brewery company should, "subject to the security" to the brewery company, be a security to the distillers for a sum of 120*l.* then due, and interest and all other sums that might thereafter become due to the distillers. *Notice of this second equitable mortgage was on the same day* given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money —the price of beer supplied to the publican. The company claimed to be entitled, *by virtue of a custom in the trade between brewers and publicans*, to add this further sum to the amount secured by the deposit of the lease, in priority to the distillers' charge. It was held, however, by *James*, V.-C., that the alleged custom was *bad in law* for want of mutuality, and for want of defined limits; and further that it was imperfectly supported by the evidence, and that consequently, according to the rule laid down in *Hopkinson* v. *Rolt* (*b*), the defendants, the brewery company, from and after the date of the second charge, were not entitled to any priority in respect of any goods supplied by them after the notice; and that with respect to such goods, both parties having notice of the securities, their priorities were to be according to the dates of their respective supplies.

(*a*) 8 Eq. 155.

(*b*) Supra, 9 H. L. Cas. 514.

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And the result will be the same although the securities are executed on the same day and with the knowledge of all parties (*a*).

The principle upon which these cases proceed is this, that the second charge was so framed as if it had said, " subject to the security as it stands at the moment," that is, to the amount of money now due on the security. If the parties wish to escape from this, they must say, " subject and without prejudice to the principal moneys now due from me, and to such sums as I may hereafter owe, not exceeding the sum of ——*l*." (*b*).

Where, however, in such cases the further advance is made by the first mortgagee *without notice* of an intervening advance by the second mortgagee, the first mortgagee will have priority over the second mortgagee, not only in respect of his first, but also in respect of his second advance (*c*); nor will the first mortgagee lose his priority over the second mortgagee, if subsequently to the second mortgage he renews a bill of exchange given for the sum advanced on the first mortgage (*d*).

Seventh Rule.—The seventh rule laid down in *Brace* v. *The Duchess of Marlborough* (*e*) is " that when a puisne incumbrancer buys in a prior mortgage, in order to unite the same to the puisne incumbrance, but it is proved that there was a mortgage prior to that, the Court holds that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could in such case make no advantage of his mortgage, but that in all *cases where the legal estate is standing out*, the several incumbrances must be paid according to their priority in point of time: *qui prior est tempore potior est jure* " (*f*).

And it is immaterial whether the outstanding legal estate is a fee or a term of years (*g*), or a term attendant upon the inherit-

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(*a*) Menzies *v.* Lightfoot, 11 Eq. 459.

(*b*) Per *Romilly*, M. R., in Menzies *v.* Lightfoot, 11 Eq. 468.

(*c*) Calisher *v.* Forbes, L. R. 7 Ch. 109.

(*d*) Ibid. And see Saunders *v.* Dehew, 2 Vern. 271; Allen *v.* Knight, 5 Ha. 272; Cannock *v.* Jauncey, 1 Drew. 497, 507, 5 W. R. (V.-C. K.) 764.

(*e*) 2 P. W. 495.

(*f*) See Symmes *v.* Symonds, 4 Bro. P. C. 328; Earl of Bristol *v.* Hungerford, 2 Vern. 524, 1 Eq. Ca. Abr. 142; Turner *v.* Richmond, 2 Vern. 81; Beckett *v.* Cordley, 1 Bro. Ch. 353; Manningford *v.* Toleman, 1 Coll. 670; Phillips *v.* P., 4 De G. F. & J. 208; Thorpe *v.* Holdsworth, 7 Eq. 139; *Re* Richards, 45 C. D. 589; Hopkins *v.* Hemsworth, (1898) 2 Ch. 347; and see Basset *v.* Nosworthy, post.

(*g*) *Exp.* Knott, 11 V. 618.

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ance (*a*), which in equity, unless merged under the Satisfied Terms Act (*b*), will follow all the estates created out of such inheritance and all incumbrances subsisting thereon (*c*). But a term already attendant before that Act might be clothed with a trust for a mortgagee or purchaser (*d*).

The case of *Rooper* v. *Harrison* (*e*) is also generally referred to as a strong instance of this rule. The facts in the case are complicated, but so far as regards the point in question it may be taken that the judgment treated the material facts to be as follows:—The mortgagor gave a legal first mortgage to W., a second equitable mortgage to the plaintiff R., a third mortgage to the defendant H. W., the first mortgagee, died, having devised mortgage and trust estates to the defendant H., and appointed him and another executors. H. thus became holder of the legal first mortgage as trustee of W.'s will, and holder of a third mortgage in his own right. H. sold under the power of sale in the first mortgage, and claimed to apply the proceeds, after payment of the first mortgage, in discharge of his third security, to the exclusion of the plaintiff's second mortgage. The V.-C. decided that he could not do so, because, having sold the estate in exercise of his trusts under the will, he had no longer the legal estate. The V.-C. affirmed the doctrine that the possessor of the legal estate acquires thereby no additional equity, but merely "stays the hands of the Court by resting on that legal estate, which the Court will not deal with unless a superior equity can be shown," and held that the defendant H., having sold in execution of the trusts of the will, was not possessor of a legal estate, and that the money now came on the trusts of the equity of redemption, and that the plaintiff as second mortgagee had, by reason of the date of his mortgage, priority over the defendant as third mortgagee. It will be seen that the facts were peculiar, as the legal estate and equitable third mortgage were held in different rights, and the Judge treated the sale as made in exercise of the trusts of the will; but the case would be of great importance if it were held to apply to the ordinary case of tacking, and to operate as a decision that if the person tacking exercises the power of sale the right to tack is gone.

(*a*) Charlton *v.* Low, 3 P. W. 330.

(*b*) 8 & 9 Vict. c. 112.

(*c*) Charlton *v.* Low, 3 P. W. 330.

(*d*) Shaw *v.* Johnson, 1 Dr. & Sm. 412; Plant *v.* Taylor, 7 H. & N. 211; Owen *v.* O., 3 H. & C. 88; and see Sug. R. P. Stat. 282, note, 2nd edit.

(*e*) 2 K. & J. 86.

Eighth Rule.—The eighth rule in *Brace* v. *Duchess of Marlborough* (a) is: "To complete the title to tack, the incumbrancer must either have *actual possession* of the legal estate, *or* the *best right to call for a conveyance or assignment* of it, for in such case the creditor having such right will, under certain circumstances, be placed in equity in the same position as if he had obtained an actual assignment." This is a qualified statement of the effect of the "best right," its operation being limited by "certain circumstances." The extent of this doctrine is a matter of doubt. There are, it would appear, three possible grounds on which a claim to a better right might be set up: first, that the trustee of an outstanding legal estate had expressly declared himself trustee for the incumbrancer; secondly, that the mortgagor had constituted himself trustee for the incumbrancer; thirdly, that the incumbrancer held the title-deeds.

In the first class of cases there is authority for saying that where, *at the time of the advance*, a trustee of the legal estate, not being the mortgagor, agrees to hold as trustee for the person making the advance, and joins as a party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), the position as to priorities is to be treated as it would be if the legal estate had been actually conveyed to such person (b). These cases are, it is to be observed, illustrations of the application of the principle of purchase for value without notice, and are not strictly cases of tacking.

In *Wilkes* v. *Bodington* (c) *Cowper*, C., said, "I take it to be the rule in equity, that where a man is purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other; and therefore dismissed the bill." In that case the trustees of a legal term were parties to the settlement impeached though they did not actually assign the term, and the claim against the purchaser was by an assignee in bankruptcy to upset the settlement. It seems that the case may be supported either on the ground that the concurrence of the trustees of the term, though they did not convey, amounted to an agreement to be trustees for the purchaser; or that the claim resisted by the purchaser was a claim merely to an equity, and not to an equitable estate, and therefore within the third case noticed by Lord *Westbury* in *Phillips* v. *P.*, see notes to *Basset* v. *Nosworthy*, post. In *Maundrell* v. *M.* (*a*), says *Eldon*, C.: "It is equally clear, however, with regard to mortgagees and incumbrancers, that if they do not get in the satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them against any person having mesne charges or incumbrances."

(a) 2 P. W. 495.

(b) See per *Stirling*, L. J., in Taylor *v.* London & County Banking Co., (1901) 2 Ch. at p. 263, citing Wilkes *v.* Bodington, 2 Vern. 599; Maundrell *v.* M., 10 V. 246, 270; Stanhope *v.* Verney, 2 Eden, 81; Wilmot *v.* Pike, 5 Ha. 14, 22, and infra, p. 152; Rooper *v.* Harrison, 2 K. & J. 86, 106, and supra, p. 150; and see also Willoughby *v.* W., 1 T. R. 763; Blake *v.* Hungerford, Pr. Ch. 158; Charlton *v.* Low, 3 P. W. 328; Pomfret *v.* Windsor, 2 Ves. Sen. 486; *Ex p.* Knott, 11 V. 609, 618, 8 R. R. 254; Shine *v.* Gough, 1 Ball & B. 436; Bowen *v.* Evans, 1 Jo. & Lat. 178; Tildesley *v.* Lodge, 3 Sm. & G. 543.

(c) 2 Vern. 599.

The building society cases (*b*) which are sometimes referred to as supporting the doctrine, are discussed in the notes to *Basset* v. *Nosworthy*, post, and it will be seen that they do not determine the question, because although it is necessary in these cases to consider who has the best right to call for the legal estate, when that is ascertained the statutory receipt actually vests the legal estate in him, so that there is no question of an equitable right to call in an outstanding estate.

The law seems to be correctly stated by *Wigram*, V.-C., in the case of *Wilmot* v. *Pike* (*c*), as follows:—

"Now the general rule—the rule relied on by Mr. *Wood* as to equitable interests in land—is the rule '*qui prior est tempore potior est jure*,' and I have, on the former point, decided that neither the omission of one mortgagee to give notice, nor the activity of the other, would, in the circumstances of that case, give the second mortgagee priority over the first. But if a first incumbrancer has a declaration of trust only by the borrower, and none by the trustee, and the second incumbrancer has a formal mortgage of the equity of redemption, and the trustee is a party to the deed, and declares himself a trustee for the second incumbrancer, will not that declaration by the trustee give the second priority over the first? I think the second would in that case have a better right to call for the legal

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(*a*) 10 V. 246, see p. 270; 7 R. R. 393.

(*b*) Pease *v.* Jackson, L. R. 3 Ch. 576; Robinson *v.* Trevor, 12 Q. B. D. 423; Fourth City Benefit, &c. *v.* Williams, 14 C. D. 140; Hosking *v.* Smith, 13 A. C. 582; Crosbie-Hill *v.* Sayer, (1908) 1 Ch. 866.

(*c*) 5 Ha. 22.

estate than the first; and if it would be so in the case of a stranger, I think the trustee cannot be precluded by his situation as trustee from claiming the benefit of the legal estate without notice. . . I have referred to the cases of *Stanhope* v. *Verney* (*a*) and *Maundrell* v. *M.* (*b*), from which it appears that, as to the trusts of a term, a declaration in form by a trustee, that he will stand possessed of the term, is held equivalent to an assignment, so as to give a preference to the party who gets the declaration over one who has a good equitable interest, but not in the same form."

It appears, therefore, that in such a case, while the trustee for one of the incumbrancers holds the legal estate it will be treated, as is reasonable, as being the same thing as if the incumbrancer himself held it. But the cases shew that such a declaration of trust would not protect the person in whose favour it was declared as against any mortgagee or other person who obtained from the trustee an actual conveyance of the legal estate for valuable consideration and without notice (*c*).

It is further to be observed that the authorities above cited deal only with the case where the "better right" is obtained by the equitable incumbrancer contemporaneously with his advance. It would seem, however, on principle that an equitable incumbrancer who had made his advance without notice could rely on a "better right" subsequently acquired, provided that the conditions permitting him to rely on a legal estate actually acquired were fulfilled (*d*).

As to the second class of cases there is but little authority. A common form of equitable mortgage to banks at the present day is by deposit of title-deeds accompanied by a memorandum, usually under seal (*e*), whereby the mortgagor undertakes to execute a legal mortgage when required, declares himself trustee for the mortgagee, makes officials of the mortgagee attorneys to convey the legal estate to the mortgagee, and authorises the mortgagee to remove him from the trusteeship at pleasure, giving the mortgagee power to appoint new trustees and to make vesting declarations.

In *London & County Banking Co.* v. *Goddard* (*f*), the mortgagor by deposit had executed a memorandum of the above nature in

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(*a*) 2 Eden, 81.

(*b*) 10 V. 271.

(*c*) See, e.g., Pilcher *v.* Rawlins, L. R. 7 Ch. 259; Rooper *v.* Harrison, 2 K. & J. 86.

(*d*) See supra, pp. 126, 134, and especially Taylor *v.* Russell, (1891) 1 Ch. at p. 27, (1892) A. C. at p. 259.

(*e*) Prideaux's Precedents (20th ed.), Vol. ii., p. 938.

(*f*) (1897) 1 Ch. 642.

favour of the defendant bank, and afterwards conveyed the fee by way of mortgage to X., who made his advance with notice of the bank's mortgage. The bank later appointed new trustees with a vesting declaration. *North*, J., held that the declaration vested the legal estate in the new trustees and divested the legal estate conveyed to X. Since X. had taken with notice of the bank's mortgage, and therefore with notice of the trusts, the property was subject to the trusts, and so remained within the operation of the power of appointment and vesting declaration. If X. had advanced his money and taken the legal estate without notice of the bank's mortgage, he would have been entitled to priority over the bank, and the vesting declaration could have had no divesting operation. In *Taylor* v. *London & County Banking Co.* (*a*), one of two trustees had, in fraud of his trust, deposited title-deeds with, and executed a memorandum containing clauses similar in effect to those above stated in favour of the defendants, who had no notice of the breach of trust. The defendants, after they had become aware of T.'s breach of trust, caused a conveyance of the legal estate to be made to them by their officials, who had been appointed T.'s attorneys to convey by the memorandum. It was held that a moiety of the legal estate vested under the conveyance in the defendants, but that it was inequitable for them to get in the legal title as against T.'s co-trustee and the *cestui que trusts*, and further that the deed of conveyance had no retroactive operation so as to vest the legal estate in the defendants as from the date of the memorandum (*b*). If the defendants had in the first instance taken a conveyance of the legal estate, they would have been purchasers for value without notice and protected against the equitable claims of the *cestui que trusts*.

Neither of the above cases throws much light on the question of the effect of a declaration of trust by a mortgagor on priorities between equitable incumbrancers, so long as the legal estate remains out in the mortgagor. The latter case, however, shews that, if the acquisition of the legal estate by an incumbrancer involved to his knowledge a breach of a trust in favour of a prior incumbrancer, he could not rely on the legal estate.

As to the third class of cases, the possession of title-deeds by an equitable incumbrancer often gives him priority over a prior or

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(*a*) (1901) 2 Ch. 231.

(*b*) See and cf. Cooke *v.* Wilton, 29 B. 100, where, however, retroactive effect was not necessary to protect the mortgagee on his acquiring the legal estate.

subsequent legal mortgagee by reason of the negligence of the legal mortgagee in not obtaining or in parting with the title-deeds (*a*), and cases in which the possession of title-deeds is the determining factor belong to the topics of notice and negligence. In certain cases, however, possession of the title-deeds has been held to give an equitable incumbrancer the "better right" to the legal estate (*b*).

3. As to the Time at which an Incumbrance sought to be Tacked can be Acquired.

A first mortgagee cannot tack a subsequent incumbrance taken *pendente lite*, the *lis pendens* being duly registered, because the suit would affect him with notice of the mesne incumbrance (*c*).

But a third mortgagee, who has advanced his money without notice, may get in and tack the first mortgage *pendente lite*, and up to the judgment (*d*).

And after the first mortgagee has by his answer submitted (on payment of money due to him) to assign to the plaintiff the second mortgage, the third mortgagee has been held entitled *pendente lite* to obtain an assignment of the first mortgage, and to hold the estate against the second mortgagee till he should be paid what was due to him upon both, he having had no notice of the second mortgage when he advanced his money (*e*).

But after a judgment to settle priorities, a party to the cause will not have the advantage of tacking his puisne incumbrance to a prior one taken since (*f*); for there is then a judgment for the creditors that they shall be paid according to their priorities (*g*).

4. Consolidation of Mortgages.

Though the doctrine of consolidation is quite distinct from, and depends on a different principle from, that which governs "tacking," consolidation has in some respects an effect similar to that of

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(*a*) See above, notes to Russell *v.* R., pp. 105 et seq.

(*b*) See Fourth City, &c. Society *v* Williams, 14 C. D. 140; Crosbie-Hill *v.* Sayer, (1908) 1 Ch. 866, at p. 879, building society cases; and per *Eldon*, C., in *Ex p.* Knott, 11 V. 609; and cf. Bank of Ireland *v.* Cogry Spinning Co., (1900) 1 Ir. R. 219.

(*c*) Morret *v.* Paske, 2 Atk. 52.

(*d*) Brace *v.* Duchess of Marlborough, 2 P. W. 491; Hawkins *v.* Taylor, 2 Vern. 29; Belchier *v.* Butler, 1 Eden, 523; Belchier *v.* Renforth, 5 Bro. P. C. 292.

(*e*) Belchier *v.* Butler, 1 Eden, 523.

(*f*) Bristol *v.* Hungerford, 2 Vern. 525; Wortley *v.* Birkhead, 2 Ves. Sen. 574.

(*g*) *Ex p.* Knott, 11 V. 619; *Re* Scott's Estate, 14 Ir. Ch. R. 57.

tacking, and it is often referred to inaccurately as a form of tacking; and see judgment of Lord *Campbell* in *Selby* v. *Pomfret* (*a*), and the marginal note in *Vint* v. *Padget* (*b*). Tacking depends on the advantage given by all the Courts to the possession of the legal estate, and is the uniting of two debts charged on the same property.

Consolidation is the right of a person who has two or more mortgage debts respectively charged on different properties, under mortgages made by the same mortgagor (*c*), to refuse under certain circumstances to be redeemed as to one unless the other or others be redeemed also.

Consolidation, as expressed by *James*, L. J., in *Cummins* v. *Fletcher* (*d*), "arises from the power of the Court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor."

In the same case *Cotton*, L.J., says (p. 711), "Originally it was only, as against the mortgagor, an interference by the Court of equity with his right of redemption. The right to redeem was the creature of equity, and the Court of Equity held that it was inequitable that the mortgagor should take from his creditor the sufficient and leave him with an insufficient estate as a security for a different debt."

So Lord *Davey*, in delivering the judgment of the House of Lords in *Pledge* v. *White* (*e*), says, "Originally it may have been a right of a mortgagee, holding two separate mortgages on estates originally belonging to the same mortgagor which had become absolute estates at law against the mortgagor and debtor, personally to refuse to be redeemed as regards one estate without having the debt charged on the other paid. But it has long been settled that the right of consolidation may be exercised in respect of equitable mortgages, as well as by a mortgagee holding the legal estate absolute at law; and on the other hand that it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself."

It appears to be recognised in very early cases. See *Bovey* v. *Skipwith* (*f*) in the reign of Charles II.; see also Lord *Hardwicke's* decision in 1743, in the case of *Titley* v. *Davies* (*g*).

"The equitable rule as to consolidation has not met with general

(*a*) 3 De G. F. & J. 595.

(*b*) 2 De G. & J. 611.

(*c*) Sharp *v.* Rickards, (1909) 1 Ch. 109.

(*d*) 14 C. D. 708.

(*e*) (1896) A. C. 187.

(*f*) 1 Ch. Ca. 201

(*g*) 2 Y. & C. Ch. 399 (n.).

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approval, as regards at least its latest development" (*a*), and the doctrine is excluded except in case of express agreement to the contrary by sect. 17 (1) of the Conveyancing and Law of Property Act, 1881, which enacts that

"(1) A mortgagor seeking to redeem any one mortgage shall by virtue of this Act be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

"(2) This section applies only if and as far as a contrary contention is not expressed in the mortgage deeds or one of them.

"(3) This section applies only where the mortgages or one of them are or is made after the commencement of this Act" (*b*).

Inasmuch as sub-sect. (2) enables mortgagees to contract out of and exclude the application of the section, and this is very commonly done in practice, the enactment has not prevented the doctrine of consolidation being of importance, even as regards mortgages since the Act, and in fact there has been since that date considerable litigation on questions of consolidation.

The principal difficulty has arisen where there has been an assignment of the equity of redemption in one or more of several properties which have been separately mortgaged.

The case which is most frequently commented on is that of *Vint* v. *Padget*, decided in 1858 (*c*). The facts as stated in the marginal notes are these: Two estates, subject respectively to distinct first mortgages vested in different mortgagees, were both again mortgaged to the same second mortgagees. Afterwards the two first mortgages were transferred to one person, with notice of the second mortgage. It was held that the transferee was, in a foreclosure suit instituted by him against the second mortgagee, entitled to consolidate (in the marginal note, to tack) the two first mortgages. The Court of Appeal considered the right to consolidate clear, subject only to the question whether it was material that notice of the second mortgage was given to the transferee of the first mortgages at the time he took his transfer. And they held that this did not affect the transferee's

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(*a*) Per Lord *Davey* in Pledge *v.* White, (1896) A. C. 187.

(*b*) See the following cases on the application of the section:—Bird *v.* Wenn, 33 C. D. 215; Griffith *v.* Pound, 45 C. D. 553; Farmer *v.* Pitt, (1902) 1 Ch. 954; *Re* Salmon, (1903) 1 K. B. 147; Hughes *v.* Britannia Permanent &c. Building Society, (1906) 2 Ch. 607.

(*c*) 2 De G. & J. 611; and see Tweedale *v.* T., 23 B. 341.

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right. A doubt whether the judgment was in this respect justifiable was expressed by *Lindley*, L. J., in the case of *Minter* v. *Carr* (*a*). But the decision in *Vint* v. *Padget* was recognised as binding by the same Judge and the other Judges of the Court of Appeal, and the House of Lords, in the case of *Pledge* v. *White* (*b*).

In the important case of *Jennings* v. *Jordan*, decided by the House of Lords in 1881 (*c*), the mortgagor of one property assigned the equity of redemption in it on a settlement for value, and after this assignment mortgaged another property to the mortgagee of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the two mortgages. *Held* that he could not consolidate.

As stated by Lord *Davey* in *Pledge* v. *White* (*d*), the actual point decided in *Jennings* v. *Jordan* (*e*) was "that a mortgagee could not, as against the assignee of the equity of redemption of one property, consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption. The contrary had been maintained by the defendant, on what was probably a misunderstanding of the case of *Tassell* v. *Smith* (*f*). . . . The House of Lords preferred the decision in *White* v. *Hillacre* (*g*) to *Beevor* v. *Luck*" (*h*).

In the case of *Harter* v. *Colman* (*i*), the facts were very similar to those in *Jennings* v. *Jordan*, only the mortgages were made to different persons before the equity of redemption in one property was assigned, and the union of the mortgages in the transferee was subsequent to such assignment. It was held by *Fry*, L. J., that the transferee could not consolidate them as against the assignee of the equity in one of them. The Judge considered "that the Courts have laid down the principle that the equities to be performed by the assignee of an equity of redemption are those to which his assignor was liable at the date of the assignment." He quotes from the judgment of Lord *Selborne*, in *Jennings* v. *Jordan*, the following

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(*a*) (1894) 3 Ch. 498; see p. 501.

(*b*) (1896) A. C. 187; (1895) 1 Ch. 51.

(*c*) 6 A. C. 698. See also Baker *v.* Gray, 1 C. D. 491, and White *v.* Hillacre, 3 Y. & C. Ex. 597.

(*d*) (1896) A. C. 196, affirming *Romer*, J., (1894) 2 Ch. 328; (1895) 1 Ch. 51 (C. A.).

(*e*) 6 A. C. 698.

(*f*) 2 De G. & J. 713, 27 L. J. Ch. 694, overruled.

(*g*) 3 Y. & C. Ex. 597.

(*h*) 4 Eq. 537; cf. Riley *v.* Hall, 79 L. T. 244.

(*i*) 19 C. D. 630.

passage: "The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor, of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one." The cases of *Harter* v. *Colman* and *Jennings* v. *Jordan* must be taken to have overruled the case of *Beevor* v. *Luck* (*a*).

It appears, however, from the more recent case of *Pledge* v. *White*, hereinafter referred to, that it cannot be said that in all cases the equities must stand as they stood at the time of the purchase of the equity of redemption.

The more recent cases of *Minter* v. *Carr* (*b*) and *Pledge* v. *White* (*c*) were both cases arising out of mortgages by the same person (Banks) of eight different properties. Ultimately the equity of redemption in all had become vested in the same person, and the mortgages of all the properties had also become vested in another person. But in the first-mentioned case of *Minter* v. *Carr* it was held that the plaintiff, the assignee of the equity of redemption of one of the properties, had become entitled to a separate mortgage, or to the title by purchase through a separate mortgage, which had been made to his predecessor in title before the other mortgages were united in the defendants, and that he was entitled to redeem this mortgage alone without redeeming the others, because, although at the time when he claimed to redeem he had the equity of redemption in all the properties, he was to be treated as to this particular property as standing in the position of an assignee of the equity of redemption of it alone, before the union of the mortgages in the plaintiffs.

In *Pledge* v. *White*, reported in the Courts below, nom. *Pledge* v. *Carr* (*d*), it appears that at the date of the action being commenced the plaintiff had become entitled to the equity of redemption in all the seven remaining properties which had been mortgaged by Banks by several separate mortgages, and that these separate mortgages at the date of the action were vested in the defendants. The plaintiff claimed to redeem one of the properties (No. 2), without

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(*a*) 4 Eq. 537; cf. Riley *v.* Hall, 79 L. T. 244.

(*b*) Reported before *Romer*, J., (1894) 2 Ch. 321; (1894) 3 Ch. 498 (C. A.).

(*c*) (1896) A. C. 187 (H. L.); (1894) 2 Ch. 222, *Romer*, J.; (1895) 1 Ch. 51, (C. A.).

(*d*) (1894) 2 Ch. 328, *Romer*, J.; (1895) 1 Ch. 51 (C. A.); and (1896) A. C. 187 (H. L.).

redeeming the others. It was held that he could not do so, and that *Vint* v. *Padget* (*a*) had been too long established to be overruled; and therefore it was held, following *Tweedale* v. *T.* (*b*) and *Vint* v. *Padget* (*a*), that the executor of the transferee was entitled to consolidate all the first mortgages.

The result of the cases seems to be that the dictum of *Fry*, L. J., in the above-stated case of *Harter* v. *Colman*, must be modified so far as it purported to lay down that the equities were to be regulated at the date of the assignment of the equity.

The cases are discussed in an exhaustive judgment of Lord *Davey* in *Pledge* v. *White*, and the result is, consolidation will be applicable "(1) where at the date when redemption is sought all the mortgages are united in one hand, and redeemable by the same person (*c*);

"(2) Or where, after that state of things has once existed, the equities of redemption have become separated" (*d*).

It also appears that a mortgagee is not prevented from claiming the right to consolidate by reason that, at the time he pays his money and unites the mortgages by taking a transfer of one or more of them, he has notice of a second mortgage of all the properties vested in another mortgagee, whose right may be affected by the consolidation (*e*). But, on the other hand, he cannot consolidate against a second mortgagee or purchaser of the equity of redemption in one only of the properties who derives title before the union of the mortgages claimed to be consolidated (*f*).

The position is explained by Lord *Davey* as follows:—"It appears to me, my Lords, that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted, it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of the mortgages, subject to which he has

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(*a*) 2 De G. & J. 611.

(*b*) 23 B. 341.

(*c*) Riley *v.* Hall, 79 L. T. 244.

(*d*) These two propositions are stated by Lord *Davey*, (1896) A. C. 198.

(*e*) Vint *v.* Padget De G & J. 611. See Baker *v.* Gray, 1 C. D. 491, where some weight appears to have been given to the fact of notice.

(*f*) Jennings *v.* Jordan, supra; Harter *v.* Colman, supra.

purchased, although it may be unreasonable to hold that he can be affected by the transfer to such holders of mortgages to other persons by the same mortgagor on property which he has not purchased, and with the equity of redemption of which he has no concern. He does not investigate the title to such other property, and cannot know in the latter case to what mortgages the property is subject."

Other Points connected with Consolidation.—It is plain on principle that the mortgages sought to be consolidated must have been originally created by the same mortgagor, and this has been recently recognised (*a*). The right of consolidation is merely the right of the holder of two mortgages to refuse to be redeemed as to one without the other being redeemed also. It does not effect a charge of the mortgage debt on the two properties, and in consequence it has been held—

(1) That it does not have the effect of making the mortgagee (who claims to consolidate), in respect of any right which he gains by it, a purchaser within the statute 27 Eliz. c. 4, and that he cannot exercise it against persons claiming under a voluntary settlement of one property made before the execution of the mortgage (*b*);

(2) That it does not attach where one of the properties originally mortgaged has ceased to exist (*c*).

On the other hand, in the case of *Cracknall* v. *Janson* (*d*), a mortgagee of two estates, A and B, of which A was subject to a first mortgage, in exercise of a power of sale in his mortgage, sold the estate A. The first mortgagee, to whom another debt was due upon an equitable mortgage by deposit of a policy of assurance and other documents by the mortgagor, refused to join in the conveyance to the purchaser, unless he received out of the purchase-money the amount due on both his mortgages. That amount was paid to him accordingly, and the documents comprised in the equitable deposit were delivered to the second mortgagee. The balance of the proceeds of sale was insufficient to discharge what was due to the second mortgagee. It was held by the Court of Appeal that as the equitable mortgage was paid with money which, had the first mortgagee not claimed the right to consolidate, would have belonged to the second mortgagee, it was in fact paid by

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(*a*) Sharp *v.* Rickards, (1909) 1 Ch. 109.

(*b*) *Re* Walhampton Estate, 26 C. D. 391; but see now the Voluntary Conveyances Act, 1893; and cf. Cracknall *v.* Janson, 11 C. D. 1.

(*c*) *Re* Raggett, 16 C. D. 117; *Re* Gregson, 36 C. D. 223; cf. Watkins *v.* Lindsay 67 L. J. Q. B. 362.

(*d*) 11 C. D. 1.

Marsh v. Lee.

the second mortgagee, who, by the fact of such payment, became equitable transferee, and was entitled to consolidate that mortgage with his mortgage on estate B.

The case of *Cracknall* v. *Janson* was a foreclosure action, and shews that the doctrine applies when the mortgagee is suing for foreclosure as well as when the mortgagor is seeking redemption.

This case shews also that an equitable mortgage can be consolidated with a legal mortgage, and that the right applies to the proceeds of sale of the properties comprised in the two mortgages when sold by the mortgagee.

In *Marshall* v. *Shrewsbury* (*a*), a mortgagee having from the same mortgagor, who died, a legal mortgage on one property and an equitable mortgage on another, contracted to sell both, and then filed a bill for the administration of the estate of the deceased mortgagor, and praying for permission to carry out the sale and for payment of both debts out of the proceeds and the mortgagor's estate. It was held that he was entitled to do so.

In *Griffith* v. *Pound* (*b*), it was held that the right attached in the case of a mortgage since the Conveyancing Act, 1881 (sect. 17 being excluded), where the mortgagee had given notice under sect. 20 to pay off one mortgage, and the mortgagor had tendered the money, and that the doctrine of election did not apply.

Mortgages made in Different Rights.—In the case of *Cummins* v. *Fletcher* (*c*), it was laid down by *James*, L. J.,—

(1) That the right of consolidation did not attach when the mortgages were made in different rights, as in the case of one being a mortgage by A. for his own debt, and the other a mortgage by A. and B. of other property for a partnership debt (see as to the similar rule with respect to tacking ante, under note (*e*), p. 150);

(2) That consolidation only applies where default has been made on all the securities in respect of which it is claimed.

In the case of *Neve* v. *Pennell* (*d*), it was held that a *puisne* mortgagee of lands in a register county, who had registered his mortgage before a mortgage prior in date, could consolidate against it.

(*a*) L. R. 10 Ch. 250.

(*b*) 45 C. D. 553.

(*c*) 14 C. D. 699.

(*d*) 2 Hem. & M. 170

NOTICE.

BASSET *v.* NOSWORTHY.

1673. Rep. Temp. Finch, 102.

Purchase for valuable Consideration without Notice.

A bill was filed by an heir-at-law against a person claiming as purchaser from the devisee under the will of his ancestor, to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, *bonâ fide*, without notice of any revocation, and the plea was allowed, and upon proof of it, the bill was dismissed.

Though lands by the falling in of several lives prove to be of much greater value than they were at the time of the purchase, if the consideration be such as will make the defendant a purchaser within the statute 27 Eliz., he will be considered as a purchaser for valuable consideration; for the question is, not whether the consideration be adequate, but whether it be valuable.

The plaintiff, Sir William Basset, entitled himself as son and heir of Elizabeth Seymour, who was the only daughter and heir of Sir Joseph Killegrew, who was brother and heir of Sir Henry Killegrew, whose estate the lands in the bill mentioned formerly were; the defendant's title being under (as the plaintiff alleged) a pretended purchase of these lands at Drury House, and under the will of Sir Henry Killegrew, the purchase being from Jane Davis (afterwards the wife of Mr. Berkley) and from Henry Hill, the pretended natural son of the said Sir Henry Killegrew, of which will the plaintiff alleged there was a revocation by some subsequent deed or will; and for a discovery thereof, and what Mr. Nosworthy really paid for the purchase, and what deeds and writings he had, and to set aside the incumbrances which he had bought to protect his purchase, and that Mrs. Seymour might try her title at law upon the supposed revocation against the title of the defendant, as a purchaser under the said will, the now plaintiffs exhibited this bill (*a*).

To which the defendant pleaded a dismission of a bill in the Court of Exchequer (*b*), signed and enrolled, which bill was there brought for the same matter as in this bill, and fully examined and dismissed upon a full hearing, but without prejudice, and the dismission duly signed and enrolled.

The defendant further pleaded *that he was a purchaser for a valuable consideration,* bonâ fide *paid, without notice of any revocation.*

This cause being heard by the Lord Keeper *Bridgman,* he ordered precedents to be searched where a plaintiff, after a dismission of his bill on a judicial and formal hearing, and a full examination of witnesses in one Court of equity, and that without prejudice, had ever been admitted in another Court of equity to examine new witnesses to the same matter formerly in issue and examined (*c*).

Afterwards there being several orders made in this cause, and one by which the plea was overruled (*d*), the cause now came on to be heard.

LORD KEEPER FINCH (*e*) (having set the cause right, which had been perplexed with several extraordinary orders and not according to the usual course of proceedings) proceeded to consider the two chief points in the case.

1st, What the law of this Court is concerning purchasers;

2nd, Whether the defendant was a purchaser within that law.

As to the first point, a purchaser *bonâ fide,* without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his

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(*a*) A bill of revivor.

(*b*) See Seymor *v.* Nosworthy, Hard. 374, upon an issue directed by the Court of Exchequer, whether the will of Sir Henry Killegrew was revoked or not: Mich. 16 Car. 2.

(*c*) Seymor *v.* Nosworthy, before Lord Keeper *Bridgman* and Justice *Morton,* 1 Ch. Ca. 155, where, however, the name of the case is omitted, and the cause is said to have been on demurrer, whereas it appears from other parts of the report to have been on a plea.

(*d*) Seymor *v.* Nosworthy, Mich. Hil. 1669; 3 Ch. R. 40; Nels. 135; Freem. Ch. Rep. 128; 2 Eq. Ca. Abr. 69, nom. Seymer *v.* Nosworthy.

(*e*) Afterwards Lord Chancellor and Earl of Nottingham.

adversary shall never be aided in a Court of equity by setting aside such incumbrances; for equity will not disarm a purchaser, but assist him. And precedents of this nature are very ancient and numerous, viz., where the Court hath refused to give any assistance against a purchaser either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.

And this rule in a Court of equity is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and to strengthen the rights of purchasers.

As to the second point, the Court declared that the defendant had sufficiently proved his plea, and himself to be a purchaser within the protection of this Court, because no fraud or circumvention appeared; and it was evident that the defendant had paid several great sums to discharge statutes, which incumbered those lands, over and above what was paid to Mrs. Jane Berkley for her estate for life and to Henry Hill for his reversion; and though the lands were proved to be of much greater value at this time, by the falling in of several lives, than what they were at the time of the purchase, yet that will not alter the case in equity, because *in purchases the question is not whether the consideration be adequate, but whether it be valuable* (*a*) *; for if it be such a consideration as will make the defendant a purchaser within the statute* 27 *Eliz.* (*b*), *and bring him within the protection of that law, he ought not to be impeached in equity.*

And since Henry Hill had nothing to subsist on during his minority but this reversion, and, being a bastard, could have no kindred by the law, and probably but few friends, there was some hazard of the money which was advanced during his minority, if he died before the fine and recovery suffered.

Therefore the Court allowed the plea and dismissed the bill, and suppressed all the depositions taken in this cause before April last, and all since but only such which relate to this plea of the defendant (*c*).

(*a*) See Copis *v.* Middleton, 2 Madd. 410, 432.

(*b*) In the report by mistake cited as 21 Eliz.

(*c*) Proceedings were afterwards taken at law in this long-contested

NOTES.

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1. Generally.

Basset v. *Nosworthy* is generally referred to as an application of what was called the auxiliary jurisdiction of the Court of Chancery to grant discovery in aid of an action at law; and, where and so far as it relates to such an application, the decision has ceased to be material by reason of the Judicature Act, 1873 (*a*). The actual judgment, however, went further, and laid down what was the general law of the Court as to purchasers for value without notice (*b*).

The rule applies to personal as well as real estate (*c*).

The defence has been set up not only by a purchaser without notice obtaining the legal estate from a person affected by notice (*d*), but also by a purchaser with notice obtaining the legal estate from

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case. See Hitchins *v.* Basset, 3 Mod. 203; Salk. 592; 1 Show. 537. And ultimately, upon a special verdict, the Court was of opinion that there was no revocation; and upon a writ of error the judgment in B. R. was affirmed by the House of Lords. See Hungerford *v.* Nosworthy, Show. P. C. 146; and see 1 Vern. 351.

(*a*) See Ind, Coope &c. *v.* Emmerson, 12 A. C. 300; infra, p. 172.

(*b*) For the form of the plea see Mitford's Chancery Pleadings, 5th ed., p. 319.

(*c*) See, e.g., Dawson *v.* Prince, 2 De G. & J. 41; Taylor *v.* Blakelock, 32 C. D. 560; cf. Cloutte *v.* Storey, (1911) 1 Ch. 18.

(*d*) Harrison *v.* Forth, Pr. Ch. 51; 1 Eq. Ca. Abr. 331, r.

a person who acquired it without notice (*a*). The defence does not, however, avail for one who, being a trustee or having notice, first conveys and then takes a reconveyance of the legal estate from another who had taken the conveyance without notice (*b*).

Where the consideration is valuable, equity has never inquired whether it was adequate, because, as was laid down in the principal case, "the question is not whether the consideration be adequate, but whether it be valuable; for, if it be such a consideration as will make the defendant a purchaser within the statute 27 Eliz. c. 4, and bring him within the protection of that law, he ought not to be impeached in equity" (*c*).

It has been held that the consideration money must have been actually paid without notice; it is not sufficient that payment was secured before notice (*d*). Past consideration is insufficient (*e*).

The defence of purchase for value without notice will not prevent the Court exercising jurisdiction to preserve the property in question during litigation (*f*). It may be used as a shield and not as a sword. Lord *Rosslyn* expressed his opinion that the plea was a shield *to the possession*, and that he found it very difficult to imagine a case in which it could be used for any other purpose than to defend the *actual possession* (*g*). But in *Wallwyn* v. *Lee* (*h*) *Eldon*, C., held that it could be set up by a defendant claiming under a legal mortgage in fee, made by a life tenant alleging himself to be seised in fee against the plaintiff, the legal remainderman *in possession*. The Court of Chancery would not exercise its *ordinary* jurisdiction

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(*a*) See Lowther *v.* Carlton, 2 Atk. 242; Wilkes *v.* Spooner, (1911) 2 K. B. 473 (C. A.); and see note to Le Neve *v.* Le N., post, and cases there cited.

(*b*) See *Re* Stapleford Colliery Co. (Barrow's Case), 14 C. D. 432, at p. 445.

(*c*) More *v.* Mayhow, 1 Ch. Ca. 34; Wagstaff *v.* Read, 2 Ch. Ca. 156; Bullock *v.* Sadlier, Amb. 764; Mildmay *v.* M., Amb. 767, cited; and see as to this Townend *v.* Toker, L. R. 1 Ch. 446; Bayspoole *v.* Collins, L. R. 6 Ch. 228; Price *v.* Jenkins, 4 C. D. 483, 5 C. D. 619; Teasdale *v.* Braithwaite, 4 C. D. 85, 5 C. D. 630; *Re* Foster & Lister, 6 C. D. 87; Harris *v.* Tubb, 42 C. D. 79.

(*d*) Hardingham *v.* Nicholls, 3 Atk. 304; Molony *v.* Kernan, 2 Dr. & War. 31; Tourville *v.* Naish, 3 P. W. 307; Rayne *v.* Baker, 1 Gif. 241; Tildesley *v.* Lodge, 3 Sm. & Gif. 543; but see Sharpe *v.* Foy, L. R. 4 Ch. 35, and with this last case cf. Bateman *v.* Faber, (1898) 1 Ch. 144.

(*e*) Aldritt *v.* Maconchy, (1906) 1 Ir. R. 416.

(*f*) Greenslade *v.* Dare, 17 B. 502; 20 B. 284.

(*g*) Strode *v.* Blackburne, 3 V. 222.

(*h*) 9 V. 24, 7 R. R. 142; Joyce *v.* De Moleyns, 2 Jo. & Lat. 374. In both these cases full equitable relief was asked for; see per *Selborne*, C., in Ind, Coope &c. *v.* Emmerson, 12 A. C. p. 307.

of compelling the defendant to make discovery, or deliver up the title-deeds to the plaintiff, but would leave the latter to his remedy at law to recover the deeds or their value in detinue or trover.

When used as a shield, as in the case of *Wallwyn* v. *Lee*, and in the principal case, and in modern cases before the Judicature Acts (*a*) where there was an application to what was called the auxiliary jurisdiction of the Court of Chancery, the plea was allowed against a plaintiff claiming the legal title and beneficial ownership, apparently contrary to the maxim on which the Court of Chancery generally acted, "When equities are equal the law shall prevail."

As this only applied in cases of application to the "auxiliary" jurisdiction of Chancery, and has ceased to have material importance since the Judicature Act, 1873, the principle on which the rule in these cases was grounded is now only of historical interest; but the reason is indicated by Lord *Eldon* in *Wallwyn* v. *Lee* (supra), where he says:—"I apprehend there is sufficient ground for saying, *a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it*."

The Judges seem to have treated the exercise of the auxiliary jurisdiction as discretionary, exercising it when they considered that there was some equity which made it against conscience for the defendant to refuse discovery to the legal owner, and considering that the latter shewed no such equity when the defendant purchased without notice (*b*).

The subject afterwards met with full consideration by Lord Chancellor *Sugden* in the case of *Joyce* v. *De Moleyns* (*c*), where the doctrine laid down in *Wallwyn* v. *Lee* was approved of and acted upon.

And in *Bowen* v. *Evans* (*d*) *Sugden*, C., said that, in his opinion, whether the purchaser has the legal estate, or only an *equitable* interest, he may, by way of defence, avail himself of the character of

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(*a*) See Heath *v.* Crealock, 18 Eq. 215, 242; L. R. 10 Ch. 22, 34. Cf. The Horlock, 2 P. D. 249.

(*b*) Parker *v.* Blythmore, Pr. Ch. 58; Burlace *v.* Cooke, Freem. Ch. R. 24; Rogers *v.* Seale, ib. 84.

(*c*) 2 Jo. & Lat. 374.

(*d*) 1 Jo. & Lat. 178, at p. 264; and see Sug. V. & P., 14th edit., cap. 25, pp. 787—798, and also Payne *v.* Compton, 2 Y. & C. Ex. 457; A.-G. *v.* Wilkins, 17 B. 285; Lane *v.* Jackson, 20 B. 535; Hope *v.* Liddell, 21 B. 183; Penny *v.* Watts, 2 De G. & Sm. 501, at p. 521, 1 Mac. & G. 150; Colyer *v.* Finch, 5 H. L. C. 905, at p. 920; Ernest *v.* Vivian, 33 L. J. Ch. 513; Gomm *v.* Parrott, 5 W. R. 882.

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a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title.

But, in considering the opinion and decision of Lord *St. Leonards*, it must be remembered that he insisted that the plea was available not only in the case of an application to the auxiliary jurisdiction as against the legal owner, but also in favour of persons acquiring equitable estates where the Court was exercising its ordinary jurisdiction (*a*). In such cases it is plain that the rule has no operation (*b*), and the cases mentioned in note (*d*) on the preceding page are not of authority upon this point.

Who are Purchasers.—The word "purchaser" is extended in many cases beyond the meaning of purchaser in ordinary parlance. Thus lessees (*c*), and parties within the marriage consideration, claiming under an ante-nuptial settlement (*d*), are included in the term. In cases where a trustee has made good a breach of trust with regard to one trust fund by the application for that purpose of funds belonging to another trust, there is purchase for value without notice, and the *cestui que trusts* of the second fund will not be able to reclaim any part of it so applied in making good the breach of trust. Thus, in *Thorndike* v. *Hunt* (*e*), a trustee of two different settlements, called the Thorndike and Linzee settlements, having applied to his own use a fund subject to the Thorndike settlement, replaced it by funds which, under a power of attorney from his co-trustee under the Linzee settlement, he transferred into the names of himself and his co-trustee in the Thorndike settlement; and, under an order made on motion in a suit in respect of breaches of trust of the Thorndike settlement, the trustees of it transferred the fund thus replaced into Court. It was held by the Lords Justices, reversing the decision of *Romilly*, M. R., that the transfer was equivalent to an alienation for value without notice, there being a debt due from the Thorndike trustees which, if not paid, would have rendered them liable to an execution, and that the *cestui que trusts* under the Linzee settlement could not follow the trust fund. See also

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(*a*) Sug. V. & P., 14th edit., pp. 787—798.

(*b*) See infra, p. 172.

(*c*) *Re* King, 16 Eq. 525. As to assignees of lessees see Price *v.* Jenkins, 5 C. D. 619; Harris *v.* Tubb, 42 C. D. 79.

(*d*) Harding *v.* Hardrett, Rep. t. Finch, 9; Vane *v.* V., L. R. 8 Ch. 383; and see Lord Keeper *v.* Wyld, 1 Vern. 139.

(*e*) 3 De G. & J. 563; and see Taylor *v.* London & County Banking Co., (1901) 2 Ch. 231, p. 257.

[illegible]

Taylor v. *Blakelock* (*a*), where in a similar case the Court of Appeal, affirming *Bacon*, V.-C., held that the innocent trustee accepting the transfer of stock, without notice of the breach of trust, gave up the right to sue the fraudulent trustee for his debt to the trust, and was on this ground entitled to be treated as a purchaser for value without notice (*b*).

The defence should be pleaded.—By R. S. C., 1883, O. XIX., r. 23, notice is to be alleged. In *A.-G.* v. *Biphosphated, &c., Co.* (*c*) it was held that the plea of purchaser for value, &c., must be specifically pleaded; and, although in *Taylor* v. *Blakelock* (*d*) *Bacon*, V.-C., thought it was sufficient if it could be inferred from the facts alleged, the safer course is always to plead it.

2. Of this Defence before and after the Judicature Act, 1873.

In the earlier cases expressions will be found which would in terms seem to imply that, in every case, a Court of equity would refuse to entertain any jurisdiction against a defendant who could maintain the plea of purchaser for value without notice (*e*). But many of the cases, taken with the facts, only amounted to decisions that the plaintiff, applying to the *auxiliary* jurisdiction for discovery or delivery of title-deeds (which seems to have been treated as an application to the auxiliary jurisdiction), must be left to his remedy at law, or that relief was refused to a plaintiff applying to enforce some *equity* as distinguished from establishing his right to some estate. But taking the decision of Lord *Westbury*, in *Phillips* v. *P.* (*f*), as a correct exposition of the law as existing before the Judicature Act, the doctrine was not so wide as apparently implied in the cases above cited. It is necessary to bear in mind that before the Judicature Acts the Court of Chancery only entertained claims by *legal* owners claiming under a *legal* title in certain cases—

(1) Under what was called the "auxiliary jurisdiction," *i.e.* where a plaintiff suing at law on a legal title, *e.g.* in ejectment, which could not have been maintained in Chancery, applied to Chancery for

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(*a*) 32 C. D. 560.

(*b*) See Case *v.* James, 3 De G. F. & J. 256; Taylor *v.* Blakelock, 32 C. D. 569; Taylor *v.* London & County Banking Co., supra, at p. 257.

(*c*) 11 C. D. 327; and see per *Farwell*, J., *Re* Nisbet & Potts' Contract, (1905) 1 Ch. 402.

(*d*) 32 C. D. 564.

(*e*) See the principal case and Stanhope *v.* Verney, 2 Eden, 81; Wallwyn *v.* Lee, 9 V. 24; Bowen *v.* Evans, 1 Jo. & Lat. 178, p. 264; Strode *v.* Blackburne, 3 V. 222; Jerrard *v.* Saunders, 2 V. 454, 458.

(*f*) 4 De G. F. & J. 208.

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assistance, *e.g.* in ordering discovery in aid of the action, which the common law Court could not grant;

(2) In cases where Chancery had concurrent jurisdiction with Courts of law, so that the action might be brought either at law or in equity, as in matters of dower (*a*) or tithes (*b*);

(3) Where Chancery had exclusive jurisdiction, as in foreclosure.

In the case of *Phillips* v. *P.* (*c*), in 1862, Lord *Westbury* specifies three classes of cases in which the defence of purchaser for value without notice was familiar in Chancery. These three classes are stated in Lord *Westbury's* words, infra. Putting them shortly, they are—

(1) Applications to the auxiliary jurisdiction in aid of an action at law;

(2) Cases of a purchaser or mortgagee paying his purchase-money without notice of some prior equitable interest, and subsequently getting the legal estate (*d*);

(3) Defences against "an equity" as distinguished from an estate.

It is difficult to keep the decisions distinct, as, when regarded from different points of view, one case may seem to come under two or more decisions. And it is important to bear this in mind in considering the effect of the Judicature Acts and the decisions on them, as in some of the cases in which the defence would be excluded if depending on the auxiliary jurisdiction it may hold good if treated as coming under some other of the divisions.

Subject to this qualification, the heads of auxiliary jurisdiction may be taken which are adopted by Mr. Freeman Oliver Haynes (*e*). His view seems to be that applications to the auxiliary jurisdiction may be ranged under the heads of bills by a legal owner for discovery in aid of proceedings at law (*f*), for the delivery up of the title-deeds (*g*), for the removal of terms, and bills to perpetuate testimony (*h*).

With regard to the first class of cases, applications to the auxiliary jurisdiction, Lord *Westbury* says: "First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a

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(*a*) Williams *v.* Lambe, 3 Bro. Ch. 264.

(*b*) Collins *v.* Archer, 1 Russ. & M. 281.

(*c*) 4 De G. F. & J. 208.

(*d*) Cases of tacking See notes to Marsh *v.* Lee, supra, and infra, p. 178 et seq.

(*e*) See a very able pamphlet by this gentleman, published in 1880.

(*f*) See Basset *v.* Nosworthy.

(*g*) Infra, p. 173; and Jerrard *v.* Saunders, 2 V. 187, 454.

(*h*) Jerrard *v.* Saunders, supra; Bechinall *v.* Arnold, 1 Vern. 354.

legal title, as by an heir-at-law (which was the case in *Basset* v. *Nosworthy*), or by a tenant for life (*a*) for the delivery of title-deeds (which was the case of *Wallwyn* v. *Lee*), and the defendant pleads *that he is a* bonâ fide *purchaser for valuable consideration without notice*. In such a case the defence is good ; and the reason given is, that as against a purchaser for valuable consideration without notice the Court gives no assistance—that is, no assistance to the legal title." He then proceeds: "But this rule does not apply where the Court exercises a legal jurisdiction concurrently with the Courts of law. Thus it was decided by Lord *Thurlow*, in *Williams* v. *Lambe* (*b*), that the defence could not be pleaded to a bill for dower, and by Sir *J. Leach*, in *Collins* v. *Archer* (*c*), that it was no answer to a bill for tithes. In those cases the Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief."

Since the Judicature Act, 1873, came in force, each division of the High Court can and must administer both law and equity, and the distinction of auxiliary and concurrent jurisdiction has ceased (*d*). On these enactments a difficulty arose on the question how far this defence of "purchase for value without notice" should now be allowed. In *Ind, Coope &c.* v. *Emmerson* (*e*), an action was brought in the Chancery Division, to recover possession of land, and claiming production and delivery of documents alleged to be material to the plaintiff's title. The defendants pleaded that *they were purchasers for valuable consideration without notice* and on this ground objected to the discovery and production of certain documents of title. It was objected that under sect. 24, sub-sect. (2), of the Judicature Act, 1873, the Court was bound to give effect to every equitable defence; but it was held by the House of Lords, affirming the decision of the Court of Appeal, that the objection was invalid for the following reason : before the Judicature Act, 1873, a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal titles. Sect. 24, sub-sect. (2), of the Act of 1873 therefore gave no protection to the defendants, the Court having now complete jurisdiction over the whole action. Lord *Selborne*, referring to cases where the auxiliary aid of the Court of Chancery was asked for, says (p. 305): "But in the present case

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(*a*) Should be "tenant in tail."

(*b*) 3 Bro. Ch. 264.

(*c*) 1 Russ. & M. 284.

(*d*) See Judicature Act, 1873, ss. 24 and 25, sub-sect. (11).

(*e*) 12 A. C. 300.

there is no suit in any other jurisdiction. The High Court of Justice is asked, and is competently asked, to exercise a principal and not an auxiliary jurisdiction, and to give effect to the legal title, which the plaintiff alleges to be in herself. If a like suit had formerly been brought in the Court of Chancery it would have been demurrable, not because there was an equitable defence, but because the title was legal and the plaintiff stated no equity.

"To abolish that division of jurisdictions was the very object of the Judicature Act. As against the claim of the plaintiff in this suit, it is not, and it cannot be pretended, that purchase for valuable consideration is a good equitable defence. Why, then, should it be an equitable defence against the discovery which is sought only as incident to, and as evidence in support of, the claim? In the class of cases referred to, the separation and division of jurisdictions between the Courts of equity and the Courts of common law was the real and only ground on which such a defence was admitted. As against an innocent purchaser, sued at law, the Court of Chancery (having no jurisdiction itself to try the title) found no equity requiring it to give assistance to a proceeding brought elsewhere for that purpose. . . . And in those cases, in which the Court of Chancery had concurrent jurisdiction with the common law Courts upon legal titles, it was not available against either discovery or relief."

It was held in effect that, as the claim in the action was for relief as well as discovery, the Court of Chancery having since the Judicature Act an equal jurisdiction to grant such relief, the case fell within the principle of the cases deciding that the plea was not admitted when an application was made to the *concurrent* jurisdiction of the Court. See supra, p. 172.

Applications for Delivery of Title-deeds.—It has long been settled that as a rule "the right to the estate confers the right to the possession of the title-deeds" (*a*). Notwithstanding this, the defence of purchaser for value without notice was, in many cases, allowed in equity to a claim by the legal owner for delivery of deeds. This is put by Lord *Westbury* in *Phillips* v. *P.* (*b*) as coming like discovery under the head of an application to the auxiliary jurisdiction. The leading case on the subject is *Wallwyn* v. *Lee* (c), which was a bill by a tenant in tail in possession against persons claiming under a mortgage by a tenant for life, who

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(*a*) Per Lord *St. Leonards* in Smith *v.* Chichester, 2 Dr. & War. 402; per Lord *Hatherley* in Newton *v.* N., L. R. 4 Ch. 145.

(*b*) 4 De G. F. & J. 208.

(c) 9 V. 24; 7 R. R. 142.

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had died, for discovery and delivery of title-deeds. Lord *Eldon*, after observing that the jurisdiction of Courts of equity to decree delivery probably was grounded on the imperfection of the common law remedies of trover and detinue, allowed the plea of purchaser for value without notice as a bar to the claim for delivery of title-deeds. *Joyce* v. *De Moleyns* (*a*) was a somewhat similar case. If these decisions or other applications for delivery of deeds are to be treated, as intimated by Lord *Westbury*, simply as cases of application to the auxiliary jurisdiction, they would in future be governed by the decision in *Ind, Coope &c.* v. *Emmerson* (*b*).

In *Newton* v. *N.* (*c*), where a trustee had deposited by way of equitable mortgage a mortgage deed forming part of the trust property, *Hatherley*, C., delivering the judgment of the Court of Appeal, says: "There appears to us to be a material distinction between such a case as *Wallwyn* v. *Lee* and cases in which either in consequence of the fund being in Court, as in *Stackhouse* v. *Countess of Jersey* (*d*), or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare, and does declare, the right to the fund or estate in question," and goes on to explain that delivery must be ordered or the decree would be incomplete (*e*). Since the Judicature Acts delivery of the deeds will be ordered (*f*). Thus, in *Re Cooper* (*g*), an action by trustees of estates for a declaration that mortgages were void against them, and for delivery up of the deeds, though it was pleaded by the defendants that they were purchasers for value without notice, it was held that the deeds were void, and as to delivery *Kay*, J., said: "I am not administering equity only. The third paragraph of the prayer asks for delivery up of these deeds. If there could be any ground for the defendants urging a Court of equity to leave the plaintiffs to their legal remedy as to the deeds, I am to give that legal remedy also. I must there-

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(*a*) 2 Jo. & Lat. 374.

(*b*) 12 A. C. 300; supra, p. 172.

(*c*) L. R. 4 Ch. 143, p. 145.

(*d*) 1 John. & H. 721.

(*e*) See contra, before the Judicature Act, Heath *v.* Crealock, 18 Eq. 215, L. R. 10 Ch. 22 (per Sir *W. M. James*, L. J., p. 33); Waldy *v.* Gray, 20 Eq. 238; Thorpe *v.* Holdsworth, 7 Eq. 139; Colyer *v.* Finch, 19 B. 500 (see p. 509), 5 H. L. Cas. 905; Frazer *v.* Jones, 17 L. J. Ch. 353; Stackhouse *v.* Countess of Jersey, 1 John. & H. 721; Smith *v.* Chichester, 2 Dr. & War. 393; and see per *Kay*, J., in Taylor *v.* Russell, (1891) 1 Ch. at p. 19.

(*f*) See Seton, Decrees, (1901), 2112.

(*g*) 20 C. D. 611, 627; James *v.* Giles, (1880) W. N. 170.

fore order that the title-deeds should be delivered up." So in *Manners* v. *Mew* (*a*), in 1885, *North*, J., held that, according to *Newton* v. *Beck* (*b*), trover or detinue would lie at law; that sect. 25, sub-sect. (11) of the Judicature Act, 1873, did not apply when equity could give legal as well as equitable relief, and that he was bound to give legal relief and therefore order delivery of deeds. So in *Re Ingham* (*c*) *Stirling*, J., made a similar order for delivery of the deeds by an equitable mortgagee pleading purchase for value without notice. It seems curious that the ground taken in modern cases is that Courts of equity should exercise their jurisdiction as to the delivery of deeds because they are sitting to administer the legal relief which might have been given in trover or detinue, while in the older cases (see *Wallwyn* v. *Lee* (*d*)) the assumption by equity of the jurisdiction to order specific delivery was put on the ground of the imperfection of the common law remedy in trover or detinue. But it seems to be settled by these modern cases that, where the jurisdiction is of practical importance for the purpose of carrying into effect a decree for sale or other relief, the plea will not be allowed, but delivery of deeds ordered. These were cases, however, when either delivery of the deeds was necessary for the relief granted, or the holder had no interest; they do not appear to affect the doctrine that in other cases where the holder has some interest in the land the Court will not order him to give up the title-deeds. See per *Romilly*, M. R., in *Newton* v. *N.* (*e*).

Plea allowed as a Defence to an Equity.—The third class put by Lord *Westbury* in *Phillips* v. *P.* (*f*), which seems more similar to the first of the three classes than to the second, and is therefore taken most conveniently in connection with the first, is as follows: "Thirdly, where there are circumstances that give rise to an *equity* as distinguished from an *equitable estate*,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere" (*g*).

(*a*) 29 C. D. 725.

(*b*) 3 H. & N. 220.

(*c*) (1893) 1 Ch. 352.

(*d*) 9 V. 24; 7 R. R. 142.

(*e*) 6 Eq. 141; and see also Thorpe *v.* Holdsworth, 7 Eq. 139.

(*f*) 4 De G. F. & J. 208.

(*g*) See as illustrations of the general principle Garrard *v.* Frankel, 30 B. 445; Bainbrigge *v.* Browne, 18 C. D. 188; Hunter *v.* Walters, L. R. 7 Ch. 75; Cloutte *v.* Storey, (1911) 1 Ch. 18; A.-G. *v.* Biphosphated Guano Co., 11 C. D. 327; Graham *v.* Drummond, (1896) 1 Ch. 968; Hobson *v.* Gorringe, (1897) 1 Ch. at p. 192.

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The distinction between an "equity" and an "equitable estate" is explained in *Cave* v. *C.* (*a*). There A., a trustee, had improperly invested trust money in the purchase of land; the legal estate was conveyed to his brother, B., for whom A. acted as solicitor and who made legal mortgages to C. and equitable mortgages to D. *Fry*, J., held, in the particular facts of the case, that the mortgagees took without notice express or constructive; that the first mortgagee was a purchaser for value without notice taking the legal estate and therefore had priority over all; but that, as between the *cestui que trusts* and the equitable mortgagees, the *cestui que trusts* money having been invested in the land, they had an *equitable estate* as distinguished from an equity, and therefore the rule "*Qui prior est tempore potior est jure*" applied, and they took priority over the equitable mortgagees without notice. *Fry*, J., distinguished the case from the third class put by Lord *Westbury* in *Phillips* v. *P.* (*b*), but recognised and approved of the doctrine laid down by him that the defence would apply "where there are circumstances which give rise to an equity as distinguished from an equitable estate" (*c*).

Plea disallowed where an Equitable Remedy was incidental to a Legal Right.—The cases of *Williams* v. *Lambe* as to dower (*d*), and *Collins* v. *Archer* as to tithes (*e*), are treated by Lord *Westbury* in *Phillips* v. *P.*, supra (*f*), as shewing that the plea was not allowed as a defence to a claim by a legal owner in cases where the Court of Chancery had *concurrent* jurisdiction with Courts of law, and he further explains that "in these cases a Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief."

Lord *St. Leonards* disputes the authority of these cases (*g*), and points out that they were not based on the ground that the jurisdiction was concurrent, but the words above quoted from Lord *Westbury's* judgment, "that the plaintiff was not asking for any equitable as distinguished from legal relief," probably explain the principle. Mr. *Roper* (*h*) suggests that the Court, assuming a concurrent

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(*a*) 15 C. D. 639.

(*b*) 4 De G. F. & J. 208.

(*c*) See Bell *v.* Cundall, Amb. 101; Malden *v.* Menill, 2 Atk. 8; Bowen *v.* Evans, 1 Jo. & Lat. 178; Marshall *v.* Collett, 1 Y. & C. Ex. 237; Baker *v.* Morgans, 2 Dow, 526; Sturge *v.* Starr, 2 My. & K. 195; Penny *v.* Watts, 1 Hall & Twells, 266; Harvy *v.* Woodhouse, Select Ch. Ca. 80.

(*d*) 3 Bro. Ch. 264.

(*e*) 1 Russ. & M. 284.

(*f*) 4 De G. F. & J. 217.

(*g*) Sug. V. & P., 14th edit., p. 797.

(*h*) Roper on Husband and Wife, vol. 1, 451, edit. 2.

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jurisdiction with Courts of law, acts in analogy to law, and decides that a plea is inadmissible which would not be recognised in law as a defence. A similar decision was given where, as in foreclosure, the Court of Chancery had *exclusive* jurisdiction and was giving an equitable remedy incidental to the legal title, and the plea of purchaser for value without notice was not allowed as an answer. In *Colyer* v. *Finch* (*a*), Finch, the plaintiff in the first suit, in 1842 became first legal mortgagee of an estate of the defendant Shaw, and Colyer, the plaintiff in the second suit, became purchaser of the estate in 1849. It was held by *Romilly*, M. R., that Colyer could not set up, as a defence to a bill of foreclosure by the first mortgagee, that he was a purchaser for valuable consideration without notice of the mortgage. And after noticing the above-cited cases of *Williams* v. *Lambe* and *Collins* v. *Archer* his Honour added, "The distinction I apprehend to be this:—if the suit be for the enforcement of a legal claim, or the establishment of a legal right, then, although this Court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy or an equitable right, which can only be enforced in this Court, I have not found any case, nor am I aware of any, where this Court will refuse to enforce the equitable remedy which is incidental to the legal right." The case of *Colyer* v. *Finch* was on appeal affirmed by the House of Lords; and Lord *Cranworth*, C., observed that the reasons of the Master of the Rolls were no doubt perfectly satisfactory, but that he should proceed on a shorter ground. "For the purpose," said his Lordship, "of the question, whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage; and, that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say, 'You shall redeem now, or you shall never redeem'" (*b*).

(*a*) 19 B. 500, affirmed 5 H. L. Cas. 905.

(*b*) See also Burlace *v.* Cooke, Freem. Ch. Ca. 24.

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3. Where Purchaser for Value Without Notice has obtained the Legal Estate.

We now come to the second class of cases put by Lord *Westbury* (*a*), "where there are several purchasers or incumbrancers each claiming in equity, and one who is later in time succeeds in obtaining an outstanding legal estate, or some other legal advantage; . . . the principle is that a Court of Equity will not disarm a purchaser, which is the common doctrine of the *tabula in naufragio*." The law as stated in the passages referred to includes, and is most commonly applied in what is called "tacking" mortgages, in the cases where an equitable incumbrancer, who has paid his money without notice of a prior equitable incumbrance, "*subsequently*" gets in a legal mortgage or legal estate, and this is the subject of the principal case of *Marsh* v. *Lee*, and the notes thereto, ante. But the principle applies with greater force to protect a purchaser or mortgagee *who obtains the legal estate at the time that he pays or advances his money*, a case which is not usually included in the word "tacking." The only cases of tacking with which it is proposed to deal in this note, are those where the mortgagee has advanced or paid a further sum to the mortgagor *at the same time* that he pays off and takes a transfer or conveyance from a legal mortgagee or trustee.

But there are some points common both to the case here discussed, of moneys paid *at the time when* the legal estate is obtained, and the case treated under *Marsh* v. *Lee*, where the money is paid *before* the legal estate is obtained. In both cases, to the words "purchaser for value without notice," must be added "*having the legal estate*."

Legal estate outstanding.—As against any equitable estate, it is necessary that the legal estate should be vested in the person raising the defence, or in a trustee for him. If the legal estate is outstanding, and the parties have all equitable estates, the rule will apply *qui prior est in tempore potior est in jure* (*b*). So restrictive covenants binding the land under the doctrine of *Tulk* v. *Moxhay* (*c*) are regarded as creating equitable easements, and will bind subsequent purchasers for value without notice of the restrictive

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(*a*) Phillips *v* P., 4 De G. F. & J. 208, and see the judgment in the principal case.

(*b*) *Re* Richards, 45 C. D. 589.

(*c*) 2 Ph. 774

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covenants unless they have the legal estate (*a*). Lord *Hardwicke*, in one of the early cases (*b*), explains that the legal estate is the foundation of the rule; that "though Courts of Equity would break in upon the common law where necessity and circumstances require it, . . . still they allow superior force and strength to a legal title, and that the rule could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different Courts." In *Phillips* v. *P.* (*c*), A., being entitled to the equity of redemption in certain lands, by a deed of family arrangement dated in February, 1820, granted to his brother B. an annuity of 20*l*. charged on these lands, payable on the death of his mother, C. By a settlement made on his marriage in May, 1821, A. settled the above lands, subject to the mortgage existing thereon, and he at the same time covenanted that they were not otherwise incumbered. A. died in 1825, and C. died in 1839. The first payment of the annuity became due in March, 1840. In 1859, B. filed a bill against those claiming under the settlement for payment of the annuity. The defendants pleaded orally at the bar the defence, that they were purchasers for valuable consideration without notice of B.'s annuity. It was held by *Westbury*, C., that, even assuming such defence could be set up orally at the hearing (and he held it could not (*d*)), it was not available, inasmuch as the defendant was only the purchaser of an equitable interest. "I take it," said his Lordship, "to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised

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(*a*) Per *Jessel*, M. R., in L. & S. W. Ry. Co. *v.* Gomm, 20 C. D. 562, at p. 583; Rogers *v.* Hosegood, (1900) 2 Ch. 388, 406; *Re* Nisbet and Potts' Contract, (1906) 1 Ch. 386, where the Court of Appeal, affirming Farwell, J. (1905) 1 Ch. 391, held that such covenants were binding upon a purchaser for value with notice deriving title under a disseisor who had acquired a statutory title to the land under the Statute of Limitations. See Mr. Cyprian Williams' criticism of this case in 51 Sol. Jo. 141, 155. It is respectfully submitted that Mr. Williams' conclusion, that the decision in question is inconsistent with the fundamental principles of equity, is correct.

(*b*) Wortley *v.* Birkhead, 2 Ves. Sen. 571; and see per *Wood*, V.-C., in Rooper *v.* Harrison, 2 K. & J. 108, 109, and per Lord *Blackburn* in Jennings *v.* Jordan, 6 A. C. 714.

(*c*) 4 De G. F. & J. 208; see Cloutte *v.* Storey, (1911) 1 Ch. 18.

(*d*) See R. S. C., 1883, O. XIX., r. 23; A.-G. *v.* Biphosphated, &c. Co., 11 C. D. 327; Taylor *v.* Blakelock, 32 C. D. 560.

of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies *qui prior est in tempore potior est in jure*. The first grantee is *potior*, that is *potentior*. He has a better and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time they took their securities and paid their money, had notice of the first incumbrance or not. These elementary rules are recognised in the case of *Brace* v. *The Duchess of Marlborough* (*a*), and they are further illustrated by the familiar doctrine of this Court as to the tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title, for if the first mortgagee has not the legal title, the third mortgagee, by payment off of the first, acquires no priority over the second" (*b*).

So by the seventh resolution in *Brace* v. *Duchess of Marlborough* (*c*), it is stated "in all cases where the legal estate is outstanding the several incumbrancers must be paid according to their priority in point of time" (*d*). So in *Rooper* v. *Harrison* (*e*), a legal first mortgage and a third mortgage became vested in A., as to the legal mortgage as trustee of the will of the original mortgagee, and as to the third mortgage in his own right. A. sold under the power of sale in the first mortgage, and it was held that as he had parted with the legal estate, the proceeds of sale must be applied in satisfying the

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(*a*) 2 P. W. 491.

(*b*) See also Cave *v.* C., 15 C. D. 639, cited supra, p. 176; Eyre *v.* Burmester, 10 H. L. Cas. 90.

(*c*) 2 P. W. 491.

(*d*) See also Willoughby *v.* W., 1 T. R. 763.

(*e*) 2 K. & J. 86, 108; and see the cases on consolidation, ante, pp. 155 et seq.

different mortgages according to their priority in date. The judgment referred to the sale as being made in execution of the trusts of the will. If the decision did not depend on this, or on the mortgages being taken in different rights (which does not appear to have been noticed in the judgment), the case would be important to shew that mortgagees claiming to tack should not exercise the power of sale.

The case of *Phillips* v. *P.* and other cases, shewing that the doctrine of purchase for value will not be applied to give priority as between owners of equitable estates, are strongly disapproved by Lord *St. Leonards* (*a*). But the doctrine may be taken to be now established by the cases above cited, the only exception being, that if the mortgagee, advancing his money without notice, acquired at the same time power to complete his legal title without any further act to be done by the trustee or holder of the legal estate, or, in the case of shares, any act to be done by the company, except some mere ministerial act, he has been treated as having acquired the estate at the time of his advance (*b*).

Legal estate obtained by the Purchaser contemporaneously with Payment of Purchase-money.—When money is paid or consideration given, and contemporaneously (*c*) the legal estate is obtained as part of the transaction, it is only necessary that the purchaser should not be affected with notice, actual or constructive, of any trust or equity affecting the legal estate; it is immaterial that the trustee or person conveying may have notice and be knowingly committing a breach of trust or fraud. In *Pilcher* v. *Rawlins* (*d*), a trustee holding a legal mortgage, fraudulently released to the mortgagor, and the mortgagor, concealing both the trust mortgage and release, mortgaged to a legal mortgagee; such mortgagee was held entitled to priority over the *cestuis que trust*. In the same case the mortgagor executed a fictitious conveyance, as on a sale, to the survivor of three legal trustee mortgagees, who, concealing the original trust mortgage, mortgaged by a legal mortgage to a mortgagee without notice; the latter was held entitled to priority over the *cestuis que trust*. In both instances the title of the innocent mortgagee was actually derived through documents which disclosed the trust; but, as they were suppressed, and a due investigation of title made, the Court of Appeal

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(*a*) Sug. V. & P., 14th edit. 798.

(*b*) Dodds *v.* Hills, 2 Hem. & M. 424; cf. Powell *v.* London and Provincial Bank, (1893) 1 Ch. 610.

(*c*) Part consideration is insufficient; see Aldritt *v.* Maconchy, (1906) 1 Ir. R. 416.

(*d*) L. R. 7 Ch. 259, dissenting from Carter *v.* C., 3 K. & J. 617; see also Willoughby *v.* W., 1 T. R. 763.

held the mortgagee's title was not affected, overruling on this point the decision in *Carter* v. *C.* (*a*), and the case must on this ground be distinguished from those where a mortgagee was held to have notice because he did not investigate the title (*b*).

In *Jones* v. *Powles* (*c*), the rule was applied to protect a purchaser who, so far as his agreement for purchase and payment extended, purchased from a claimant under a forged will. M., claiming title under an instrument proved as a will, but in reality a forgery, borrowed money on the security of the property, and the mortgagee advancing his money obtained contemporaneously with his advancing, and as part of the transaction, a conveyance of the legal estate under a mortgage by a deceased owner, which had been paid off without a reconveyance. There were other advances, some before and some after the discovery of the forgery, and in an action by the plaintiff, who claimed under a true title, it was held that the defendant's plea of purchase for value without notice was good, both as to the advances he made contemporaneously with the conveyance of the legal estate and the advances subsequently made before notice that the will was a forgery. In this case the legal mortgage was a satisfied mortgage. The case in one respect is not so strong as *Pilcher* v. *Rawlins*, as neither the satisfied mortgagee conveying the legal estate nor the mortgagee who took it had notice that the will was a forgery.

In *Young* v. *Y.* (*d*) a testator, in 1832, devised his copyhold estate, which was subject to a mortgage, to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the Court rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851 the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mortgage of the estate, and the original mortgage having been transferred to the second mortgagee, he claimed a right to tack his further advance. The widow died in 1860. Held, that the mortgagee, having the legal estate, and having no notice of any adverse title, was entitled to be protected against the rights of the children and to tack his further advance (*e*); and for the distinction where the second purchaser does not get the legal estate, see *Frere* v. *Moore* (*f*). In *Sharpe* v.

(*a*) 3 K. & J. 617.

(*b*) See as to this Le Neve *v.* Le N., post.

(*c*) 3 My. & K. 581; and see and cf. Robinson *v.* Briggs, 1 Sm. & G. 188.

(*d*) 3 Eq. 801.

(*e*) See also Carlisle Banking Co. *v.* Thompson, 28 C. D. 398.

(*f*) 8 Price, 475.

Foy (*a*), a mortgagee paid his money and took a conveyance of real estate of the wife before notice of an agreement for a settlement of it on marriage made by the husband while the wife was an infant. The conveyance by the wife was not perfected by acknowledgment until after notice to the mortgagee. It was held that he was protected against the agreement for settlement, but so far as regards the wife's interest, which did not pass till after notice, the decision was grounded on the fraud of the wife, she representing that there was no settlement.

Cases where the defence of purchase for value without notice has been set up against the vendor's lien, are discussed infra, in the notes to *Mackreth* v. *Symmons*.

Effect of Receipt by Building Society Mortgagee.—There were conflicting decisions as to the effect, with respect to advances to a mortgagor contemporaneously with the payment off of a prior mortgage to a building society, of the statutory receipt (*b*) endorsed on the mortgage to the building society. It is clear that the effect of the statutory receipt is to vest the legal estate in the person having the best right to call for a conveyance thereof (*c*). In *Pease* v. *Jackson* (*d*), and *Robinson* v. *Trevor* (*e*), on a mortgagee's advancing money to a mortgagor, and paying off a prior legal mortgage to a building society without notice of intermediate incumbrancers, and obtaining on the occasion of payment a statutory receipt endorsed by the building society, it was held that by paying off the building society the mortgagee had a first right to the legal estate, and that it consequently vested in him by the endorsed receipt, but that he was only entitled to priority, in respect of the legal estate so obtained, for the money then paid to the building society, and not for contemporaneous or subsequent advances. But the contrary view was expressed in *Fourth City Mutual B. B. Society* v. *Williams* (*f*), and *Carlisle Banking Co.* v. *Thompson* (*g*), and in *Sangster* v. *Cochrane* (*h*). The questions arising on these cases are now settled by *Hosking* v. *Smith* (*i*), in which the House of Lords held in effect that mortgagees without notice of subsequent incumbrances, paying off a legal mortgage to a building society, and getting

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(*a*) L. R. 4 Ch. 35; cf. Bateman *v.* Faber, (1898) 1 Ch. 144.

(*b*) Under Building Societies Act, 1874, s. 42, replacing 6 & 7 Will. 4, c. 32.

(*c*) Hosking *v.* Smith, 13 A. C. 582; Crosbie-Hill *v.* Sayer, (1908) 1 Ch. 866.

(*d*) L. R. 3 Ch. 576.

(*e*) 12 Q. B. D. 423.

(*f*) 14 C. D. 140.

(*g*) 28 C. D. 398.

(*h*) Ibid. 298.

(*i*) 13 A. C. 582.

the statutory receipt indorsed on it, and at the same time advancing further money to the mortgagor and taking a formal mortgage from him, were as to all the money, including both the payments to the building society and the further advance to the mortgagor, protected by the legal estate as against intermediate incumbrances of which they had no notice. This case seems clearly to recognise the principle that the legal estate being obtained by a purchaser for value without notice at the time of his payment, gives him priority for all such payments, whether made to a prior legal mortgagee or to a mortgagor, and that it applies equally whether the legal estate passes by a statutory receipt indorsed on a building society's mortgage or whether it passes by conveyance.

The question as to how far the best right to call for the legal estate is equivalent to an actual acquisition of that estate, is discussed supra, in the notes to *Marsh* v. *Lee*, at pp. 151 et seq.

In considering the cases above stated, establishing the doctrine that a purchaser for value without notice obtaining the legal estate at the time of his purchase obtains priority over all prior equitable interests and rights, it must be remembered that this is subject to the assumption that such purchaser has not been guilty of anything which would be sufficient to give priority to some equitable interest, as, *e.g.*, leaving the mortgagor in possession of the deeds without reason (*a*).

As a rule, negligence in not inquiring for the deeds, or other omission postponing a purchaser, is held to amount to "constructive notice," and therefore to exclude the plea discussed in this note.

Defence favoured in Equity.—In former editions it has been pointed out that in many of the older cases great favour was shewn by equity to the plea of purchaser for value without notice, so as to allow it to prevail even in the cases of a purchaser for a song from persons who are ignorant of their title (*b*); of the laying hands on a statue in a man's study (*c*); or of the release of a rent-charge obtained from a grantee without consideration by fraud (*d*).

These would not now be followed, but still the Courts look favourably on the claim by a purchaser without notice who with due diligence *acquires the legal estate at the time of his purchase.* But, on

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(*a*) See Russell *v.* R., ante; Le Neve *v.* Le N., post.

(*b*) Culpepper's Case, cited Freem. Ch. Ca. 123.

(*c*) Sir John Fagg's Case, cited 1 Vern. 52.

(*d*) Harcourt *v.* Knowel, cited 2 Vern. 159; Siddon *v.* Charnells, Bunb. 298; but cf. Carter *v.* C., 3 K. & J. 617.

the other hand, the rule in *Marsh* v. *Lee*, as to tacking mortgages so as to oust a prior equitable mortgagee, is regarded with disfavour, and will certainly not be extended: see observations of Lord *Blackburn* in *Jennings* v. *Jordan* (*a*).

4. Protection by Statute to Purchaser for Value without Notice.

The equitable doctrine above discussed as depending on possession of the legal estate must of course be distinguished from cases in which a statute gives protection to a purchaser for value without notice, in which the terms may be sufficient to include equitable estates, as for instance sect. 5 of 13 Eliz. c. 5. In the case of a settlement void against creditors under sect. 2 of this Act, a reversionary life interest was reserved to the settlor which he subsequently charged by way of equitable mortgage to a person who advanced his money without notice that the settlement was fraudulent. It was held that sect. 5 protected a subsequent purchaser who without notice purchased any interest under such a settlement, whether the interest were legal or equitable, and that the deed impeached was not void in respect of his interest (*b*). So sect. 28 of the Solicitors Act, 1860, contains a provision avoiding conveyances defeating a charging order in favour of the solicitor "unless made to a *bonâ fide* purchaser without notice;" this is wide enough to apply to equitable interests: see *Faithfull* v. *Ewen* (*c*), where it was held that mortgages by the plaintiffs to the defendants, though sent to the solicitor of the plaintiffs and approved by him, were postponed to a charging order which he afterwards obtained, on the ground that the mortgagees had notice of the suit and his rights which were preserved by this section.

The words "without notice" in this section mean without notice of the solicitor's right to a lien, and are not confined to notice of the existence of a charging order (*d*).

The Bankruptcy Act of 1883, s. 49 (2), contains a protection of *bonâ fide* transactions by or with the bankrupt for valuable consideration, without notice of any available act of bankruptcy (*e*).

(*a*) 6 A. C. 698.

(*b*) Halifax Joint Stock Bank *v.* Gledhill, (1891) 1 Ch. 31.

(*c*) 7 C. D. 495; see also Macfarlane *v.* Lister, 37 C. D. 88; Ross *v.* Buxton, 42 C. D. 190; Scholey *v.* Peck, (1893) 1 Ch. 709; Ridd *v.* Thorne, (1902) 2 Ch. 344.

(*d*) Cole *v.* Eley, (1894) 2 Q. B. 180, affirmed by C. A., (1894) 2 Q. B. 350; Ridd *v.* Thorne, (1902) 2 Ch. 344.

(*e*) See also ibid., s. 47, and *Re* Carter and Kenderdine's Contract, (1897) 1 Ch. 776, following *Re* Brall, (1893) 2 Q. B. 381, and overruling *Re* Briggs, &c., (1891) 2 Ch. 127.

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Sect. 26 of the Statute of Limitations (*a*), enacting that in case of concealed fraud, time should begin to run from the date when the fraud was discovered, or might with reasonable diligence have been discovered, provides that nothing in the clause "shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not aided in the commission of such fraud, and who at the time he made his purchase did not know and had no reason to believe that any such fraud had been committed" (*b*). It is to be observed that this section does not use the words "without notice" but an extended paraphrase of those words which was probably intended to exclude the application of the doctrine of constructive notice through a solicitor (*c*).

On the other hand, by the Yorkshire Registries Act, 1884 (*d*), it was enacted that in any case in which priority or protection might, but for this Act, have been given or allowed to any estate or interest being protected by or tacked to any legal or other estate or interest in such lands, no such priority or protection shall after the commencement of the Act be so given or allowed to any estate or interest in lands within the three ridings, except as against any estate or interest which shall have existed prior to such commencement, and full effect shall be given in every Court to this present provision, *although* the party claiming such priority or protection shall claim as a purchaser for valuable consideration and without notice.

(*a*) 3 & 4 Will. 4, c. 27.

(*b*) See as to this section and meaning of *bona fides*, Vane *v.* V., L. R. 8 Ch. 383; and cf. A.-G. *v.* Duke of Richmond, (1908) 2 K. B. 729; (1909) A. C. 466.

(*c*) See as to this Le Neve *v.* Le N., post, p. 234.

(*d*) 47 & 48 Vict. c. 54, s. 16.

LE NEVE *v.* LE NEVE.

1747. Amb. 436 (*a*).

Notice.

Lands in a register county, settled by a deed which is not registered, are settled upon a second marriage, with notice of the former settlement, and the second settlement is registered pursuant to the statute 7 Anne, c. 20. The former settlement shall be preferred in equity. Notice to agent or trustee is notice to the principal.

LORD CHANCELLOR HARDWICKE.—The bill was brought by the plaintiffs, Peter Le Neve and Hugh Pigott and Elizabeth his wife, late Elizabeth Le Neve, as the only surviving children of the defendant Edward Le Neve, by Henrietta, his late wife.

The end of the bill in general is, to have the execution of a trust of leasehold estates settled upon the late wife of Edward Le Neve and the issue of that marriage, by articles previous to the marriage, dated the 1st July, 1718; and that the conveyance made by the defendant Edward Le Neve and the defendant Mary, his now wife, to trustees, may be set aside and delivered up, being made after notice of the articles of the 1st July, 1718, or of the other conveyance made in pursuance thereof; and to have the leasehold exonerated and disincumbered.

The facts are that, in 1718, the defendant Edward Le Neve intermarried with his first wife, Henrietta Le Neve, who had a considerable fortune; and articles were executed previous to the marriage, dated the 1st July, 1718, whereby the father of Edward, in consideration of Henrietta's fortune, &c., covenanted with trustees to convey to them several estates, and some leasehold amongst the rest, near Soho Square, in the county of Middlesex; to permit Edward Le Neve the younger to receive the rents and profits during his own life, and after his death to pay to Henrietta 250*l.* a year in case she survived Edward; and after the decease of Edward and Henrietta,

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(*a*) S. C., 3 Atk. 646; 1 Ves. Sen. 64.

then the said estates should remain to their issue in such manner as Edward the younger should by will or otherwise appoint; and, for want of such issue, to the use of Edward Le Neve the father, and his heirs.

The 16th June, 1719, a settlement was made in pursuance of the articles.

The marriage took effect; and Edward and Henrietta had issue, plaintiffs Peter and Elizabeth. Henrietta died July, 1740, leaving no other children.

Twenty-five years after the first marriage, Edward Le Neve entered into a treaty of marriage with the defendant Mary, and by articles dated the 16th November, 1743, previous to the marriage, Edward, in consideration of such marriage, covenanted with the trustees, the defendants Dandridge and Norton, to convey these very leasehold estates near Soho Square to them, their executors, &c., within three months after the marriage, in trust to pay to defendant Mary, out of the rents of these messuages, in case she survived him, a clear annuity of 150*l.* for her life, for her jointure, &c.

The marriage took effect, and three months after, on the 20th January, 1744, a settlement was made pursuant to the articles.

The settled estate, being houses in Middlesex, was subject to the Register Act, the 7th Anne, c. 20.

The second articles and settlement were registered, but not the first.

Edward has mortgaged the houses likewise.

The bill is brought in order to set the second articles and settlement out of the way, and that they may be postponed to the first articles and settlement; upon this equity, that the defendant Mary Le Neve had notice of them.

The counsel for the plaintiffs admit that the registering of the second articles and settlement has, in point of law, affected the leasehold estates, as the 7th Anne, c. 20, gives the legal estate where the effect of the registering has placed it.

The question is, Whether equity will enable the children of the first marriage to get the better of the defendant's legal right? And this will depend upon the question of notice:—

1st, Whether it appears sufficiently that Joseph Norton was attorney for the defendant Mary in the transaction of her marriage?

2ndly, Whether Norton himself had sufficient notice of the first articles and settlement?

3rdly, Whether that will affect Mary as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

First, it will depend on the answer of the defendant Mary.

She has in general denied any notice of the first articles and settlement till six months after the marriage, and says, "that the defendant Joseph Norton was so far from being employed as solicitor for her, in transacting the business of the marriage articles and settlement, that he had been for a considerable time before employed as attorney for the defendant Edward Le Neve, her husband; that, being at the time of the marriage concerned for her husband, she was thereupon induced to place confidence in him, and her husband assured her he would take care there should be a handsome provision made for her, and recommended Norton as a proper person to prepare the deeds whereby such settlement was to be made upon her, to which she consented: and that Norton assured her that he had taken care to secure for her 150*l.* a year by way of jointure, and did not then, or at any time before her intended marriage, give her any notice of any former settlement."

It is insisted by the defendant Mary's counsel, that Joseph Norton was not her attorney or agent, but her husband's, and that the attorney for one party having notice will not affect her with notice.

I am of opinion she has admitted enough on her side to make him attorney or agent for her. If she placed confidence in Joseph Norton, no matter on whose recommendation,—if she relied enough on her husband to take his recommendation, it is sufficient; or otherwise it would be mischievous and inconvenient if this Court was to take into their consideration from whom the recommendation comes; for in purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice as much as if different counsel and agents had been employed.

It is material to see how far the cases have gone on this point. Two have been cited: *Brotherton* v. *Hatt* (*a*), and *Jennings* v.

(*a*) 2 Vern. 574.

Moore, Blincorne and others (*a*). The first was shortly this:—A. makes three several mortgages to B., C., and D., and in the last mortgage B. is a party, and agrees, after he is paid he will stand a trustee for D. Decreed, that C. shall be paid before D., for, all the securities being transacted by the same scrivener, notice to him was notice to D.

See how far this goes:—the same scriveners were witnesses, and engrossed all the securities, and were in the nature of agents for all the lenders, and very likely for the borrower himself; and notwithstanding it does not appear Mrs. Hatt had personal notice, "yet notice to the agent is notice to the party, and, consequently, they that lend last must come last, having notice of what was before lent; and if any one after notice lend more money, although he should obtain the legal estate, yet he would in equity stand affected with the notice, and be bound thereby."

The second case was no more than this:—Blincorne having notice of an incumbrance, purchases in the name of Moore, and then agrees that Moore shall be the purchaser, and he accordingly pays the purchase-money without notice of the incumbrance. Though Moore did not employ Blincorne, nor know anything of the purchase till after it was made, yet Moore, approving of it afterwards, made Blincorne his agent *ab initio*, and therefore shall be affected with the notice to Blincorne.

The last goes a great way, for Moore knew nothing of the transaction, and yet the Court held, that his approving it afterwards made Blincorne his agent *ab initio*. This carries it further than the present case; but the first is a clear authority.

These cases, therefore, sufficiently prove, that it is not at all material to the plaintiffs on whose advice or recommendation the defendant Mary intrusted Norton; nor does it make any difference that it is the recommendation of the husband, any more than of any other person.

The second consideration is (as it appears clearly that Norton was employed for defendant Mary), whether there is sufficient evidence of notice to him?

An objection has been taken by defendant Mary's counsel, that

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(*a*) 2 Vern. 609. [S. C., 2 Bro. P. C. 278.]

as notice had been denied by her answer, if it be sworn to by one witness only, that being but oath against oath, cannot prevail to establish the fact.

The general rule, to be sure, is so, but it admits of this distinction:—where the denial of a defendant is clear, it has been adhered to; but where the answer is not a positive denial of the same fact, but only as to part, as in the present case, as to the notice to herself only, it makes a difference.

And there are many cases where the Court, upon the testimony of one witness, whose credit is unimpeached, and what he swears is uncontradicted by the answer, have decreed upon this single evidence.

The defendant Mary denies notice to herself; but whether there was notice to another person, her agent, she passes by without giving any answer.

This is a denial, indeed, as to herself, but it is at the same time what is called at law a negative pregnant, that there was notice to her agent.

As to the evidence of notice to Norton, it is extremely strong; for he swears that he had notice of the first articles some time before the second marriage, and *that he had then a copy thereof from the defendant Edward Le Neve, in order to take counsel's opinion thereon, how to secure against the effect of them, and to contrive in what manner they might get the better of these articles;* and, therefore, as to Norton, there cannot be a stronger notice.

The third and last general question is, whether the notice to Norton will affect the defendant Mary, as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

This depends on two things:—

1st, Whether any notice whatsoever would be sufficient to take from the defendant the benefit of the Register Act?

2nd, Whether personal notice to the defendant Mary is requisite to postpone her?—or whether notice to her agent is sufficient to do it likewise?

As to the 1st, it is a question of great extent and consequence.

The preamble of the statute of the 7th Anne, c. 20, is in substance:—"Whereas, by the different and secret ways of conveying lands, &c., such as are ill disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, *by prior and secret conveyances*, and fraudulent incumbrances." Then comes the enacting clause:—"That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, lands, &c., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed; and that every such deed or conveyance that shall, at any time after, &c., be made and executed, shall be *adjudged fraudulent and void against any subsequent purchaser or mortgagee* for valuable consideration, unless such memorial be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," &c.

What appears, by the preamble, to be the intention of the Act?

Plainly, to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent incumbrances.

Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced.

The enacting clause says *that every such deed shall be void against any subsequent purchaser or mortgagee*, unless the memorial thereof be registered, &c.; that is, it gives him the legal estate, but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding.

This case has been very properly compared to cases on the 27 Hen. 8, c. 16, for enrolment of bargains and sales.

That Act is formed pretty much in the same manner with this.

The words of the enacting clause:—"That from, &c., no manors, lands, tenements, &c., shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, *or any use thereof* to be made thereof, by reason only of any bargain and sale thereof, except the same bargain and sale be by writing, indented, sealed, and inrolled in one of the King's Courts of Record at Westminster, or else within the same county, &c., where the same manors, &c., so bargained and sold do lie, &c.; and the same inrolment to be had and made within six months next after the date of the same writings, indented, &c. *Nor any use shall pass thereof from one to another.*"

What is the meaning of this?

Before the making of the Act, any paper writing passed the use from the bargainor to the bargainee, whereby great mischief arose; for it entangled the purchasers, affected and injured the Crown, and was contrary to the rule of law, which required notoriety in purchases by feoffment and livery, &c.

But what has been the construction of this statute ever since? Why, if a subsequent bargainee has notice of a prior, he is equally affected with that notice as if the prior purchase had been a conveyance by feoffment and livery, &c.

The operation of both Acts of Parliament and the construction of them is the same; and it would be a most mischievous thing if a person, taking that advantage of the legal form appointed by an Act of Parliament, might under that protect himself against a person who had a prior equity, of which he had notice.

The cases put by the Attorney-General are very material:—

"Suppose," said he, "the defendant Mary had, by letter of attorney, empowered Norton to transact the affair with her husband, and he by means of this agency comes to the knowledge of the prior articles and settlement, would not this affect the principal? Or suppose a purchaser of lands in a register county orders his attorney to register it, and he neglects to do it, and then buys the estate himself, and registers his own conveyance, shall this be allowed to prevail?"

It certainly shall not; for such a purchaser is out of the consequences which the Register Act guards against, of opposition from a prior secret conveyance, as he had personal knowledge of the first.

There have been three cases on the Register Act.

1st, *Lord Forbes* v. *Deniston* (*a*).

(*a*) 4 Bro. P. C. 189.

2nd, *Blades* v. *B.* (*a*).

3rd, *Chivall* v. *Nicholls* (*b*).

The first (*c*) arose originally in Ireland, where there is a general Register Act, and heard on appeal to the House of Lords, in England, 22nd and 23rd February, 1722.

The Earl of Granard, father of Lord Forbes, was seised of a large estate of which he was tenant for life, with remainder to his first and every other son in tail, and had a power of leasing for lives at the best rent.

The Register Act in Ireland passed the 6th Anne, c. 2, Ir.; Lord Granard granted a lease for three lives, at the rent of 30*l.* a year, which was not registered.

His Lordship, being greatly in debt, came to an agreement with Lord Forbes, his eldest son, by the agency of Mr. Steward, to take upon him the payment of certain debts of his father, and to secure a jointure to his mother-in-law, and an annuity to his father.

The estate was conveyed to Mr. Justice Doyne and Mr. Justice Nutt, as trustees, during the life of the father.

Mr. Steward had notice of this lease during the treaty between Lord Granard and Lord Forbes.

The conveyance to the trustees being registered, they brought an ejectment against the lessee of the leasehold estate: and it was heard before Lord *Middleton*, Lord Chancellor of Ireland, in February, 1721, who then made a declaration rather than a decree, that the conveyance was void as against the lessee. It came on again before him the 17th of February, 1721, and he then determined, there was full notice of the lease to Lord Forbes, and awarded a perpetual injunction from time to time.

The judgment of the House of Lords was, That the said decree be reversed, and that all proceedings at law of the appellants against the respondent should, during the life of Lord Granard, be stayed, on lessee's paying the rents, performing the covenants, &c.; but that after the death of Lord Granard, Lord Forbes might be at liberty to try the tenant's right to the lease.

The decree was reversed, not because Lord *Middleton* had proceeded on a wrong principle, but had drawn a wrong inference from

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(*a*) 1 Eq. Ca. Abr. 358, pl. 12.

(*b*) 10th December, 1725, in the Exchequer, 1 Stra. 664.

(*c*) Lord Forbes *v.* Deniston.

it; for Lord Forbes did not insist merely on the register, but that the lease was made contrary to the power; and therefore the Lord Chancellor of Ireland was mistaken and wrong in decreeing the lease to be good in every respect: and the House of Lords set the decree right only as to this particular part, that, after the death of Lord Granard, the estate determined; and therefore left it open to Lord Forbes to dispute whether it was a lease pursuant to the power, but gave no relief as to the Register Act.

The case of *Blades* v. *B.* (*a*) came before Lord Chancellor *King*, 2nd May, 1727.

William Blades, in 1716, devised certain lands to his wife for life, and after her death to his nine children. The wife enters, but does not register the will. The heir-at-law mortgages the estate, and has it registered, and, upon a bill brought against him, denies notice of the will. But it was proved in evidence that he had notice: and the Court said, that having notice of the first purchase (though it was not registered), bound him; and that getting his own purchase first registered was a fraud; the design of those Acts being only to give parties notice who might otherwise without such registry be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have any notice thereof in any manner, though not by the registry; and that they would never suffer any Act of Parliament made to prevent fraud to be a protection to fraud; and therefore decreed for plaintiff, *looking upon the transaction between the heir-at-law and mortgagee to be collusive.*

I mention this, not only as a material authority, but as determined by Lord *King*, who, we all know, was as willing to adhere to the common law as any judge that ever sat here.

The other case, of *Chivall* v. *Nicholls* (*b*), was in the Court of Exchequer, the 10th of December, 1725, before Lord Chief Baron *Gilbert*, and is a clear authority for giving relief against the Register Act upon an equity of notice. But then there were charges of fraudulent circumstances besides, and therefore not so similar to the present.

Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent.

(*a*) 1 Eq. Ca. Abr. 358, pl. 12.

(*b*) 1 Stra. 664.

The ground of it is plainly this: That the *taking of a legal estate after notice of a prior right, makes a person a malâ fide purchaser;* and not, that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself: for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

And this exactly agrees with the definition of the civil law of *dolus malus* (*a*): "*Dolum malum Servius quidem ita definiit, machinationem quandam alterius decipiendi causâ, cum aliud simulatur, et aliud agitur. Labeo autem, posse et sine simulatione id agi, ut quis circumveniatur: posse et sine dolo malo aliud agi, aliud simulari: sicuti faciunt, qui per ejusmodi dissimulationem deserviant et tuentur vel sua vel aliena. Itaque ipse sic definiit dolum malum* esse omnem calliditatem fallaciam machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. *Labeonis definitio vera est.*"

Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum.* It is a maxim, too, in our law, that *fraus et dolus nemini patrocinari debent* (*b*).

Fraud, or *mala fides,* therefore, is the true ground on which the Court is governed in the cases of notice; and it is a consequence of the decision of the former question, that notice to the agent is sufficient; for if the ground is the fraud, or *mala fides,* of the party, then it is all one, whether by the party himself or his agent: still it is a *machinatio ad circumveniendum,* and the putting *a copy of the first articles and settlement into Norton's hands, to take the opinion of counsel in what manner they could be set aside, is a contrivance to circumvent.*

It has been said, if this woman has been imposed on by her husband, she, instead of cheating, has been cheated.

But, then, who ought to suffer, the person entrusting an agent, or a stranger who did not employ him? He, certainly, who trusts most ought to suffer most.

Mrs. Hatt, the third mortgagee in the case in 2 Vern. 574, men-

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(*a*) Dig. 4, 3, 1, 2.

(*b*) Vide Co., 3 Rep. 78, 7 Rep. 38

tioned before, was imposed on; and so was Moore, in the other case reported there (*a*), clearly imposed on; and yet, if this was to be any excuse, it would make all the cases of notice very precarious; for it seldom happens but the agent has imposed on his principal; and notwithstanding that, the person trusting ought to suffer for his ill-placed confidence.

Therefore, in both respects, as agent and trustee, notice to Joseph Norton is notice to defendant Mary likewise. And as to the Registry Act, here is sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding those only have been registered.

And decreed accordingly.

NOTES.

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(*a*) Jennings *v.* Moore, 2 Vern. 609.

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9. Notice under Land Transfer Acts, 1875 and 1897, p. 253.

1. Generally.

The principal case of *Le Neve* v. *Le N.* decided :—

(1) That the beneficial interests of persons taking land in Middlesex under a settlement in consideration of marriage, and therefore in the position of purchasers for value, the deed of settlement being registered in the Registry, but executed by all parties to it with notice of a prior unregistered settlement, must be postponed in equity to the prior settlement, though the trustees of the second settlement took the legal estate.

(2) That the enactment in the Middlesex Registry Act (*a*), "Every such deed shall be void against any subsequent purchaser or mortgagee unless a memorial be registered," &c., had the effect of giving the legal estate to the trustees of the second settlement which was registered.

(3) That notice to an agent or trustee is notice to the principal. Lord *Hardwicke* lays down as the ground for giving the first settlement priority, notwithstanding the express terms of the Act, "that the taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser, and not that he is not a purchaser for valuable consideration in every other respect."

The observations of Lord *Hardwicke* are made with reference to a case in which there was *notice at the time when the consideration was given*, so that the persons against whom judgment was given were not in the position of purchasers for value without notice, as to which see *Basset* v. *Nosworthy*, ante ; nor is the decision a decision on the question particularly discussed in the note to *Marsh* v. *Lee*, ante, whether, if a person gives consideration without notice, he can protect himself by the legal estate acquired after he has been affected with notice.

Apart from any question arising under the Register Acts, it had been settled long before the principal case, that a purchaser paying his purchase money and taking a conveyance, with notice of an equity binding his vendor, was bound to give effect to it (*b*), and that notice to the agent conducting the sale was the same as notice to the purchaser.

(*a*) 7 Anne, c. 20 (1708).

(*b*) For a modern instance of this rule, see Jared *v.* Clements, (1903) 1 Ch. 428.

Thus, in *Merry* v. *Abney* (*a*), in 1669, A. contracted with B. to purchase lands of him; and afterwards C., on behalf of his son, purchased the same lands, and took a conveyance from B. to his (C.'s) son in fee. On a bill by A. to be relieved against this conveyance, the son pleaded himself to be a purchaser *bonâ fide*, without any notice of B.'s contract with the plaintiff, and without any trust for his father. But, it appearing that C., the father, had notice of the plaintiff's contract before he purchased for his son, the Court decreed in favour of the plaintiff (*b*).

So, in an old case, a purchaser with notice of a prior defective mortgage was ordered either to pay the mortgagee his money, or to surrender to him the legal estate (*c*).

So also, a mortgagee of the legal estate, with notice of an equitable mortgage by deposit of title-deeds took subject thereto (*d*).

So, as to an equitable lien for unpaid purchase-money, it was held a purchaser with notice will be bound by it (*e*).

So also, that a purchaser with notice of a trust will be bound in the same manner as the person from whom he purchased by all the subsisting trusts (*f*), including incumbrances of which the trustees had notice (*g*).

(1) If a person purchases for valuable consideration with notice, from a person who bought without notice, the second purchaser may shelter himself under the first (*h*).

(2) If a person who has notice sells to a *bonâ fide* purchaser for valuable consideration without notice, and at the same time

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(*a*) 1 Ch. Ca. 38.

(*b*) See also Ferrars *v.* Cherry, 2 Vern. 384; Jackson's Case, Lane, 60; Earl Brooke *v.* Bulkeley, 2 Ves. Sen. 498; Daniels *v.* Davison, 16 V. 249; Crofton *v.* Ormsby, 2 S. & L. 583; Kennedy *v.* Daly, 1 S. & L. 355; Field *v.* Boland, 1 Dr. & Walsh, 37; Potter *v.* Sanders, 6 Ha. 1; Holmes *v.* Powell, 8 De G. M. & G. 572; Fenwick *v.* Bulman, 9 Eq. 165.

(*c*) Jennings *v.* Moore, 2 Vern. 609; S. C., 2 Bro. P. C. 278.

(*d*) Birch *v.* Ellames, 2 Anst. 427.

(*e*) Mackreth *v.* Symmons, 15 V. 349, 10 R. R. 85, infra; Grant *v.* Mills, 2 V. & B. 306.

(*f*) Dunbar *v.* Tredennick, 2 Ball & B. 319; Pawlett *v.* A.-G., Hard. 465; Burgess *v.* Wheate, 1 Eden, 195; Bovey *v.* Smith, 1 Vern. 149; Mansell *v.* M., 2 P. W. 681; Phayre *v.* Peree, 3 Dow, 129; Adair *v.* Shaw, 1 S. & L. 262; Wigg *v.* W., 1 Atk. 382; Mead *v.* Lord Orrery, 3 Atk. 238; Mackreth *v.* Symmons, 15 V. 349; Saunders *v.* Dehew, 2 Vern. 271; Mumford *v.* Stohwasser, 18 Eq. 562; Harpham *v.* Shacklock, 19 C. D. 207; London, &c. Banking Co. *v.* Goddard, (1897) 1 Ch. 642.

(*g*) Perham *v.* Kempster, (1907) 1 Ch. 373.

(*h*) See Marsh *v.* Lee, ante, and see Lowther *v.* Carlton, 2 Atk. 242; Wilkes *v.* Spooner, (1911) 2 K. B. 437 (C. A.); Harrison *v.* Forth, Pr. Ch. 51.

conveys to him the legal estate, the latter may protect his title (*a*).

(3) If the right in question were a mere equity, as distinguished from an equitable estate, the defence of purchaser for value without notice might be good even without the legal estate, but in other cases the defence could not be supported without the legal estate (*b*).

Before the passing of the Voluntary Conveyances Act, 1893, under the construction put on the statute 27 Eliz. c. 4, as a settlement of land was void against the purchaser for value, notice of it did not affect him (*c*).

Contracts for Purchase.—The general rule in equity is that after a contract for sale of land the vendor is constructively a trustee for the purchaser, subject to the vendor's lien for his purchase-money, and to his interest as vendor (*d*). But it does not follow that, after the assignment of a contract, and notice of the assignment given to the vendor by the assignee, the notice will have the effect of making the vendor trustee for the assignee. Thus in *Shaw* v. *Foster* (*e*), F. contracted to sell P. leaseholds. P. paid part of the purchase-money. P. subsequently deposited the contract by way of mortgage with his bankers, together with a memorandum agreeing on "request" to execute an assignment. Notice of the memorandum to assign on "request" was given to the vendor. The bankers never agreed to undertake the burden of the contract. It was held that nothing had occurred which prevented the vendor from completing his contract, and conveying the property to P.

The Rule in Tulk v. *Moxhay* (*f*).—The rule deals with the conditions under which a covenant by a former owner of land restricting its user will be enforceable against a subsequent holder of the land. The equitable doctrine on this matter was formulated in *Tulk* v. *Moxhay* (supra). The rule as laid down in that case may be thus stated: A person who holds land with notice, actual or constructive (*g*), of a valid restrictive covenant, not to use that land in a particular manner, which covenant was entered into by the late or former

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(*a*) Basset *v.* Nosworthy, Marsh *v.* Lee, ante; see pp. 125, 146.

(*b*) Basset *v.* Nosworthy, ante, at p. 175.

(*c*) Buckle *v.* Mitchell, 18 V. 100.

(*d*) See per Lord *Cairns* in Shaw *v.* Foster, L. R. 5 H. L. 338; Lysaght *v.* Edwards, 2 C. D. 499, 506.

(*e*) L. R. 5 H. L. 338; Crabtree *v.* Poole, 12 Eq. 13.

(*f*) 2 Ph. 774; and see Duke of Bedford *v.* Trustees of British Museum, 2 My. & K. 552; White *v.* Southend, &c. Co., (1897) 1 Ch. 767; Osborne *v.* Bradley, (1903) 2 Ch. 446; Holloway *v.* Hill, (1902) 2 Ch. 612; Graham *v.* Craig, (1902) 1 Ir. R. 264; Teape *v.* Douse, 92 L. T. 319.

(*g*) See, e.g., Rowell *v.* Satchell, (1903) 2 Ch. 212.

owner, through whom the holder derives title, will be bound by it. Recent decisions require, however, a modification in the statement of the rule. In *London & S. W. Ry. Co.* v. *Gomm* (*a*), *Jessel*, M. R., suggested that a restrictive covenant enforceable under the rule, created an equitable easement enforceable against any holder of the land save a purchaser of the legal estate for value without notice, and therefore enforceable against an equitable owner without notice. This suggestion has been approved by the Court of Appeal (*b*), and, as the law stands since the decision in *Re Nisbet and Potts' Contract* (*b*), a restrictive covenant will bind any holder of the land originally subject to it, whether the holder derives title through the original covenantor or not (*c*), unless the holder can maintain the defence that he was a purchaser of the legal estate for value without notice. A detailed discussion of this rule does not fall within the scope of this note. The following essential points may, however, be noticed. The rule applies only to *restrictive* covenants; a subsequent holder of the land will not be bound under this rule by a positive covenant (*d*). Since the Court enforces the covenant by injunction, it is only the person who is in possession of the land, and who has it in his power to observe the covenant without taking positive action, who can be proceeded against. Thus in *Hall* v. *Ewin* (*e*) the under-lessee in possession was held liable to an injunction to restrain breach of a restrictive covenant in a lease as to carrying on trade, while an injunction was refused against Ewin, his lessor, the under-lessee of the whole term of 80 years (less 3 days), he not being in possession, on the ground that it would have been necessary to hold that he was bound to take legal proceedings against his tenant, contrary to the true principle, that the duty cast upon a person who takes with notice of a restrictive covenant is a purely negative one. The holder of the land has the benefit of whatever would prevent the person entitled to the benefit of the covenant from insisting on it—*e.g.*, material alterations in the property or acquiescence in breaches of the covenant (*f*). When a vendor, on a sale of the whole of his

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(*a*) 20 C. D. 562, at p. 583.

(*b*) (1906) 1 Ch. 386, affirming *Farwell*, J., (1905) 1 Ch. 391; Rogers *v.* Hosegood, (1900) 2 Ch. 388.

(*c*) See p. 179, supra, note (*a*).

(*d*) Austerberry *v.* Oldham (Corporation of), 29 C. D. 750; Haywood *v.* Brunswick, &c. Building Soc., 8 Q. B. D. 403.

(*e*) 37 C. D. 74; Powell *v.* Hemsley, (1909) 2 Ch. 252.

(*f*) Duke of Bedford *v.* Trustees of Brit. Museum, 2 My. & K. 552; Sayers *v.* Collyer, 28 C. D. 103; Knight *v.* Simmonds, (1896) 2 Ch. 294; cf. Craig *v.* Greer, (1899) 1 Ir. R. 258.

land, takes a restrictive covenant from the purchaser, that covenant is not enforceable under the rule against subsequent purchasers (*a*).

As to the Time at which Notice is Given (*b*).—1. If notice of a prior equity or equitable incumbrance is received before payment (*c*) of the money or giving the consideration, the purchaser will be bound by it, except in cases where some special statute excludes this doctrine, *e.g.* sect. 69 of the Merchant Shipping Act, 1854 (*d*), and the Yorkshire Registries Act, 1884, s. 14 (see ante, and as to the exception in case of fraud, *Battison* v. *Hobson*) (*e*).

2. If the purchaser pays his money without notice, and at the same time gets the legal estate, he is protected by the legal estate against prior equities or incumbrances of which he may subsequently acquire notice (*f*), except that, as noticed below, pp. 250 et seq., under the Yorkshire Registries Act of 1884, and under the Irish Registry Act, a previously registered equitable assignment for value could obtain priority against a subsequent conveyance of the legal estate.

3. If the purchaser had no notice at the time of payment of his purchase-money or giving consideration, then the cases shew (*g*) that if the legal estate is not affected with any trust for the mesne incumbrancer, the subsequent incumbrancer may protect himself by obtaining the legal estate after notice, but if the legal estate is affected with any trust the cases are not very clear, and it is difficult to lay down any general rule (*h*).

4. Where, however, the legal estate, or a declaration of trust of it, is not obtained, and there is a conflict between equitable estates, then, as a general rule, all the estates being equitable, they will take effect according to priority of date (*i*), with the exceptions below noticed under certain Registry Acts. And certain anomalies may arise under these Registry Acts, according to the case whether the equity

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(*a*) Formby *v.* Barker, (1903) 2 Ch. 539.

(*b*) See on this point also Basset *v.* Nosworthy, ante; Marsh *v.* Lee, ante.

(*c*) As to what is payment within the rule, and that giving security for the purchase-money is not, see cases cited in Basset *v.* Nosworthy, ante, p. 163, and Tourville *v.* Naish, 3 P. W. 307. See also, as to part payment, Rayne *v.* Baker, 1 Gif. 241.

(*d*) Liverpool Borough Bank *v.* Turner, 1 J. & H. 159; on appeal 2 De G. F. & J. 502; Black *v.* Williams, (1895) 1 Ch. 408; Barclay & Co., Ltd. *v.* Poole, (1907) 2 Ch. 284, decision on Merchant Shipping Act, 1894, s. 56.

(*e*) (1896) 2 Ch. 403.

(*f*) Pilcher *v.* Rawlins, L. R. 7 Ch. 259; and Basset *v.* Nosworthy, ante.

(*g*) See Marsh *v.* Lee and notes, ante.

(*h*) See pp. 127—135, supra.

(*i*) Page 149, supra.

of which notice is alleged is in a form capable of registration or not (*a*).

This subject, "time of notice," also involves the question whether notice to affect a purchaser or mortgagee must be in the same transaction in which it is claimed to be imputed. In the old cases there were conflicting decisions and dicta on this question, when the notice was imputed through notice to the *solicitor* (*b*). These cases are noticed in discussing sect. 3 of the Conveyancing Act, 1882, infra, pp. 207 et seq., which settles the question raised in them in all cases for the future, and is retrospective. In the case of notice to the *principal*, there does not appear to be any presumption, and it would probably be a question of evidence whether he remembered the transaction or not (*c*).

2. Of Actual or Constructive Notice.

Generally.—It is commonly said that notice is either "actual or constructive," but this division without explanation sometimes leads to confusion. The words "constructive notice" are used in two senses:

(1) As denoting notice implied by reason of some omission, as default in making either proper investigation of title, or inquiries as to deeds or facts which would set reasonable purchasers on inquiry; and this kind of notice may be implied by the omissions either of a solicitor or agent, or of the client or principal himself. Probably, accurately speaking, this is the only kind of notice to which the word "constructive" properly applies.

(2) But in common user it is also applied to notice which is *imputed* to the client or principal by reason of notice to the solicitor or agent. In the case of *Espin* v. *Pemberton* (*d*) Lord *Chelmsford* suggested that the proper name for this would be "imputed" notice. It is evident that notice may, so far as regards solicitor or agent, be either actual or constructive, as when notice is implied from omissions; and the division into "actual or constructive" is, in effect, a cross division. The word "constructive" has, however, been so constantly applied to the notice imputed to the client or principal by reason of notice to the solicitor or agent, that it would be misleading to speak of it as not constructive; only it is necessary

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(*a*) White *v.* Neaylon, 11 A. C. 171.

(*b*) Sug. V. & P., (1862) p. 757.

(*c*) Hargreaves *v.* Rothwell, 1 Keen, 154. See Hamilton *v.* Royse, 2 Sch. & L. 327; Mountford *v.* Scott, T. & R. 274.

(*d*) 3 De G. & J. 547.

to bear in mind, in considering the cases, that the word "constructive" is used in these two different senses, and that *actual* notice, if given to the agent or solicitor, may be *constructive* in the second sense as notice *imputed* to the principal.

Actual Notice.—Questions as to what constitutes actual notice have most frequently arisen in the case of trustees and of purchasers. Notice to purchasers is treated in reference to the Conveyancing Act of 1882, infra, pp. 207 et seq.; cases as to notice to trustees may be shortly noticed here.

In a question as to actual notice to a trustee by conversation, Lord *Cairns*, in *Lloyd* v. *Banks* (*a*), said, "I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension, &c." See also *Williams* v. *W.* (*b*), where it was laid down that notice to raise a constructive trust is different from notice to an actual trustee. In *Hallows* v. *Lloyd* (*c*), *Kekewich*, J., said that new trustees "ought to look into the trust documents and papers, to ascertain what notices appear among them of incumbrances and other matters affecting the trust;" but held that they are not fixed with notice through a retiring trustee, of incumbrances affecting the trust estate of which no notice appears among the trust documents, and the existence of which, though known to the retiring trustee, is not disclosed to them.

Constructive Notice.—As to constructive notice, though there is considerable difficulty in stating exactly how far the doctrine goes, it seems clear that it will not be extended. *Esher*, M. R., in an often quoted case (*d*), said: "In a series of cases Lords *Cottenham*, *Lyndhurst*, and *Cranworth*, *Turner*, L. J., and *Jessel*, M. R., have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In *Allen* v. *Seckham* (*e*) I pointed out that the doctrine was a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man

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(*a*) L. R. 3 Ch. 488; see p. 490; and see Saffron Walden, &c. *v.* Rayner, 14 C. D. 406.

(*b*) 17 C. D. 437.

(*c*) 39 C. D. 686.

(*d*) English and Scottish, &c. Co. *v.* Brunton, (1892) 2 Q. B. at p. 708; and see *Re* Castell and Brown, Ltd., (1898) 1 Ch. 315; *Re* Valletort Sanitary Steam Laundry Co., Ltd., (1903), 2 Ch. 654; *Re* Bourne, (1906) 1 Ch. 113; *Re* Standard Rotary Co., 95 L. T. 829; Wilson *v.* Kelland, (1910) 2 Ch. 306.

(*e*) 11 C. D. 790.

does not know the facts, and yet it is said that constructively he does know them." In *Benham* v. *Keane* (*a*), Lord *Hatherley* said: "'The hardship which sometimes arises springs from the difficulty of drawing the nice distinction between cases of fraud and cases of implied notice.'" It is difficult either to ascertain the principle on which it is founded or to give a definition of it (*b*). It will be seen from some of the cases cited below, that it has generally been put on fraud or negligence so gross as to amount to evidence of fraud—*i.e.* that the purchaser purposely avoided inquiry in order to avoid discovery (*c*). In *Northern Counties, &c.* v. *Whipp* (*d*), the judgment of the Court of Appeal treats constructive notice as based on fraud, but it seems that this will not meet all the cases where it has been implied from mere negligence: see the cases referred to in *Bailey* v. *Barnes* (*e*), and the cases as to investigation of title, infra, p. 213.

Eyre, C. B., in *Plumb* v. *Fluitt* (*f*), defined it as follows:—"Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted."

In *Espin* v. *Pemberton* (*g*), *Chelmsford*, C., said: "Constructive notice, properly so called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry or from his wilfully abstaining from inquiry, to avoid notice."

In *Ware* v. *Egmont* (*h*), Lord *Cranworth* says: "Where a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an

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(*a*) 1 J. & H. 702.

(*b*) Lord St. Leonards introduced a Bill into the House of Lords, in 1862, to limit and define constructive notice. See Sug. V. & P. (1862), p. 784.

(*c*) See Jones *v.* Smith, 1 Ha. 43; *Re* Valletort Sanitary Steam Laundry Co., Ltd., (1903) 2 Ch. 654.

(*d*) 26 C. D. 482.

(*e*) (1894) 1 Ch. 31; and see Walker *v.* Linom, (1907) 2 Ch. 104.

(*f*) 2 Anst. 438.

(*g*) 3 De G. & J. 554.

(*h*) 4 De G. M. & G. 460, 473.

act of gross or culpable negligence." In *Montefiore* v. *Browne* (*a*), Lord *Cranworth* also says: "But at the same time I said that, in my opinion, every purchaser and mortgagee must be considered as having notice, not merely if he might have obtained, but if he ought to have obtained a knowledge of that with which he is to be affected." In this case it was held that a recital of a judgment had put the mortgagees on inquiry which would have disclosed another incumbrance.

In *Bailey* v. *Barnes* (*b*), *Lindley*, L. J., after reading the extract from Lord *Cranworth's* judgment in *Ware* v. *Egmont*, says: "'Gross or culpable negligence' in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. In the celebrated judgment of *Wigram*, V.-C., in *Jones* v. *Smith* (*c*), the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong."

Without therefore professing to give a principle or definition that would be applicable to every case, it may be briefly stated as the result of the cases hereinafter cited, that constructive notice will be implied where there is—(1) notice of any fact which would put a reasonable man on such an inquiry as would have led to discovery; (2) notice of any deed necessarily forming part of the title, and within the distance back of what would be usual title, which deed, if examined, would have disclosed the objection or right; (3) such negligence in making inquiries as to deeds, or (4) as to title, as would, according to the Judges, be considered gross negligence in a man of business. The decisions on (3) and (4), and probably (2), were (5) first based on the ground that the negligence was evidence of a wilful desire to avoid discovery, then (6) extended to cases of similar facts without imputing an actual design to avoid discovery,

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(*a*) 7 H. L. Cas. 241; see p. 269. (*b*) (1894) 1 Ch. 35. (*c*) 1 Ha.

probably on the ground that it was impossible or difficult to distinguish the cases from those where there was a wilful design, and then (7) extended to cases where there was a contract precluding investigation, or (8) a statute preventing investigation (*a*). (9) In the cases of constructive or imputed notice through notice to the solicitor or agent, the ground taken seems to have been somewhat similar to that on which mere negligence was treated as fraud—viz., that if evidence were admitted of non-disclosure by the solicitor, it would be almost impossible to detect cases of collusion between solicitor and client; and hence the rule (10), that the imputation of notice through the solicitor should not be rebutted, either by evidence that it was against his interest to disclose, or (11) evidence that he did not in fact disclose.

There are anomalies in the present law as to constructive notice, but the cases noticed in *Northern Counties, &c.* v. *Whipp* (*b*), of not inquiring for the deeds, seem to stand on a different footing from others; for since title-deeds are treated to a great extent as indicative of title, the leaving them in the hands of a grantor may be treated as an act enabling him to commit a fraud (*c*). On the other hand, it would seem that the statutory provision, that on selling part of a property the vendor might keep the deeds (Vendor and Purchaser Act, 1874, s. 2), should have contained a further provision providing that he should indorse on the deeds retained notice of the sale, and it would be prudent for purchasers of part, not getting the deeds, to stipulate expressly for this.

3. The Conveyancing Act, 1882, as to Notice.

This Act enacts:

"Sect. 3 (1): A purchaser (*d*) shall not be prejudicially affected by notice of any instrument, fact, or thing, unless:

"(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

"(ii.) In the same transaction with respect to which a question

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(*a*) This extension appears anomalous and indefensible.

(*b*) 26 C. D. 482.

(*c*) See, e.g., Whitbread *v.* Jordan, 1 Y. & C. Ex. 303, commented upon in Jones *v.* Smith, 1 Ha. 43; Walker *v.* Linom, (1907) 2 Ch. 104.

(*d*) A purchaser includes a mortgagee, *Re* Cousins, 31 C. D. 676; and sect. 1, sub-sect. (4) (ii.), of the Act.

> of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

"(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

"(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

"(4) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section."

In *Bailey* v. *Barnes* (*a*) it was said that this section "really does no more than state the law as it was before, but its negative form shews that a restriction rather than an extension of the doctrine of notice was intended." The section was intended "for the protection of purchasers to some extent * * * against that refined doctrine of imputed notice which had been found to work very grievous injustice to honest men": per *Chitty*, J., in *Re Cousins* (*b*).

In *Hunt* v. *Luck* (*c*) *Vaughan Williams*, L. J., said that, so far as sect. 3 is concerned, the practical result is that the law prior to the Conveyancing Act can only be used as a shield, and not treated as going beyond the law contained in the code like definition in the section.

4. First Condition of Notice under the Act.

Unless the instrument, fact, or thing "is within his (the purchaser's) own knowledge." These words do not seem to affect the old law with respect to actual notice. It had been held before the Act that mere vague reports from strangers or mere general

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(*a*) (1894) 1 Ch. 35.

(*b*) 31 C. D. 671, 676.

(*c*) (1902) 1 Ch. 428, at p. 435; see also per *Cozens-Hardy*, L. J., ibid. at p. 430, and in Molyneux *v.* Hawtrey, (1903) 2 K. B. at p. 497.

assertions that some other persons claimed title were not sufficient to affect a person with actual notice (*a*).

Thus in *Barnhart* v. *Greenshields* (*b*), Lord *Kingsdown* (then *Pemberton Leigh*) in delivering judgment says:—"We now come to the parol evidence of notice. Upon this subject the rule is settled that a purchaser is not bound to attend to vague rumours, to statements by mere strangers, but that a notice, in order to be binding, must proceed from some person interested in the property" (*c*).

Notwithstanding, however, the strong terms in which these dicta are expressed, it is submitted that it would not be prudent or safe in practice for a purchaser to rely upon them in any case in which he had, even from a person not interested in the property, reasonably clear information of some prior equity or incumbrance, nor is it clear that, if such information gave notice of a deed, the purchaser would not be affected by it (*d*).

The Act of 1882 uses the word "knowledge" and leaves the question open whether previous knowledge would be held to imply actual knowledge of the purchaser at the date of purchase, while the Act limits the case of notice to counsel, solicitor, or agent to notice received in the transaction. It was said in the case of *Hamilton* v. *Royse* (*e*), "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase."

5. Second Condition of Notice under the Act.

The second condition in sub-sect. (1) of sect. 3 of the Act is, "or" unless such instrument, fact, or thing "would have come to his knowledge if such inquiries and inspections had been made as *ought* reasonably to have been made by him." This is in effect constructive notice proper, as distinguished from the third condition in sub-sect. (2), which relates to notice to the solicitor or agent *imputed* to the client or principal. The word "ought" does not

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(*a*) Wildgoose *v.* Wayland, Gould, 147; Jolland *v.* Stainbridge, 3 V. 478; Butcher *v.* Stapely, 1 Vern. 363.

(*b*) 9 Moo. P. C. 36.

(*c*) See also Hine *v.* Dodd, 2 Atk. 275; Sug. V. & P. (1862), p. 755.

(*d*) But see Rowell *v.* Satchell, (1903) 2 Ch. 212; and see Dart, V. & P., 7th edit., p. 875.

(*e*) 2 Sch. & L. 327.

imply that a purchaser is under any duty towards a third person to make any inquiries or inspection. It has reference to that which a reasonable man would do, having regard to that which men of business usually do under similar circumstances (*a*).

Condition of Estate.—It has been laid down in old cases that whatever is sufficient to put a person upon inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it. Thus if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice of what the trust is (*b*).

So the *state of the property* may be such as to put a purchaser upon inquiry. Upon this principle it was held that the purchaser of land below the level of the sea, was bound to inquire how all sea-walls, necessary for the protection of the property against the encroachments of the sea, were maintained, and had therefore constructive notice of all provisions for such purpose (*c*). So where a mortgagee of a burial ground had notice of the purposes to which it was devoted, he was held to be bound by rights of burial, temporary or in perpetuity, granted by the mortgagor while in possession (*d*). So the existence of an archway at the time of the purchase, with knowledge that the adjoining land was to be built upon so as to leave the archway the only access to the vendor's mews, was held to be sufficient to affect the purchaser with constructive notice of a right of way thereunder (*e*).

The existence of windows is, according to dicta of Lord *Chelmsford,* constructive notice of a right of access of light to them (*f*). It was held, however, in *Allen* v. *Seckham* (*g*), reversing the decision of *Hall*, V.-C., and dissenting from these dicta of Lord *Chelmsford*, that the mere fact of there being windows in an adjoining house which overlook a purchased property, is not constructive notice of any agreement giving a right to the access of light to them, because windows are frequently made in situations where they are liable to be obstructed, the owner being in hopes of coming to some arrangement about lights, or being disposed to take his chance of acquiring a right by lapse of time.

(*a*) See per *Lindley*, L. J., in Bailey *v.* Barnes, (1894) 1 Ch. at p. 35.

(*b*) Anon., Freem. Ch. Ca. 137, c. 171.

(*c*) Morland *v.* Cook, 6 Eq. 252; cf. Union Lighterage Co. *v.* London Graving Dock Co., (1902) 2 Ch. 557. This principle seems to have been pressed too far in the case of Hervey *v.* Smith, 22 B. 299, 1 K. & J. 389; see Sug. V. & P., 14th edit., p. 765.

(*d*) Moreland *v.* Richardson. 24 B. 33.

(*e*) Davies *v.* Sear, 7 Eq. 427.

(*f*) Miles *v.* Tobin, 16 W. R. 465.

(*g*) 11 C. D. 790.

Not Inquiring for Title-deeds.—Notice that the title-deeds are in another man's possession may be held to be notice of any claim which he has upon the estate, especially if the person having such notice appears studiously to have avoided inquiry for what purposes they were deposited, or the conveyance to him is to secure an antecedent debt (*a*). A mortgagor, on paying off a part of his mortgage debt, is not, however, bound to enquire for the deeds, and apparently is not affected with constructive notice of an equitable sub-mortgage by deposit of deeds by his mortgagee (*b*).

And it has been held that where the holder of the deeds is also the largest co-owner and the person in whose possession, independently of any mortgage, the deeds should be, notice of his possession is not notice of an equitable mortgage to him (*c*).

Notice that the deeds are in the possession of a person other than the vendor, though notice of that person's rights is not notice to the purchaser of a fraud committed by the vendor in mortgaging by a false and spurious deed (*d*).

Notice that the solicitor of the vendor or mortgagor has possession of the title-deeds, is not notice of an equitable mortgage to the solicitor (*e*).

The *mere absence*, however, of the title-deeds has never been held sufficient *per se* to affect a party with notice, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; for in that case the Court cannot impute fraud, or gross or wilful negligence to him (*f*).

But the Court will impute notice on the ground of fraud, or gross and wilful negligence shewing "that he wilfully shuts his eyes to the facts" (*g*), to a person dealing with an estate, and not

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(*a*) Birch *v.* Ellames, 2 Anst. 427; Hiern *v.* Mill, 13 V. 114; Dryden *v.* Frost, 3 My. & C. 670, 673; Maxfield *v.* Burton, 17 Eq. 15.

(*b*) Berwick & Co. *v.* Price, (1905) 1 Ch. 632.

(*c*) *Ex p.* Hardy, 2 D. & C. 393, 394.

(*d*) Hipkins *v.* Amery, 2 Gif. 292, 301.

(*e*) Bozon *v.* Williams, 3 Y. & J. 150; but see Richards *v.* Platel, Cr. & Ph. 79.

(*f*) Plumb *v.* Fluitt, 2 Anst. 432; Hewitt *v.* Loosemore, 9 Ha. 449, 458; Finch *v.* Shaw, 19 B. 500; S. C., nom. Colyer *v.* Finch, 5 H. L. Cas. 905; Jones *v.* Williams, 24 B. 47; Roberts *v.* Croft, 24 B. 223, 2 De G. & J. 1; Perry Herrick *v.* Attwood, 2 De G. & J. 37; Hunt *v.* Elmes, 28 B. 631, 2 De G. F. & J. 578; Espin *v.* Pemberton, 4 Drew. 333, 3 De G. & J. 547; Atterbury *v.* Wallis, 8 De G. M. & G. 454; Hipkins *v.* Amery, 2 Gif. 292; Dixon *v.* Muckleston, L. R. 8 Ch. 155; Brown *v.* Stedman, 44 W. R. 458; *Re* Valletort Steam Laundry Co., (1903) 2 Ch. 654.

(*g*) Ratcliffe *v.* Barnard, L. R. 6 Ch. 652; but see the observations on this case in Oliver *v.* Hinton, (1899) 2 Ch. 264; Berwick & Co. *v.* Price, (1905) 1 Ch. 632, 640; Walker *v.* Linom, (1907) 2 Ch. 104.

obtaining possession of the title-deeds, if he *omits all inquiries as to them*, or neglects to call for an abstract of title, and will hold him to have notice of those circumstances which, had he not neglected his duty, would have come to his knowledge (*a*).

In *Northern Counties of England, &c. Co.* v. *Whipp* (*b*), *Fry*, L. J., in delivering the judgment of the Court of Appeal, analysed and defined the classes of cases in which a legal mortgagee had been, or would be, postponed by reason either of omissions or commissions with respect to title-deeds so exhaustively, that it may be taken as a landmark in the history of the law of notice.

The judgment, so far as regards notice from not inquiring for the deeds, which alone falls within the scope of this Note, divided the cases into the following classes:—

(1) Where the legal mortgagee or purchaser has made no inquiry for the title-deeds and has been postponed, either to a prior equitable estate (*c*), or to a subsequent equitable owner who used diligence in inquiring for the title-deeds (*d*). In cases of the former nature the Courts have considered the conduct of the mortgagee in making no inquiry to be evidence of a fraudulent intent to escape notice of a prior equity, and in the latter cases have held that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent (*e*).

"(2) Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority (*f*).

"(3) Where a legal mortgagee has received *part* of the deeds

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(*a*) Worthington *v.* Morgan, 16 Si. 547; Hewitt *v.* Loosemore, 9 Ha. 458; Finch *v.* Shaw, 19 B. 511; Allen *v.* Knight, 5 Ha. 272, 11 Jur. 527; Ladbroke *v.* Lee, 4 De G. & Sm. 106; Broadbent *v.* Barlow, 3 De G. F. & J. 570; note to Russel *v.* R., ante; Whitbread *v.* Jordan, 1 Y. & C. Ex. 303, which is difficult to reconcile with later cases, explained in *Re* West, 56 L. T. 622; Jones *v.* Williams, 24 B. 47; Peto *v.* Hammond, 30 B. 495; and see Jones *v.* Smith, 1 Ha. 64, 1 Ph. 255; Spencer *v.* Clarke, 9 C. D. 137; *Re* Morgan, 18 C. D. 93; Oliver *v.* Hinton, supra; *Re* Alms Corn Charity, (1901) 2 Ch. 750.

(*b*) 26 C. D. 482.

(*c*) Worthington *v.* Morgan, 16 Si. 547.

(*d*) Clarke *v.* Palmer, 21 C. D. 124.

(*e*) 26 C. D. 491. See the nature of this "*fraudulent* intent" discussed in Oliver *v.* Hinton, (1899) 2 Ch. 264; Walker *v.* Linom, (1907) 2 Ch. 104.

(*f*) Barnett *v.* Weston, 12 V. 130; Hewitt *v.* Loosemore, 9 Ha. 449; Agra Bank *v.* Barry, L. R. 7 H. L. 135; Ratcliffe *v.* Barnard, L. R. 6 Ch. 652, 654; Kettlewell *v.* Watson, 21 C. D. 685, 26 C. D. 501; Oliver *v.* Hinton, (1899) 2 Ch. 264.

only, under a reasonable belief that he was receiving all, and has accordingly not lost his priority" (*a*).

With reference to class (1) it may be added that the negligence of a trustee may postpone his innocent *cestui que trusts*. Thus in *Lloyds Banking Co.* v. *Jones* (*b*), it was held that the neglect of the trustee of a marriage settlement to inquire for the deeds postponed him and the infant *cestui que trusts* to a subsequent mortgagee by deposit.

In *Re Ingham* (*c*), the Court held that one executor was not postponed by the negligence of his co-executor. In that case a mortgagee of leaseholds died, leaving two executors, C. and D. C. had possession of the mortgage deeds, and was guilty of negligence sufficient, if he had been sole mortgagee in his own right, to postpone him to subsequent mortgagees. C. died. D. (the co-executor), who had been guilty of no negligence, was not postponed.

Notice of Lessor's Title.—A lessee (*d*), sub-lessee (*e*), or tenant from year to year (*f*), has constructive notice of his lessor's title, and, if he enters without inquiries, he will be taken to have notice of that which he would have found out if he had made proper inquiries (*g*).

Notice from Not Investigating Title.—The following is a summary of the law, by *Turner*, L. J., in 1866: "It cannot, I think, be denied that, generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases, ought not to be held to apply in the case of a tenant from year to year. The difference in the cases seems to me to be only in the quantum of injury which falls upon the party to whom the rule is applied" (*h*).

In *Robson* v. *Flight*, in 1865 (*i*), *Westbury*, C., said: "An attempt

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(*a*) Hunt *v.* Elmes, 2 De G. F. & J. 578; Ratcliffe *v.* Barnard, L. R. 6 Ch. 652; Colyer *v.* Finch, 5 H. L. Cas. 905.

(*b*) 29 C. D. 221, followed in Walker *v.* Linom, (1907) 2 Ch. 104.

(*c*) (1893) 1 Ch. 352.

(*d*) Feilden *v.* Slater, 7 Eq. 523; Holloway Bros., Ltd. *v.* Hill, (1902) 2 Ch. 612.

(*e*) Parker *v.* Whyte, 1 Hem. & M. 167.

(*f*) Wilson *v.* Hart, L. R. 1 Ch. 463; 2 Hem. & M. 551.

(*g*) And see Clements *v.* Welles, 1 Eq. 200, 35 B. 513; Patman *v.* Harland, 17 C. D. 353; Imray *v.* Oakshette, (1897) 2 Q. B. 218.

(*h*) Wilson *v.* Hart, L. R. 1 Ch. 467.

(*i*) 4 De G. J. & S. 608. See also Lord *Hatherley* (then *Page Wood*, V.-C.) in Parker *v.* Whyte, 1 Hem. & M. 171.

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is made by the defendant, the assignee of the lease, to set up the defence of a purchaser for valuable consideration without notice, but as he bought under an engagement not to ask for the lessor's title, he must have imputed to him the knowledge which on prudent inquiry he would have immediately obtained."

In *Peto* v. *Hammond* (*a*) Lord *Romilly* held that special conditions of sale limiting the extent of title were no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice.

But see the exception suggested by Lord *Hatherley*, C., in *Hunter* v. *Walters* (*b*), that the rule would not apply where the purchaser merely omitted to investigate the title to a small part of a large property. And where the purchase-money was extremely small—42*l.*—and no investigation of the title was made, the property being in a register county—Yorkshire, *Fry*, J., held that the purchaser was not postponed (*c*).

Abstaining from any investigation of title will not affect a purchaser or mortgagee with notice of a fact which would not have become apparent had the title been properly investigated (*d*).

These rules are unaffected by the provisions of the Vendor and Purchaser Act, 1874 (*e*). Sect. 1 of that Act substitutes forty years as the period of commencement of title for the sixty years which a purchaser on an open contract could require before the Act, leaving it open to the purchaser to require an earlier title in cases similar to those in which an earlier title than sixty years could be required before the Act.

By sect. 2, sub-sect. 1, of the Act (*e*), under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold, the intended lessee or assign shall not be entitled to call for the title to the freehold. By sub-sect. 2 recitals in instruments twenty years old, in the absence of evidence to the contrary, are to be deemed sufficient.

By sect. 3, sub-sect. 1, of the Conveyancing Act of 1881, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have a right to call for the title to the leasehold reversion (*f*). Under sub-sect. 2 of the

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(*a*) 30 B. 495.

(*b*) L. R. 7 Ch. 75, at p. 83.

(*c*) Kettlewell *v.* Watson, 21 C. D. 685, at p. 708; 26 C. D. 502.

(*d*) Gainsborough (Earl of) *v.* Watcombe &c. Co., 53 L. T. 116; 54 L. J. Ch. 991; and see Taylor *v.* London and County Banking Co., (1901) 2 Ch. 231.

(*e*) 37 & 38 Vict. c. 78.

(*f*) See, as to the meaning of this, Gosling *v.* Woolf, (1893) 1 Q. B. 39.

same section, the purchaser of an enfranchised copyhold is not entitled to call for the title to make an enfranchisement. Under sub-sect. 3 a purchaser is not to require an abstract or production of any instrument prior to the root of title, and is to assume recitals of such prior instruments are sufficient and correct. By sub-sect. 4, on the sale of a lease it is to be assumed that the lease was duly granted; and under sub-sect. 5, on a sale of an underlease, that the underlease and every superior lease were duly granted.

As to sect. 1 of the Vendor and Purchaser Act, 1874, a purchaser who agrees to take less than the full forty years' title, has constructive notice of all facts which would have been shewn on a proper abstract of the forty years' title (*a*).

In *Patman* v. *Harland* (*b*), *Jessel*, M. R., held that the rule that a lessee has constructive notice of the lessor's title, has not been altered by sect. 2, sub-sect. 1, of the V. & P. Act, 1874, but that a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title (*c*).

As to the extent to which notice of an instrument would be implied from omitting to investigate the title, in *Patman* v. *Harland* (*d*) *Jessel*, M. R., said it had been settled for more than a century that a lessee has constructive notice of his lessor's title; that, as a purchaser of the fee simple is bound to look into the title, so is the lessee bound to make reasonable inquiry; and proceeded: "As to what is reasonable inquiry, it has been held that he must require the usual title, whatever the usual title may be."

Before the Conveyancing Act of 1881 it had been held that notice of a deed was notice of its contents, and also of whatever deeds examination of that deed would have disclosed (*e*). It is not clear whether sect. 3, sub-sect. 3, of that Act would prevent an implication of notice from recitals of instruments, which under that sub-section are to be taken as sufficient in the absence of evidence to the contrary, even if the recitals throw no suspicion on the title (*f*). But plainly, if they do suggest any suspicions, then the

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(*a*) *Re* Cox & Neve's Contract, (1891) 2 Ch. 109, 118; *Re* Nisbet & Potts' Contract, (1906) 1 Ch. 386; and cf. Gainsborough (Earl of) *v.* Watcombe Terra Cotta, &c., 53 L. T. 116.

(*b*) 17 C. D. 353.

(*c*) Mogridge *v.* Clapp, (1892) 3 Ch. 382, 397; Imray *v.* Oakshette, (1897) 2 Q. B. 218; see also Thornewell *v.* Johnson, 50 L. J. Ch. 611; 44 L. T. 768, 29 W. R. 677; Nicoll *v.* Fenning, 19 C. D. 258.

(*d*) Supra.

(*e*) Coppin *v.* Fernyhough, 2 Bro. Ch. 291.

(*f*) And see *infra*, p. 219.

purchaser would be affected (*a*), as he will be also if the earlier title is accidentally disclosed (*b*). And it must be borne in mind that the forty years' limit does not apply where an earlier title than sixty years could have been required before the Act (*c*). And the purchaser retains power to object to the earlier title, if he can shew a defect *aliunde* (*d*).

There does not appear to have been a decision on the question whether a purchaser of an enfranchised copyhold (*e*) would be affected with constructive notice of anything that would have appeared had the lord's title been investigated; but assuming that the decision in *Patman* v. *Harland*, supra, would be applicable, it must be treated as another anomaly, and not as indicating fraud or culpable negligence.

A purchaser, including a lessee, is in some cases expressly protected from the application of the doctrine of notice by reason of not making inquiries. The Conveyancing, &c. Act, 1881, sect. 21, sub-sect. 2, protects purchasers under a conveyance in professed exercise of the powers of sale conferred on a mortgagee by the Act (*f*); sect. 22, sub-sect. 1, makes the receipt of the mortgagee selling a sufficient discharge (*g*); sect. 55 makes the receipt in the body of a deed sufficient evidence of payment (*h*). Before this Act, if there had been a receipt only in the body of the deed, and not endorsed; or if endorsed, but not in the form usual in practice; and the purchase-money, or any part of it, had not been paid, the purchaser would have been held to have notice of this (*i*).

By sect. 45 (3) of the Settled Land Act, 1882, persons dealing

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(*a*) Sellick *v.* Trevor, 11 M. & W. 722.

(*b*) Smith *v.* Robinson, 13 C. D. 148.

(*c*) Parr *v.* Lovegrove, 4 Dr. 170; *Re* Marsh & Granville, 24 C. D. 11.

(*d*) Darlington *v.* Hamilton, Kay, 550; Waddell *v.* Wolfe, L. R. 9 Q. B. 515; Harnett *v.* Baker, 20 Eq. 50; Jones *v.* Clifford, 3 C. D. 779; *Re* Banister, 12 C. D. 131.

(*e*) See, as to title to enfranchised lands, Kerr *v.* Pawson, 25 B. 394; *Re* Agg-Gardner, 25 C. D. 600.

(*f*) Bailey *v.* Barnes, (1894) 1 Ch. 25; Life Interest and Reversionary Securities Corporation *v.* Hand in Hand Society, (1898) 2 Ch. 230; cf. *Re* Edwards to Green, 58 L. T. 789. A purchaser buying with express notice of the impropriety of the sale would not be protected. See Bailey *v.* Barnes, supra; Selwyn *v.* Garfit, 38 C. D. 273, 283; *Re* Thompson & Holt, 44 C. D. 492, and see pp. 44, 45, supra.

(*g*) Cf. Dicker *v.* Angerstein, 3 C. D. 600.

(*h*) Lloyds Bank *v.* Bullock, (1896) 2 Ch. 192; Saunders *v.* Kent, (1885) W. N. p. 147; Bateman *v.* Hunt, (1904) 2 K. B. 530; Powell *v.* Browne, (1907) W. N. 228 (C.A.); 97 L. T. 854; Rimmer *v.* Webster, (1902) 2 Ch. 163; and see as to this section infra, notes to Brice *v.* Stokes.

(*i*) Kennedy *v.* Green, 3 My. & K. 699; Greenslade *v.* Dare, 17 B. 502, 20 B. 284; Robinson *v.* Briggs, 1 Sm. & G. 188.

with a tenant for life are protected from inquiries as to notice to the trustees. In *Mogridge* v. *Clapp* (*a*), a tenant by the curtesy proposed to grant a lease, not in exercise of any power of the tenant for life, but as absolute owner, and the lessee seems to have made no investigation of title. There were no trustees, for the purposes of the Act, and no notice was consequently given. It was held that the lessee, having dealt with the lessor in good faith, was protected by this section, and that the lease was valid.

Anything *out of the ordinary course*, such as, before the Conveyancing Act of 1881, the unusual position of the indorsed receipt, may be held to affect a person with notice of a fraud affecting the deed, as it ought to have induced his solicitor to have made further inquiries, which would have led to its discovery (*b*).

If, however, the peculiarity in a deed is not in any way connected with the circumstances under which the deed might be set aside, it will not affect a purchaser with notice of such circumstances. Thus, the absence in a deed of the receipt for the consideration, although it was formerly notice of its non-payment, was not constructive notice of other irregularities in the transaction, *e.g.*, as notice that the grantor was of unsound mind, or that he was induced to execute the deed under undue influence (*c*).

A director of a company is not bound to examine entries in any of the company's books; hence it has been held that in the absence of actual fraud on his part, the doctrine of constructive notice ought not to be extended so as to impute to him a knowledge of the contents of the books, and thus render him liable equally with co-directors guilty of fraud (*d*).

Notice of a Deed.—It may be laid down generally that a purchaser with notice of a deed necessarily forming part of the chain of title of a vendor or lessor, and therefore *necessarily* affecting the property, has constructive notice of and is bound by its contents (*e*), and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the

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(*a*) (1892) 3 Ch. 382. Cf. *Re* Handman & Wilcox's Contract, (1902) 1 Ch. 599, and Hurrell *v.* Littlejohn, (1904) 1 Ch. 689 (cases on sect. 54 of S. L. A. 1882); and see Marlborough *v.* Sartoris, 32 C. D. 623.

(*b*) Kennedy *v.* Green, 3 My. & K. 699; Robinson *v.* Briggs, 1 Sm. & G. 188.

(*c*) Greenslade *v.* Dare, 20 B. 284.

(*d*) *Re* Denham & Co., 25 C. D. 752; *Re* Hampshire Land Co., (1896) 2 Ch. 743; *Re* National Bank of Wales, (1899) 2 Ch. 629, (1901) A. C. 477.

(*e*) Jones *v.* Smith, 1 Ha. 43; Davis *v.* Hutchings, (1907) 1 Ch. 356.

vendor or lessor that it contains nothing in any way affecting the title.

But the position is different where the deed need *not necessarily* affect the title, and the purchaser is informed that it does not affect the title. Lord *Esher*, M. R., in *English and Scottish, &c. Co.* v. *Brunton* (*a*), adopted on this point the statement of the law as given in former editions of this work as follows: "I think the doctrine has been accurately deduced from the various cases, and is accurately stated in the Notes to *Le Neve* v. *Le N.* Although, as we have already seen, where a party has notice of a deed which, from the nature of it, must affect the property, or is told at the time that it does not affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; nevertheless, where a party has notice of a deed which does not necessarily affect the property, and is told that in fact it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the representation to be true, he will not be fixed with notice of the contents of the instrument." In this case it was held that debentures of a company came within the class of documents that need not necessarily affect the property, and that the mortgagee was not affected with notice when his solicitor had notice that debentures had been issued, but was told they did not affect the property.

The principle laid down in *English and Scottish &c. Co.* v. *Brunton*, supra, has been fully applied in later cases. Debentures creating a floating charge frequently contain a proviso forbidding the creation of mortgages or charges in priority to or ranking *pari passu* with those debentures. A subsequent mortgagee from the company of specific property who has notice of the proviso will be postponed to the debenture holders; but notice that the debentures have been issued is not notice of the proviso, and registration of the debentures under the Companies Act is notice only of the existence of the debentures and not of the proviso (*b*). Where there is no notice of the proviso, such a mortgagee, whether legal or equitable of specific property, is not postponed to the debenture holders (*b*).

The law is put in the same way by *Jessel*, M. R., in *Patman* v.

(*a*) (1892) 2 Q. B. 700, at p. 709.

(*b*) *Re* Castell and Brown, (1898) 1 Ch. 315; *Re* Valletort Sanitary Steam Laundry Co., Ltd., (1903) 2 Ch. 654; *Re* Standard Rotary &c. Co., 95 L. T. 829; *Re* Bourne, (1906) 1 Ch. 113; but cf. Wilson *v.* Kelland, (1910) 2 Ch. 306; and see Vol. I., pp. 109, 110 and ante, p. 111.

Harland (*a*) : "Where you know of a deed it is no answer to be told that it does not prejudicially affect the title, as if it does affect the title you are bound by its contents. There is a class of cases, of which I think *Jones* v. *Smith* (*b*) is the most notorious, where the purchaser was told of a deed which might *or might not* affect the title, and was told at the same time that it did not affect the title. Supposing you are buying land of a married man, as in *Jones* v. *Smith,* and you are told at the same time that there is a marriage settlement, but the deed does not affect the land in question, you have no constructive notice of its contents, because, although you know there is a settlement, you are told it does not affect the land. * * * But that line of cases has no bearing at all on a case *where you know the deed does affect the land,* and the question as to the extent to which it does affect the land is to be ascertained only by looking at the deed itself" (*c*).

Notice from Recital, Reference, &c., &c.—It was well established by old cases (*d*), that where the purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia* that he sought not after it (*e*) ; and that it is immaterial whether the deed leads him to the knowledge of that fact by the description of the parties, or the recitals, or otherwise. In *Bisco* v. *Earl of Banbury* (*f*), a party purchased with actual notice of a specific mortgage. The deed creating this mortgage referred to other incumbrances. The question was, whether the purchaser was to be affected with notice of the incumbrances which the deed creating the mortgage disclosed. The *Lord Chancellor* laid down as a rule, "that the purchaser could not be ignorant of the mortgage, and ought to have seen that, and that

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(*a*) 17 C. D. 353, p. 357; supra, p. 215.

(*b*) 1 Ha. 43, 1 Ph. 244.

(*c*) See especially the judgment of *Wigram*, V.-C., in Jones *v.* Smith, supra, and Allen *v.* Knight, 5 Ha. 272, 11 Jur. 527; Bird *v.* Fox, 11 Ha. 40; Ware *v.* Egmont, 4 De G. M. & G. 460, 473, 474; Coles *v.* Sims, 5 De G. M. & G. 1; Williams *v.* W., 17 C. D. 437; Carter *v.* Williams, 9 Eq. 678; Banco de Lima *v.* Anglo-Peruvian Bank, 8 C. D. 160; Harryman *v.* Collins, 18 B. 11; *Re* Bright's Trust, 21 B. 430; Holloway *v.* Hill, (1902) 2 Ch. 612; *Re* Alms Corn Charity, (1901) 2 Ch. 750.

(*d*) Whether these cases are in any way affected by sect. 3, sub-sect. 3, of the Conveyancing Act, 1881, is doubtful. Having regard to the construction put upon sect. 2, sub-sect. 1, of the Vendor and Purchaser Act, 1874, in Patman *v.* Harland, 17 C. D. 353, it would appear that they are not.

(*e*) Moore *v.* Bennett, 2 Ch. Ca. 246; Bacon *v.* B., Tothill, 133.

(*f*) 1 Ch. Ca. 287.

would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him." So, in *Coppin* v. *Fernyhough* (*a*), the mortgagee of a lease which recited the surrender of a former lease, which was in consideration of the surrender of a former lease, in which the plaintiff's title appeared, was held to have notice of that title. This case decides, in effect, that a purchaser who has actual notice of one instrument affecting an estate, has constructive notice of all other instruments to which an examination of the first could have led him (*b*).

So, in *Davies* v. *Thomas* (*c*), the purchaser had actual notice that the property in question was affected by a marriage settlement, and this settlement, when referred to, gave notice of a will. The Court decided that the purchaser had notice of the will. This case, however, has been questioned (*d*).

Notice of a trust has been held to be notice of all the particulars of the trust (*e*); but the usual recital in transfers of mortgages on appointment of new trustees, that the transferees have become entitled in equity, does not give notice of the trust: see infra, p. 226.

A general recital in a deed, that there were mortgages on the estate, was held to affect parties claiming under the deed with notice (*f*). And a purchaser will be affected with notice of incumbrances by a recital which describes them inaccurately (*g*). So, *inaccurate recitals* of an instrument, as a will, affect a purchaser with notice of its true contents (*h*), and a recital that a person was seised "for the term of his life with the power of jointuring" was held to affect a purchaser with notice of the settlement (*i*).

Upon the same principle was decided the well-known case of *Penny* v. *Watts* (*k*). There, on the marriage of the defendant with A., who, under the will of her former husband, was entitled to certain real estates, charged with a legacy of 2,000*l*., payable to B.,

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(*a*) 2 Bro. Ch. 291.

(*b*) And see Nixon *v.* Robinson, 2 Jo. & Lat. 14; Roddy *v.* Williams, 3 Jo. & Lat. 1; Hope *v.* Liddell, 21 B. 183; Barber *v.* Brown, 3 Jur. (N. S.) 18.

(*c*) 2 Y. & C., Exch. 234.

(*d*) Sug. V. & P., 11th edit. 819.

(*e*) Malpas *v.* Ackland, 3 Russ. 273; Perham *v.* Kempster, (1907) 1 Ch. 373.

(*f*) Farrow *v.* Rees, 4 B. 18; Lacey *v.* Ingle, 2 Ph. 413; Gibson *v.* Ingo, 6 Ha. 124; and see Eland *v.* E., 1 B. 235; Hamilton *v.* Royse, 2 Sch. & L. 327; Mertins *v.* Jolliffe, Amb. 311. See also and consider Ingram *v.* Pelham, Amb. 153.

(*g*) Taylor *v.* Baker, 5 Price, 306.

(*h*) Hope *v.* Liddell, 21 B. 183; and see Trinidad Asphalte Co. *v.* Coryat, (1896) A. C. 587.

(*i*) Bury *v.* B., Sug. V. & P. Append. xxv. 11th edit.

(*k*) 1 Hall & T. 266; 1 Mac. & G. 150.

a *feme sole*, the defendant had notice that B., while sole, had released this legacy to A., and that A. had in consequence devised to B. a certain part of the real estates; it was held by Lord *Cottenham*, reversing the decision of Sir *J. L. Knight Bruce*, V.-C. (*a*), that the knowledge of these facts rendered it incumbent on the defendant to have made further inquiries, and affected him with constructive notice of an equitable title acquired by the husband of B., under a subsequent agreement with A. to have the devised estate conveyed to him (*b*).

Upon the same principle it was held that notice of a charge to an *indefinite amount*, although inaccurate as to the particulars or extent of the charge, was sufficient to put a purchaser upon inquiry (*c*).

The case of *Penny* v. *Watts* has been considered as having carried the doctrine of notice too far (*d*). And in a case in Ireland, *Brady*, C., said that it seemed to require much examination before it could be received as established law (*e*). And in another case, a purchaser was held not to be fixed with notice of a deed by evidence that he had notice of an annuity created by that deed, which, from the notice given of its existence, appeared to have expired many years before the purchase (*f*).

Notice of a post-nuptial settlement has been held to be notice of an agreement for a settlement before marriage, so far at least that the purchaser could not insist that as against him it must be treated as voluntary, and therefore void under the statute 27 Eliz. c. 4 (*g*).

A purchaser has been held to have notice of a will by the concurrence in his conveyance of persons interested under that title as devisees (*h*).

The circumstance, moreover, that, upon a renewal of a lease, the lessors are not the same persons who were lessors in the original lease, is one which ought to lead the lessee to inquire into their title, and is sufficient to fix him with notice of a trust (*i*). So, the

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(*a*) Reported 2 De G. & Sm. 501.

(*b*) And see Heathorn *v.* Darling, 1 Moo. P. C. 5; Ladbroke *v.* Lee, 4 De G. & Sm. 106; Tildesley *v.* Lodge, 3 Sm. & Gif. 543.

(*c*) Gibson *v.* Ingo, 6 Ha. 112, 124. And see Gurney *v.* Lord Oranmore, 5 Ir. Ch. R. 436; Jones *v.* Williams, 24 B. 47; Armstrong *v.* Lynn, 9 Ir. R. Eq. 186; *Re* The Alms Corn Charity, (1901) 2 Ch. 750.

(*d*) Sugd. V. & P. 766, 14th edit.

(*e*) Abbott *v.* Geraghty, 4 Ir. Ch. R. 23.

(*f*) Stephenson *v.* Royce, 5 Ir. Ch. R. 401.

(*g*) Ferrars *v.* Cherry, 2 Vern. 383; see Raithby's notes on this case, 2 Vern. 384, 3rd edit.; and see Jones *v.* Smith, 1 Ha. 56.

(*h*) Burgoyne *v.* Hatton, Barn. Ch. 237.

(*i*) A.-G. *v.* Hall, 16 B. 388; A.-G. *v.* Backhouse, 17 V. 283; sed vide Howorth *v.* Deem, 1 Eden, 355.

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fact of a married woman being party to an under-lease has been held notice of her title (*a*).

Notice of a lease necessarily imparts notice of the covenants, usual or unusual, restrictive or otherwise, contained in it to any person claiming under the lease (*b*).

But in cases where specific performance of a contract is sought to be enforced, the rule with respect to notice is different as between vendor and purchaser from what it is as between a purchaser and the person claiming under the deed. Thus in *Jones* v. *Rimmer* (*c*), a case of specific performance, *Jessel*, M. R., said: "Misrepresentation is not got rid of by constructive notice."

So in *Redgrave* v. *Hurd* (*d*), *Jessel*, M. R., says: "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'if you had used due diligence you would have found out that the statement was untrue. You had the means of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer."

A vendor seeking to enforce a contract of sale of a lease containing unusual or onerous covenants, must, however, shew that the purchaser had a fair opportunity of acquainting himself with the terms of the lease under such circumstances that he might reasonably have done so. The vendor cannot rely simply upon the constructive notice arising from the fact that the purchaser knew there was a lease (*e*).

The distinction was taken in an old case of notice of a lease by

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(*a*) Steedman *v.* Poole, 6 Ha. 193; 16 L. J. Ch. 348. See also Cosser *v.* Collinge, 3 My. & K. 283.

(*b*) Taylor *v.* Stibbert, 2 V. 437; see also Hall *v.* Smith, 14 V. 426; Pope *v.* Garland, 4 Y. & C. Exch. 394; Spunner *v.* Walsh, 10 Ir. R. Eq. 386, 400; Lewis *v.* Bond, 18 B. 85; Wilbraham *v.* Livesey, ibid., 206; Cosser *v.* Collinge, 3 My. & K. 283; Martin *v.* Cotter, 3 Jo. & Lat. 506; Grosvenor *v.* Green, 5 Jur. (N. S.) 117; Vignolles *v.* Bowen, 12 Ir. R. Eq. 194; Vaughan *v.* Magill, ibid., 200; Stewart *v.* Marquis of Conyngham, 1 Ir. Ch. R. 534; Smith *v.* Capron, 7 Ha. 185; Drysdale *v.* Mace, 2 Sm. & G. 225; Cox *v.* Coventon, 31 B. 378; Clements *v.* Welles, 1 Eq. 200, 35 B. 513; and see in particular the law explained by *Jessel*, M. R., in Patman *v.* Harland, 17 C. D. 353.

(*c*) 14 C. D. 588, 590. See Cox *v.* Coventon, 31 B. 378.

(*d*) 20 C. D. 13.

(*e*) Molyneux *v.* Hawtrey, (1903) 2 K. B. 487; and see Hyde *v.* Warden, 3 Ex. D. 72; Reeve *v.* Berridge, 20 Q. B. D. 523; *Re* White & Smith's Contract, (1896) 1 Ch. 637.

Sugden, C., saying: "I can imagine a covenant in a lease, which would so deteriorate the property as to destroy the interest of the seller in it; and the particulars might state some of the covenants, and omit that. Such a description might amount to fraud in the sale. I agree that if a purchaser had notice that the property was held under a lease, he cannot object that he had no notice of any particular covenant therein contained. He must look closely, and be active, in order to ascertain whether there is any such as would materially prejudice him. The rule, perhaps, has been carried a little too far. It is a question of *bona fides*. *Where the purchaser has completed his purchase the rule is right;* but *where the purchaser is only bidding for something*, and has not been informed of the obligations to which he will be liable in becoming the purchaser, it is always a question of *bona fides*" (*a*).

In recent cases between vendor and purchaser attention has been directed to the question whether the purchaser was given an opportunity of examining the lease or deed in question or not, and it has been held that, in case of an agreement for purchase of a lease (*b*), or an underlease (*c*), the purchaser is not so affected with constructive notice of the covenants in the lease as to be bound to *complete* his contract if the lease be subject to onerous covenants of an unusual character, *unless* before the agreement was made he had fair opportunity of ascertaining for himself the terms of such covenants. In *Reeve* v. *Berridge* (*b*) it was pointed out that in the old case of *Cosser* v. *Collinge* (*d*), the purchaser had the opportunity of examining the lease.

So, as noticed more fully infra, the rule that notice of occupation or tenancy affects a purchaser with notice of the claims of the tenant as between him and the tenant does not apply as between vendor and purchaser *while the matter rests in contract* (*e*).

(*a*) Martin *v.* Cotter, 3 Jo. & Lat. 506; and see for other old cases Bessonet *v.* Robins, Sausse & Sc. 142; Van *v.* Corpe, 3 My. & K. 269, 277; Pope *v.* Garland, 4 Y. & C. Exch. 401; Flight *v.* Barton, 3 My. & K. 282; Darlington *v.* Hamilton, Kay, 550. See also Brookes *v.* Drysdale, 3 C. P. D. 52.

(*b*) Reeve *v.* Berridge, 20 Q. B. D. 523; *Re* White & Smith, (1896) 1 Ch. 637; Molyneux *v.* Hawtrey, (1903) 2 K. B. 487; *Re* Davis & Cavey, 40 C. D. 601; Grosvenor *v.* Green, 28 L. J. Ch. 173; Smith *v.* Capron, 7 Ha. 185; Wilbraham *v.* Livesey, 18 B. 206; Midgley *v.* Smith, (1893) W. N. 120.

(*c*) Hyde *v.* Warden, 3 Ex. D. 72.

(*d*) 3 My. & K. 283.

(*e*) Caballero *v.* Henty, L. R. 9 Ch. 447.

Le Neve v. Le Neve.

Notice of an intention to prepare a deed will not, it seems, be notice of the deed if afterwards executed. Thus, in *Cothay* v. *Sydenham* (*a*), a purchaser had notice that a *draft* of a deed was prepared, but not that a deed was executed; and it was held that he was not bound by notice of the deed, although in fact it was executed. "If," said Lord *Thurlow*, "the notice had been of a deed actually executed, it certainly would do, but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case or reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation."

In *Graham* v. *Drummond* (*b*) it was held, that the rule that a purchaser for value of an asset of the testator, from an executor who is also residuary legatee, acquires a title free from the claims of unsatisfied creditors of the testator, if the purchaser took without notice of the unsatisfied debts, or of anything which made it improper for the executor so to deal with the asset, applies in the case of equitable as well as legal assets; provided that neither the executor nor the Court administering the testator's estate still retains control over the asset, as, *e.g.*, in *Noble* v. *Brett* (*c*) and *Hooper* v. *Smart* (*d*).

In *Cole* v. *Eley* (*e*) it was held, that the assignee for value of money payable on the compromise of an action took, subject to the right of the solicitor of the assignor to obtain a charging order under sect. 28 of the Solicitors Act of 1860, it being proved that the assignee had been a witness in the action and had thus notice, though he had not express notice, of the solicitor's claim.

Whether a purchaser from an heir-at-law, with notice of a will by the ancestor, under whom the heir claimed, would be affected with notice of the contents of that will, although he was ignorant of such contents, and even misled by the heir at the time of his purchase, must, it seems, depend upon circumstances. If the testator had been long dead, and the heir long in possession, and the other circumstances of the case such as to leave the purchaser in credit for perfect good faith, a Court of equity would not interfere against the legal title, only because the purchaser had notice of a will,

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(*a*) 2 Bro. Ch. 391. See comments on this case in Williams *v.* W., 17 C. D. 442, 444; and cf. Shaw *v.* Foster, L. R. 5 H. L. 321.

(*b*) (1896) 1 Ch. 968.

(*c*) 24 B. 499.

(*d*) 1 C. D. 90.

(*e*) (1894) 2 Q. B. 180; on app., ibid., 350. See also Faithfull *v.* Ewen, 7 C. D. 495; Ridd *v.* Thorne, (1902) 2 Ch. 344.

respecting which he was misled. If the death of the testator were recent, other considerations might arise affecting the purchaser with the imputation of a fraudulent blindness (*a*).

The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees in conducting the sale,—such circumstances being entirely collateral to any question of title (*b*).

The purchaser of a charity lease takes with notice of the facts thereon, shewing its equitable invalidity (*c*). *Secus*, where the facts depend on circumstances dehors the lease (*d*).

It has been held that where a purchaser takes with notice of an instrument, he takes with notice of whatever equity affects the property under that instrument. Thus in *Hamilton* v. *Royse* (*e*), an estate subject to judgments was settled by A. the owner, in consideration of an estate conveyed to him in fee: it was held by *Redesdale*, C., that the latter estate was subject in equity to the judgments which were *at law* a charge upon the former, and that a purchaser of the estate from A. with notice of the settlement, was liable to the judgments although he had no notice of the particular judgments. His Lordship said that a purchaser took subject to all the equities to which the vendor was subject, and of which the purchaser had notice. That the purchaser took under the settlement, and without it had no title; consequently he took with notice of that settlement, and taking with notice thereof he took with notice of a clear equity against the estate which he had purchased, that is, that whatever incumbrances affected the estate put into settlement, were to be made good out of the purchased estate.

This case, however, has been disapproved of by Lord *St. Leonards*, who observes that it was an opinion not intended to decide the case, although it was acquiesced in, and that it carried the rule much further than was warranted either by principle or authority (*f*).

(*a*) Per *Wigram*, V.-C., in Jones *v.* Smith, 1 Ha. 60; and see West *v.* Reid, 2 Ha. 257; Jones *v.* Williams, 24 B. 47; sed vide Broadbent *v.* Barlow, 3 De G. F. & J. 570; 7 Jur. (N. S.) 479; Burgoyne *v.* Hatton, Barn. Ch. 237

(*b*) Borell *v.* Dann, 2 Ha. 440.

(*c*) A.-G. *v.* Pargeter, 6 B. 150; A.-G. *v.* Pilgrim, 12 B. 57.

(*d*) A.-G. *v.* Backhouse, 17 V. 293; cf. Kenney *v.* Browne, 3 Ridg. P.C. 512.

(*e*) 2 Sch. & L. 315.

(*f*) 3 Sug. V. & P. 475, 10th edit., and see Averall *v.* Wade, Ll. & G. temp. Sugd. 252; Sug. V. & P. 776, 14th edit.; Tighe *v.* Dolphin, (1906) 1 Ir. R. 305.

And see *Hipkins* v. *Amery* (*a*), where a purchaser, not calling for the deeds, was held affected with notice of a mortgage by deposit but not of an equitable mortgage effected fraudulently on the security of a spurious lease of the property to another person, though that gave such person an equitable charge as against the mortgagor; see also *Greenslade* v. *Dare* (*b*), where notice of non-payment of purchase-money by the absence of an endorsed receipt was held not to give notice of other irregularities in the transaction, *e.g.*, that the vendor was of unsound mind or subject to undue influence.

The mere attestation of a deed by a witness will not, it seems, according to the better opinion, fix the witness with notice of the provisions in the deed; for, as observed by Lord *Thurlow*, "a witness in practice is not privy to the contents of a deed" (*c*).

It seems that a purchaser is bound by notice of articles for a settlement, although the construction thereof is dubious (*d*).

Notice of Trusts in ordinary Trust Mortgage.—There is a very important exception to be noticed with reference to the doctrine above stated, that notice of a trust is notice of all particulars of the trust (*e*). When trust money is invested on mortgage, the settled practice is to take the mortgage to the trustees as joint tenants without disclosing the trust, and on the appointment of new trustees, to transfer by separate transfer, with a recital only that the transferees have become entitled in equity (*f*).

In the case of *Re Harman & Uxbridge, &c. Ry. Co.* (*g*), the facts were as follows:—

In 1840 property was mortgaged to W. in fee, there being nothing in the mortgage deed to shew that he was not the beneficial owner of the mortgage money. He died in 1842, having by his will devised and bequeathed his real and personal estate to three trustees (of whom his wife was one), on trusts for the benefit of his wife and children, and having appointed the same three persons executors. He also devised and bequeathed his trust and mortgage estates to

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(*a*) 2 Gif. 292; cf. Berwick & Co. *v.* Price, (1905) 1 Ch. 632.

(*b*) 20 B. 284.

(*c*) Beckett *v.* Cordley, 1 Bro. Ch. 357; Welford *v.* Beezely, 1 Ves. Sen. 6; Colman *v.* Sarrel, 1 V. 55; Biddulph *v.* St. John, 2 Sch. & L. 532; Rancliffe *v.* Parkyns, 6 Dow, 149, 224; sed vide Mocatta *v.* Murgatroyd, 1 P. W. 393.

(*d*) See Senhouse *v.* Earle, Amb. 285; Davies *v.* D., 4 B. 54; Thompson *v.* Simpson, 1 Dr. & W. 459; Abbott *v.* Geraghty, 4 Ir. Ch. R. 15, 24, 25.

(*e*) See Malpas *v.* Ackland, 3 Russ. 273.

(*f*) Davidson, vol. iii., part 1, edit. 1873, pp. 41, 42.

(*g*) 24 C. D. 720; and see *Re* West & Hardy's Contract, (1904) 1 Ch. 145.

the same three persons, subject to the trusts and equities affecting the same respectively. The widow alone proved the will and alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mortgage. In 1865 she, by a deed indorsed on the mortgage deed, conveyed the property, without receiving any pecuniary consideration for it, to K., C., and B., in fee, as joint tenants at law and in equity. The conveyance contained a recital that the testator held the mortgage money on an account under which K., C., and B., were then solely entitled thereto, as was thereby acknowledged, whereby the widow, as trustee under the testator's will, was trustee only of the property for K., C., and B., and they had requested her to convey it to them. On a subsequent sale of the property by persons who had purchased it from K., C., and B., the purchasers objected—(1) that proof should be given how K., C., and B. became entitled; (2) that it appeared that K., C., and B. were trustees, and it should be shewn that they were entitled to sell.

Pearson, J., overruled both objections. He said:—"Every one knows that, when in a mortgage deed the mortgage money is stated to belong to several persons on a joint account, those persons are in 99 cases out of 100 trustees of the money, and yet the Court has always resolutely refused to go behind the recital, or to inquire what the trusts are." . . . "The object of such recital being to keep the trusts off the face of the deed, the Court has always said that the persons to whom the conveyance is made can deal with the property as absolute owners. I am of opinion that there is nothing whatever in the objection, and I dismiss the summons."

Where, however, by inadvertence it was disclosed to purchasers that mortgage moneys were held on the trusts of a settlement of which the mortgagees were not the original trustees, then, though the mortgage deed contained the usual joint account clause, the purchasers were held entitled to proof that the mortgagees had been duly appointed trustees of the settlement (*a*).

In the case of *Carritt* v. *Real, &c. Advance Co.* (*b*), where a purchaser had taken a purchase in the name of his clerk, and it was claimed by an equitable mortgagee of the clerk that the real owner was estopped from claiming by the recitals that the purchase-money

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(*a*) *Re* Blaiberg & Abrahams, (1899) 2 Ch. 340.

(*b*) 42 C. D. 263. See also per *North*, J., in London & County Banking Co. *v.* Goddard, (1897) 1 Ch. 649.

had been paid by the clerk, *Chitty*, J., says (see p. 272) :—"There are some forms which are known and in common use. If trustees are lending money on mortgage, the trustees do not disclose their trust on the face of the deed; and there are forms used which are probably, when investigated as they stand at the present day, free from objection. The recital runs, or the deed in substance shews that the money is the money of the trustees, belonging to them on a joint account; and so it is in law, and they may be trustees for one equitable owner or for several. If the whole transaction were disclosed, there would be a statement to the effect that they were trustees of the money for some other person or persons; but the practice of conveyancers and the convenience of dealing with real property is the justification for keeping the trusts off the title."

This case went further than that of *Re Harman & Uxbridge, &c. Ry. Co.*, supra, as the Judge held that there was no objection to a similar recital where there was no settlement to be kept off the title, but the purchase was taken by the real owner for his own convenience in the name of a trustee. In this case, however, the mortgagee of the trustee did not get the legal estate, and accordingly, notwithstanding the recital, took subject to the rule governing equitable interests, that the first in priority of time must prevail (*a*).

It is to be observed that in *Re Harman & Uxbridge, &c. Ry. Co.*, the trust was subsisting; and the case frequently occurs of the trust determining, and the trust fund vesting beneficially in a single owner, without the mortgage being called in. The practice in such cases appears to be to transfer to such owner with a similar recital, and it would seem to follow from the cases cited supra, that this would be sufficient, and that a subsequent transferee or purchaser would not be entitled to inquire into the trust, but the editors have found no other authority touching the point. Taking the case of a large settled estate with large sums to be invested in land and intermediate investments on mortgage, it would certainly be inconvenient and a blot on the land laws if, on the trusts determining, the whole title was to be put upon the different lands on which mortgages had been taken as investments. The law on the subject, however, is in an unsatisfactory state.

Notice from Occupation or Tenancy.—As a general rule if a person purchases and takes a conveyance of an estate which he knows to be

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(*a*) See this case explained and distinguished in Rimmer *v.* Webster, (1902) 2 Ch. 163.

in the occupation of another than the vendor, he is bound by all the equities which the *person in such occupation* may have in the land; for possession is *primâ facie* seisin, and the purchaser has, therefore, actual notice of a fact by which the property is affected, and he is bound to ascertain the truth. Thus, if a person purchases property in the occupation of one whom he supposes to be only a tenant from year to year, he will be held to have notice of a lease under which he holds, and of the contents of it (*a*). But such occupation affects the purchaser only with constructive notice of the tenant's rights, not with notice of the lessor's title or rights (*b*). The rule is thus stated by *Farwell*, J., in *Hunt* v. *Luck* (*c*): (1) "A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights."

The rule has no application, as between *vendor and purchaser*, where the matter rests in contract (*d*).

The rule extends not only to interests connected with the tenancy of the occupier, but also to interests which he may have under collateral agreements. Thus in *Daniels* v. *Davison* (*e*), the tenant in possession had entered into a *contract for the purchase* of the estate, and a subsequent purchaser was held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant which would have led him to a knowledge of it; and the same rule applies although the interests which the tenant may have were posterior to the lease under which he holds (*f*).

Where two persons who are tenants in common of property are

(*a*) Taylor *v.* Stibbert, 2 V. 437, 440; Jones *v.* Smith, 1 Ha. 60; Holmes *v.* Powell, 8 De G. M. & G. 572; Mumford *v.* Stohwasser, 18 Eq. 556; Carroll *v.* Keayes, 8 Ir. R. Eq. 97; Reilly *v.* Garnett, 7 Ir. R. Eq. 1.

(*b*) Hunt *v.* Luck, (1902) 1 Ch. 428, following Barnhart *v.* Greenshields, 9 Moo. P. C. 18, and disapproving the dictum of *Jessel*, M. R., to the contrary in Mumford *v.* Stohwasser, supra.

(*c*) (1901) 1 Ch. 45 at p. 51, approved per *Vaughan Williams*, L. J., S. C. on appeal, supra, (1902) 1 Ch. at p. 432; Green *v.* Rheinberg, 104 L. T. 149 (C. A.).

(*d*) Caballero *v.* Henty, L. R. 9 Ch. 447, infra, p. 232.

(*e*) 16 V. 249, 10 R. R. 171; Lewis *v.* Bond, 18 B. 85; Wilbraham *v.* Livesey, ibid., 206; and see Crofton *v.* Ormsby, 2 Sch. & L. 583; Meux *v.* Maltby, 2 Swans. 281; Powell *v.* Dillon, 2 Ball & B. 416; Bailey *v.* Richardson, 9 Ha. 734, and the comments thereon in Barnhart *v.* Greenshields, 9 Moo. P. C. 33, 34; Thomas *v.* Davies, 9 W. R. 831. Cf. L. & N. W. Ry. Co. *v.* Boulton, 62 L. T. 393.

(*f*) Allen *v.* Anthony, 1 Mer. 282.

carrying on business upon it, it has been held that their possession will be constructive notice of the title of the partnership (*a*).

Although the case of *Daniels* v. *Davison* (*b*) has been followed, it has always been considered an extreme case, beyond which the doctrine ought not to be extended. Accordingly it was said by Lord *Cottenham*, then Master of the Rolls, that although it was true that where a tenant was in possession of the premises, a purchaser had implied notice of the nature of his title; yet if, at the time of the purchase, the tenant in possession was not the original lessee, but merely *held under a derivative lease*, and had no knowledge of the covenant contained in the original lease, it had never been considered want of due diligence in the purchaser, which was to fix him with implied notice, if he did not pursue his inquiries through every derivative lessee, until he arrived at the person entitled to the original lease, which could alone convey to him information of the covenant (*c*). And, in *Penny* v. *Watts* (*d*), it seems to have been considered doubtful whether the mere occupation by a person of property would be notice of an agreement not connected with his occupation (*e*).

Notice, however, that an occupier holds as tenant of a particular person has been held notice of the title of the latter (*f*). And notice that the tenants paid their rents to anyone is notice of the instrument under which they were compelled to pay them, and of the rights of all parties thereunder: also notice of the title of the "tenant" is not confined to the terre-tenant, but extends to the person who receives the rent (*g*).

Where a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held, nor is it necessary that such possession should be continually visible

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(*a*) See Cavander *v.* Bulteel, L. R. 9 Ch. 79. Lindley, Partnership, 7th ed. pp. 390, 398.

(*b*) Supra.

(*c*) Hanbury *v.* Litchfield, 2 My. & K. 633. And see the judgment of *Wigram*, V.-C., in Jones *v.* Smith, 1 Ha. 62.

(*d*) 2 De G. & Sm. 501; 1 Mac. & G. 150, cited p. 220, supra.

(*e*) And see Nelthorpe *v.* Holgate, 1 Coll. 203.

(*f*) Bailey *v.* Richardson, 9 Ha. 734; see this case explained in Barnhart *v.* Greenshields, 9 Moo. P. C. 34. But see Hunt *v.* Luck, (1902) 1 Ch. 428.

(*g*) Knight *v.* Bowyer, 2 De G. & J. 421; 23 B. 609. See also A.-G. *v.* Stephens, 1 K. & J. 750, reversed on other grounds, 6 De G. M. & G. 111.

or actively asserted. Thus in *Holmes* v. *Powell* (*a*), the purchasers of mines took possession under the agreement for purchase without any conveyance. Afterwards a person purchased the land without any exception of the mines. It was held that the purchaser of the land took with notice of the agreement, and was bound specifically to perform it. But see the remarks of *James*, L. J., on this case in *Cavander* v. *Bulteel* (*b*).

The possession, however, by a vendor of an estate which he has sold will not be constructive notice of any lien he may have for unpaid purchase-money, if he has signed the usual receipt on the conveyance for the whole purchase-money; for, after that, no man could be expected to inquire whether the purchase-money had been paid (*c*).

Lord *Eldon*, speaking of the position of the assignee of a lease, said (*d*): "Though the purchaser of a lease has never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, I am not aware of any case that has gone the length that he is to take notice of all those circumstances under which the lessor derived that title." So notice of a tenancy will not affect a purchaser with constructive notice of the lessor's title; nor will a purchaser *bonâ fide* and without notice be affected by the mere circumstance of the vendor having been out of possession many years (*e*).

If the possession is vacant, the purchaser is not bound to inquire as to the title of the last occupier, and will, therefore, not have constructive notice of the information he might have obtained by such inquiry (*f*).

The doctrine laid down in *Daniels* v. *Davison*, supra, does not

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(*a*) 8 De G. M. & G. 572.

(*b*) L. R. 9 Ch. at p. 82.

(*c*) White *v.* Wakefield, 7 Si. 401. And see Rice *v.* R., 2 Drew. 73; Muir *v.* Jolly, 26 B. 143; Wilson *v.* Keating, 4 De G. & J. 588; and the notes to Mackreth *v.* Symmons, infra; cf. Rimmer *v.* Webster, (1902) 2 Ch. 163.

(*d*) A.-G. *v.* Backhouse, 17 V. 293.

(*e*) Per *Wigram*, V.-C., in Jones *v.* Smith, 1 Ha. 63, and see Oxwith *v.* Plummer, Bac. Abr., tit. "Mortgage" (E.), sect. 3; S. C., 2 Vern. 636; Gilb. Eq. R. 13. And see the remarks on this case in Barnhart *v.* Greenshields, 9 Moo. P. C. 34, 35: and A.-G. *v.* Backhouse, 17 V. 293, where the question arose upon the validity of a lease of charity-lands; cf. Hunt *v.* Luck, (1901) 1 Ch. 45; (1902) 1 Ch. 428.

(*f*) Miles *v.* Langley, 1 Russ. & M. 39, 2 Russ. & M. 626; see also Jones *v.* Smith, 1 Ha. 62; Martyr *v.* Lawrence, 2 De G. J. & S. 261.

apply where the matter rests in contract. In *Caballero* v. *Henty* (*a*) the conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term, of which eight years were unexpired. It was held by the Lords Justices, affirming the decision of *Jessel*, M. R., that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and that in such a case the vendor could not enforce specific performance. "There is no pretence," said *James*, L. J., "for the case made by the plaintiff, that a person who wants to buy such property, and has notice of the occupation of the tenant, is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition *James* v. *Lichfield* (*b*) was cited as an authority. In that case there certainly are some dicta which nearly go to that extent, and which support the notion that the doctrine of *Daniels* v. *Davison* (*c*) applies as between vendor and purchaser, and whilst the matter still rests in contract. It is not necessary now to deal with that case, but I am not at present prepared to assent to any such proposition. The doctrine in question seems to me to refer to equities between the purchaser and the tenant *when the legal estate has passed*, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold, and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired you would have found out all about it.' During the argument, I referred to a passage in Sug. V. & P. (*d*) which seems to shew that a purchaser is not bound to go to the tenant to inquire. At all events, the vendor cannot enforce such an agreement as this" (*e*).

Notice in Commercial Transactions.—In the important case of *Manchester Trust* v. *Furness* (*f*), the Court of Appeal laid down broadly that the doctrine of constructive notice does not apply to commercial transactions, though, taken with the facts, this only amounted to a

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(*a*) L. R. 9 Ch. 447. James *v.* Lichfield, 9 Eq. 51, and Phillips *v.* Miller, L. R. 9 C. P. 196, must be considered as overruled.

(*b*) 9 Eq. 51.

(*c*) 16 V. 249.

(*d*) 7th edit., p. 745; 14th edit., p. 774.

(*e*) See Martyr *v.* Lawrence, 2 De G. J. & S. 261; Hughes *v.* Jones, 3 De G. F. & J. 307.

(*f*) (1895) 2 Q. B. 539.

decision that constructive notice would not be implied of all provisions of a document referred to. There bills of lading were signed by the captain for goods to be delivered to the holders, the bills expressly containing the words "they paying freight and other conditions as per charterparty." The charterparty provided expressly that the captain should be the servant of the charterers and should only sign bills of lading as agent for the charterers, and that the charterers should indemnify the owners against all liability from such bills of lading. The goods being misdelivered, and the holders bringing an action against the owners, it was held that the special clause in the charterparty was binding only between the owners and the charterers, and did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the captain as the agent of the owners; and that the reference to the charterparty in the bills of lading did not give the holders constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice not being applicable to mercantile transactions. And see particularly the judgment of *Lindley*, L. J., p. 545 (*a*).

The doctrine, however, that constructive notice does not apply to commercial transactions cannot be laid down without qualification or explanation. Thus it has been held that actual knowledge that the person dealing is an agent with a limited agency only, puts the person dealing with the agent upon inquiry as to the extent of the authority (*b*).

In the case of *Cooke* v. *Eshelby* (*c*), the Court acted on the admission of the buyer that he had no belief one way or the other whether the seller was acting as principal or agent, and he was on this held to have notice that the seller might be an agent with limited authority. In the absence of a positive belief that the seller was selling as a principal, the buyer was held *not* to be entitled to set off a debt due to him from the seller.

Further it must be borne in mind that the common law Courts recognise in commercial transactions something extremely like constructive notice arising from gross negligence, and this even with

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(*a*) And see London J. S. Bank *v.* Simmons, (1892) A. C. 201, at p. 221.

(*b*) Ibid., p. 229, per Lord *Field*, and see Cooke *v.* Eshelby, 12 A. C. 271; Sheffield *v.* London, &c. Bank, 13 A. C. 333, explained in London, &c. Bank *v.* Simmons, supra; Molyneux *v.* Hawtrey, (1903) 2 K. B. 487; and see, in contracts of marine insurance, the rules as to knowledge of facts imputed to the assured and his agent, ss. 18, 19, Marine Insurance Act, 1906.

(*c*) 12 A. C. 271.

respect to negotiable instruments. Thus in the old case of *Solomons* v. *Bank of England* (*a*), it was held that in taking a negotiable instrument there might be negligence so gross as to shew *mala fides*, and that the taker had notice of a fraud, and in *May* v. *Chapman* (*b*), *Parke*, B., said: "I agree that notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes," which seems to be extremely similar to the doctrine of constructive notice in equity; and in *Re Gomersall* (*c*), Lord *Blackburn* says: "If the facts and circumstances are such that the jury, or whoever is to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong * * * I think that was dishonesty" (*d*). In *London Joint Stock Bank* v. *Simmons* (*e*), Lord *Herschell* says, "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him" (*f*). As to a bank having notice that a customer's money is trust money, see *Coleman* v. *Bucks, &c. Bank* (*g*); *Thomson* v. *Clydesdale Bank* (*h*).

6. Third Condition of Notice under the Act.

Notice imputed through Solicitor or Agent.—The third condition in the Act of 1882 is, if "in *the same transaction*, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent" (*i*).

This section restores the law as laid down by Lord *Hardwicke* in

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(*a*) 13 East, 135 (n.).

(*b*) 16 M. & W. 355.

(*c*) 2 A. C. 616.

(*d*) See Raphael *v.* Bank of England, 17 C. B. 161, 175.

(*e*) (1892) A. C. 201 at p. 221.

(*f*) And see the cases discussed in the notes to Miller *v.* Race, 1 Smith's L. C., 7th ed. pp. 471 et seq.

(*g*) (1897) 2 Ch. 243.

(*h*) (1893) A. C. 282.

(*i*) Sub-s. (ii.) of s. 3.

Warrick v. *W.* (*a*), restricting the effect of notice to counsel, agent, or solicitor, to notice in the same transaction.

In *Re Cousins* (*b*), *Chitty*, J., says that the section was intended to remedy the consequences of the doctrine illustrated by *Hargreaves* v. *Rothwell* (*c*), imputing notice "if there was such a distance only between the transactions as left the Court under the impression (it could not be much more than an impression) that the solicitor had actually remembered the former transaction, and in that way knowledge was imputed to the solicitor, and then through the solicitor notice was imputed to the client."

The result of the statute as to notice to a solicitor is that (1) it must be in the same transaction, (2) the matter must come to his knowledge, and (3) must come to the knowledge of the solicitor as such, viz., as solicitor for the mortgagee (*d*).

The view has been expressed that if the solicitor for a purchaser or mortgagee is himself the vendor or mortgagor in the transaction, and has knowledge of some defect in the title, gained in some previous transaction, then notice of the defect will be imputed despite the section (*e*).

The cases in note (*f*) may be referred to as illustrating the doctrine of notice imputed through a solicitor, and showing the reasons on which from time to time it has been grounded; and for cases where the solicitor has been concerned for both vendor and purchaser see note (*g*); or has himself been the vendor (*h*),

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(*a*) 3 Atk. 291. And see Fitzgerald *v.* Fauconberge, Fitzgibb. 207; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Steed *v.* Whitaker, Barn. Ch. 220; Hine *v.* Dodd, 2 Atk. 275; Ashley *v.* Baillie, 2 Ves. Sen. 368; Lowther *v.* Carlton, 2 Atk. 242; Fuller *v.* Benett, 2 Ha. 394; Tylee *v.* Webb, 6 B. 552; S. C., 14 B. 14; Finch *v.* Shaw, 19 B. 500; S. C. sub nom. Colyer *v.* Finch, 5 H. L. Cas. 905; *Re* Smallman's Estate, 2 Ir. R. Eq. 34.

(*b*) 31 C. D. 671, 677.

(*c*) 1 Keen, 154.

(*d*) *Re* Cousins, 31 C. D. 671; cf., (in the law of marine insurance), Blackburn, Low & Co. *v.* Vigors, 12 A. C. 531.

(*e*) See Dart, Vendors and Purchasers, 7th edit., p. 899; and see *Re* Weir, 58 L. T. 792; but cf. Bateman *v.* Hunt, (1904) 2 K. B. 530, at p. 540.

(*f*) Sheldon *v.* Cox, 2 Eden, 224; Newstead *v.* Searles, 1 Atk. 265; Tunstall *v.* Trappes, 3 Si. 301; Dryden *v.* Frost, 3 My. & C. 670; Lenehan *v.* M'Cabe, 2 Ir. R. Eq. 342; Rickards *v.* Gledstanes, 3 Gif. 298; Atterbury *v.* Wallis, 8 De G. M. & G. 454; Vane *v.* V., L. R. 8 Ch. 383; Bradley *v.* Riches, 9 C. D. 189.

(*g*) Sheldon *v.* Cox, 2 Eden, 224; Fuller *v.* Benett, 2 Ha. 402; M'Mahon *v.* M'Elroy, 5 Ir. R. Eq. 1.

(*h*) Marjoribanks *v.* Hovenden, 6 Ir. R. Eq. 238, Dru. 11; Atkins *v.* Delmege, 12 Ir. R. Eq. 1; Twycross *v.* Moore, 13 Ir. R. Eq. 250; Robinson or when the same solicitor has acted both for the mortgagor and mortgagee (*a*).

The circumstance of only one solicitor acting in a transaction does not necessarily constitute him the solicitor of both parties, so as to affect one with notice of facts known to the other (*b*).

The employment of a solicitor to do *a merely ministerial* act, such as the procuring the execution of a deed, does not constitute him solicitor to the party executing the deed so as to affect him with constructive knowledge of matters within the knowledge of the solicitor (*c*).

The relationship of solicitor and client must exist before notice can be imputed. Accordingly, if a mortgagee employs no solicitor and the mortgagor, himself a solicitor, prepares the mortgage deed, the mortgagee will not be affected with notice of facts known only to the solicitor or mortgagor (*d*). The mortgagee will, however, have notice of all facts which would have come to the knowledge of an independent solicitor acting for the mortgagee with due diligence (*e*).

Notice to a solicitor in the country is notice to a person acting in a cause by his town agent (*f*). In the case of *Toulmin* v. *Steere* (*g*), which on other points has been often questioned, *Grant*, M. R., said no difference would be made if the sale were made to infants, and referring to the principal case of *Le Neve* v. *Le N.*, said that in it the interest of unborn children was not attempted to be distinguished from that of the mother. Notice will be imputed where the relationship of principal and agent arises through ratification of a transaction. Thus in *Coote* v. *Mammon* (*h*), it was held that where A. having notice of an incumbrance purchases in the name of B. and then agrees that B. shall be the purchaser, and B. accordingly pays the purchase-money without notice of the incumbrance, though B. did not employ A., nor know anything of the purchase till after it was made, yet B., approving of it

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v. Briggs, 1 Sm. & G. 188; Tucker *v.* Henzill, 4 Ir. Ch. R. 513; Spencer *v.* Topham, 2 Jur. (N. S.) 865; *Re* Rorke, 13 Ir. Ch. R. 273, 14 Ir. Ch. R. 442.

(*a*) Tweedale *v.* T., 23 B. 341; Berwick & Co. *v.* Price, (1905) 1 Ch. 632.

(*b*) Perry *v.* Holl, 2 De G. F. & J. 38.

(*c*) Wyllie *v.* Pollen, 3 De G. J. & S. 596; 32 L. J. Ch. 782.

(*d*) Espin *v.* Pemberton, 4 Drew. 333, 3 De G. & J. 547; see Thorne *v.* Cann, (1895) A. C. 11.

(*e*) See, e.g., Atterbury *v.* Wallis, 8 De G. M. & G. 454; cf. Taylor *v.* London & County Bank, (1901) 2 Ch. 231; Bateman *v.* Hunt, (1904) 2 K. B. 530.

(*f*) Norris *v.* Le Neve, 3 Atk. 26.

(*g*) 3 Mer. 210.

(*h*) 5 Bro. P. C. 355.

afterwards, made A. his agent *ab initio*, and therefore B. was affected with the notice of A.

And where moneys which formed part of a larger sum placed by a client in the hands of his solicitor for the purposes of investment, were lent by him on the security of a mortgage in which he had affected to act as principal, the client was held to be bound by the notice of all the circumstances which came within the solicitor's knowledge (*a*).

The knowledge also must be *material* to that transaction, and such as it was the duty of the agent to communicate. See *Wyllie* v. *Pollen* (*b*), where it was held by *Westbury*, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer.

Notice to a director is not necessarily notice to the company of which he is director (*c*). The mere fact of two companies having the same solicitor, or same directors, in common, does not affect each company with notice of everything that is done by the other: *Re Marseilles Extension Railway Co.* (*d*).

In *Re Hampshire Land Co., Limited* (*e*), the question arose as to constructive notice from the same person being common officer of a lending and a borrowing company in the case of a mortgage; and it was said that the test to be applied (*f*) "was, (1) was it within the scope of the duty of one company's officer to give notice to the other; (2) was it within the scope of his duty as the officer of the other company to receive such notice." It was decided that it was not within the scope of such duty, and that the lending company had no notice that the borrowing company had no authority to accept the loan, the resolution authorising it not having been duly

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(*a*) Spaight *v.* Cowne, 1 Hem. & M. 359; cf. Bateman *v.* Hunt, (1904) 2 K. B. 530.

(*b*) 3 De G. J. & S. 596, 32 L. J. Ch. 782.

(*c*) Peruvian Railways Co. *v.* Thames, &c. Insurance Co., L. R. 2 Ch. 617.

(*d*) L. R. 7 Ch. 161; and see as to cases where actual disclosure would have involved disclosure of fraud of a sole director, *Re* European Bank, L. R. 5 Ch. 358; or of a common body of directors, Lagunas Nitrate Co. *v.* Lagunas Syndicate, (1899) 2 Ch. 431; cf. Gluckstein *v.* Barnes, (1900) A. C. 240.

(*e*) (1896) 2 Ch. 743, 75 L. T. 181; *Re* Fenwick, Stobart & Co., (1902) 1 Ch. 507; *Re* Payne & Co., Ltd., (1904) 2 Ch. 608.

(*f*) Following *Re* Marseilles Extension Railway, &c. Co., L. R. 7 Ch. 161.

passed. In this case the lending society had no notice of the irregularity, unless it could be imputed to the society from the fact that a person who was its managing director was secretary to the borrowing company (*a*).

Persons dealing with companies, or taking securities from companies, are entitled to assume that all acts of internal management have been properly done. Lord *Halsbury*, in *County of Gloucester Bank* v. *Rudry, &c.* (*b*), referring to *The Royal British Bank* v. *Turquand* (*c*), and *Mahony* v. *East Holyford Mining Co.* (*d*), says that, " persons dealing with joint stock companies are bound to look at, what one may call, the outside position of the company (that is to say), they must see that the acts which the company is purporting to do are within the general authority of the company." He then goes on to say that persons are not bound to look into the internal regulations, " and an outside person, not knowing the internal regulations, when he found a document sealed with the common seal of the company, and attested and signed by two of the directors and secretary, was entitled to assume that that was the mode in which the company was authorised to execute an instrument of that description." In this case the articles empowered the directors to fix the number of directors who should form a quorum, and they had by resolution fixed three as the quorum, and the meeting authorising the secretary to affix the seal was of only two directors.

It has been held that the *imputed* knowledge of the client through the knowledge of the solicitor, cannot be rebutted by evidence that the solicitor did not communicate his knowledge. In *Bradley* v. *Riches* (*e*), *Fry*, J., said he could not lay down as a rule that where a solicitor owes a duty on one side, and has an interest on the other side the presumption arises that he follows his interests rather than his client's. " The knowledge of the agent is, to use the language of Lord *Chelmsford* in *Espin* v. *Pemberton* (*f*), the *imputed* knowledge of the client. It appears to me clear that that presumption or imputation is a thing which the client cannot be

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(*a*) And see Peruvian Railway Co. *v.* Thames, &c. Insurance Co., L. R. 2 Ch. 617; *Re* Carew's Estate Act, 31 B. 39; *Re* Ebbw Vale Company's Claim, 8 Eq. 14; Hardy *v.* Metropolitan Land Co., 12 Eq. 386, L. R. 7 Ch. 427; Montreal &c. Co. *v.* Robert, (1906) A. C. 196.

(*b*) (1895) 1 Ch. 629, 633; and see *Re* Romford Canal Co., 24 C. D. 85.

(*c*) 6 E. & B. 327.

(*d*) L. R. 7 H. L. 869.

(*e*) 9 C. D. 196, 197; and see also per *Fry*, J., in Kettlewell *v.* Watson, 21 C. D. 704, 707; per Kindersley, V.-C., in Boursot *v.* Savage, 2 Eq. 141, 142.

(*f*) 3 De G. & J. 547.

allowed to rebut. If it could be rebutted, it was amply rebutted in *Le Neve* v. *Le N.* If it could be rebutted, the language of Lord *Hatherley*, in *Rolland* v. *Hart* (*a*), could not be upheld." In *Espin* v. *Pemberton* (*b*), Lord *Chelmsford* says: "Notice which affects a principal through a solicitor does not depend upon whether it is communicated to him or not. If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him."

The rule that where there is no fraud the imputation of notice cannot be rebutted by proof of non-disclosure, is material in considering on what ground the exceptions in cases of fraud are founded.

In *Vane* v. *V.* (*c*) it was held that the doctrine that what the agent knows the principal knows, was, at the date of the passing of the Act 3 & 4 Will. 4, c. 27, so well established that a purchaser for value, though he had not personal knowledge of a fraud, was affected by the knowledge of his agent, as his *alter ego*, in such a sense that he could not protect himself under the words of the saving in sect. 26 of 3 & 4 Will. 4, c. 27, as "a *bona fide* purchaser for value who at the time of the purchase did not know, and had no reason to believe, that any such fraud had been committed."

Qualification in case of Fraud of Solicitor or Agent.—Where fraud is effected by the transaction in which it is attempted to impute notice through the solicitor to the client there is more difficulty. The leading case is *Kennedy* v. *Green* (*d*), where *Brougham*, L. C., held that since the solicitor in the transaction in question was practising a fraud on the client, the client was not affected with constructive notice, either of the fraud practised upon him, or of a previous fraud by the solicitor on another client, in obtaining a deed of assignment of a mortgage without consideration. But as regards this previous fraud, the Lord Chancellor held that, though prior to, it was in effect part of, and for the purpose of committing the fraud in, the second transaction. The Lord Chancellor, however, held the client affected with notice that the consideration had not been paid, on the ground that the deed and the indorsed receipt thereon were drawn in a peculiar form. An examination

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(*a*) L. R. 6 Ch. 678.

(*b*) 3 De G. & J. 547.

(*c*) L. R. 8 Ch. 383.

(*d*) 3 My. & K. 699. See Taylor *v.* London & County Banking Co., (1901) 2 Ch. 231, and compare Dixon *v.* Winch, (1900) 1 Ch. 736.

of the deed by an independent solicitor would at once have shewn the suspicious character of the transaction.

But though the Lord Chancellor held that the client had no notice of the fraud, he held him affected with notice of an equity arising from the non-payment.

In *Atterbury* v. *Wallis* (*a*) the Court of Appeal refused to apply the doctrine of *Kennedy* v. *Green* to a case in which the prior transaction, of which notice was to be imputed, was not in itself a fraud of the solicitor, and the only fraud of the solicitor was the concealment of the document from the client. See per *Turner*, L. J. (p. 466); and see per *Knight-Bruce*, L. J. (p. 464), where he says "if a different solicitor had in his stead been concerned professionally for T. W., none will deny that express notice to such solicitor would have been notice to T. W." (*b*).

In the case of *Rolland* v. *Hart* (*c*), the fraud consisted in the non-communication by the solicitor of a previous deed, and *Hatherley*, C., held that notice must be imputed to the client, for that in order to apply the rule of *Kennedy* v. *Green*, excluding notice, "it must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him."

In *Boursot* v. *Savage* (*d*), A., a solicitor, acting for himself and a purchaser, executed an assignment of leaseholds held by him on trust with two co-trustees, and forged their signatures and the assent of the *cestui que trust*. Here, therefore, the fraud was in the transaction; but, as the trust itself was not a fraud, *Kindersley*, V.-C., held that the purchaser through the solicitor had notice of the trust. He said, "It is the existence of the trust, and not of the fraud, of which he is held to have constructive notice." In *Dixon* v. *Winch* (*e*), the defendant mortgaged in fee to his solicitor D., who transferred his

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(*a*) 8 De G. M. & G. 454. See also Bradley *v.* Riches, 9 C. D. 189. See note (*d*), infra.

(*b*) See also Hewitt *v.* Loosemore, 9 Ha. 449, at p. 456; Berwick & Co. *v.* Price, (1905) 1 Ch. 632.

(*c*) L. R. 6 Ch. 678, see p. 682. See also Willis *v.* Greenhill, 29 B. 387; and per *Fry*, J., in Kettlewell *v.* Watson, 21 C. D. 685; S. C., on App., 26 C. D. 502.

(*d*) 2 Eq. 134. This case is apparently not of authority since the Conveyancing Act, 1882, s. 3, in so far as it decided that the purchaser had notice of the trust; see Taylor *v.* London & County Bank, (1901) 2 Ch. at p. 259. In Williams, V. & P., 2nd edit., p. 253, it is suggested that the principle of Taylor *v.* London & County Bank, supra, affects also Atterbury *v.* Wallis and Bradley *v.* Riches, supra.

(*e*) (1900) 1 Ch. 736, affirming the decision of *Cozens-Hardy*, J., but on different grounds.

mortgage to E., who did not give notice of the transfer to the defendant. Subsequently D. and the defendant sold the fee to the plaintiff, D. acting for all parties, and the deed of conveyance falsely reciting that D. was entitled in fee free from incumbrances, and had recently agreed to sell the property to the defendant. D. paid himself the amount of the mortgage and interest out of the purchase-money; the defendant did not ask for the mortgage deed, but trusted D. blindly. The Court of Appeal held that the defendant, having placed himself entirely in the hands of D., had constructive notice of the transfer, and that in consequence the mortgage remained unpaid. The transferee was therefore entitled to priority over the plaintiff, whom the defendant was bound to indemnify. The decision appears to rest upon the fact that the defendant had placed himself entirely in the hands of D. (*a*).

In the case of *Sharpe* v. *Foy* (*b*), a solicitor acted both for a husband and wife seeking to mortgage the wife's fee simple, which was in fact caught by a covenant to settle, and also for the intending mortgagee. The solicitor had notice from the mortgagors of the covenant, and told the mortgagors that he would not disclose it to the mortgagee. It was held that the mortgagee was not affected with constructive notice of the covenant. Lord *Hatherley* says (p. 40): "When he gave the answer it was the duty of Foy and his wife to go further, and communicate with the client himself; and the Court can only treat their not doing so as a conspiracy with Clark (the solicitor) against his client. It would be an encouragement of fraud to apply the rules of notice, which were established for the safety of mankind, to a transaction like this; it would be sanctioning a scheme to rob a man by colluding with his solicitor."

In *Ogilvie* v. *Jeaffreson* (*c*), *Stuart*, V.-C., observed that "since the case of *Kennedy* v. *Green* it has become usual to treat such cases as depending on the question of negligence, rather than on the doctrine of implied notice to the purchaser by reason of his employing the same solicitor who had practised the original fraud."

(*a*) Cf. Taylor *v.* London & County Bank, (1901) 2 Ch. 231; Berwick *v.* Price, (1905) 1 Ch. 632.

(*b*) L. R. 4 Ch. 35.

(*c*) 2 Gif. 353, see p. 376; and see Jones *v.* Smith, 1 Ph. 256; Hunt *v.* Elmes, 2 De G. F. & J. 578; 27 B. 62; Neesom *v.* Clarkson, 2 Ha. 163; Frail *v.* Ellis, 16 B. 350; Hiorns *v.* Holtom, 16 B. 259; Greenslade *v.* Dare, 20 B. 284, 291; Spencer *v.* Topham, 2 Jur. (N. S.) 865; Robinson *v.* Briggs, 1 Sm. & Gif. 188; Thompson *v.* Cartwright, 33 B. 178; 2 De G. J. & S. 10; *Re* European Bank, L. R. 5 Ch. 358; Sankey *v.* Alexander, 9 Ir. R. Eq. 259

In *Espin* v. *Pemberton* (*a*), *Chelmsford*, C., referring to *Kennedy* v. *Green*, supra, says: "The presumption of non-communication does not seem to be the proper principle to apply. I would rather say that the commission of the fraud broke off the relation of principal and agent, or was beyond the scope of the authority, and therefore it prevented the possibility of imputing the knowledge of the agent to the principal." See the point also discussed by *Fry*, J., in *Cave* v. *C.* (*b*), in which he points out that the exception in the case of fraud has been put in two ways: in *Thompson* v. *Cartwright* (*c*) on the ground that circumstances raised the inevitable conclusion that the notice had not been communicated; and by Lord *Chelmsford* in *Espin* v. *Pemberton* (*d*), and Lord *Hatherley* in *Rolland* v. *Hart* (*e*), because "the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent."

It would seem that the test whether the imputation be excluded by the fraud of the solicitor should be whether the fraud was such as to exclude the doctrine of agency; and that, even if notice of the fraud were on this ground excluded, notice would be imputed of anything which an innocent solicitor would have discovered from the documents which he would have seen.

7. Some Miscellaneous Cases.

Statutes.—A public Act of Parliament is of itself full notice, but not a private Act (*f*), nor, it seems, a private Act made a public one (*g*).

Bankruptcy.—As to notice of act of bankruptcy see (*h*), or commission of bankruptcy under the old law (*i*).

Waldy *v.* Gray, 20 Eq 238; Cave *v.* C., 15 C. D. 639; *Re* Lord Southampton's Estate, 16 C. D. 178; Agra Bank *v.* Barry, L. R. 7 H. L. 149.

(*a*) 3 De G. & J. 555.

(*b*) 15 C. D. 639.

(*c*) 33 B. 178.

(*d*) 3 De G. & J. 555.

(*e*) L. R. 6 Ch. 678. See Berwick & Co. *v.* Price, (1905) 1 Ch. 632.

(*f*) Earl of Pomfret *v.* Lord Windsor, 2 Ves. Sen. 480

(*g*) Hesse *v.* Stevenson, 3 Bos. & P. 565, 578; A.-G. *v.* Marrett, 10 Ir. R. Eq. 167.

(*h*) Wilkes *v.* Bodington, 2 Vern. 599; Collet *v.* De Gols, Cas. t. Talb. 65; *Ex p.* Knott, 11 V. 609; but see Latouche *v.* Dunsany 1 Sch. & L. 152; *Ex p.* Herbert, 13 V. 183.

(*i*) Hitchcock *v.* Sedgwick, 2 Vern. 156, reversed Dom. Proc., House of Lords Journal, vol. 14, p. 601, 3 My. & K. 591; Sowerby *v.* Brooks, 4 B. & Ald. 523; *Re* Barr's Trusts, 4 K. & J. 219.

With regard to the protection given by the Bankruptcy Act in certain cases to persons dealing with bankrupts, without notice of any available act of bankruptcy, see the Bankruptcy Act, 1883, s. 49 (*a*). See for recent cases on this section (*b*).

Copyhold.—Although the contrary has been held (*c*), it appears to be now settled that court rolls of a manor do not give constructive notice of their contents (*d*). But persons dealing with copyhold tenants ought to ascertain the customs of the manor, inasmuch as they will be bound by them, as for instance, as to what is the limit to the length of a lease (*e*), or as to there being no limit to the time for presenting surrenders made out of Court by the custom of the manor (*f*).

And a search of the rolls will not protect a purchaser who neglects to inquire for the copies of court rolls (*g*). If a search be proved, it seems that notice will be presumed of all that appeared in the period searched (*h*).

The topics of the effect of a judgment and of a *lis pendens*, and the law as to their registration, though connected with notice, lie outside the scope of this Note. The reader is referred to the works mentioned in the note (*i*).

8. Notice in case of Land in a Register County.

As regards land in a register county it was long since settled that the registered deed alone would be treated as valid in law, and that the legal estate would pass by it although in equity it might be postponed. Lord *Hardwicke* says in the principal case: "The enacting clause says that every such deed shall be void against

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(*a*) See Wace, Bankruptcy, pp. 253 et seq., and for the cases on notice collected, pp. 102 et seq.

(*b*) *Re* Seaman, (1896) 1 Q. B. 412; *Re* Badham, 10 Morr. 252; *Re* Jukes, *Ex p.* Official Receiver, (1902) 2 K. B. 58; *Re* Slobodinsky, *Ex p.* Moore, (1903) 2 K. B. 517; *Re* Dunkley, *Ex p.* Waller, (1905) 2 K. B. 683; *Re* Sharp, 83 L. T. 416; The Ruby, ibid. 438; and Ward *v.* Fry, 85 L. T. 438.

(*c*) Pearce *v.* Newlyn, 3 Madd. 189.

(*d*) Bugden *v.* Bignold, 2 Y. & C. Ch. 377.

(*e*) Hanbury *v.* Litchfield 2 My. & K. 629.

(*f*) Horlock *v.* Priestly, 2 Si. 75.

(*g*) Whitbread *v.* Jordan, 1 Y. & C. Ex. 303.

(*h*) Hodgson *v.* Dean, 2 S. & S. 221; Procter *v.* Cooper, 2 Dr. 1; 1 Jur. (N. S.) 149.

(*i*) Elphinstone and Clark on Searches (1887), pp. 25 et seq., 91 et seq., and supplement 1889; Williams, V. & P. (2nd edit.), pp. 581—607; 1073 et seq.

any subsequent purchaser or mortgagee unless a memorial thereof be registered, &c., that is, it gives him the legal estate; but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have." In *Doe* v. *Allsop* (*a*), where two assignments of a leasehold in Middlesex were executed and that executed last was registered first, it was held that the legal estate passed by the deed last executed and that the deed first executed and last registered must be treated as void in law, although the party claiming thereunder might be on the ground of notice entitled to relief in equity. It had, however, been decided before the decision in the principal case and within a short time after the passing of the Act that equity would give relief on the ground of notice (*b*).

"It has been much doubted whether Courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance" (*c*).

In *Ford* v. *White* (*d*), *Romilly*, M. R., said: "That being so, the question is, what effect have the Registry Acts on the transaction? Nobody regrets more than I do the effect of the decisions which have qualified the Act. The Legislature never intended that any notice should nullify it, the object being that all incumbrancers should rank according to their priority on the register. The Court, however, has held, that where a person who obtains a security has notice of a prior incumbrance it is inequitable to allow him to obtain priority over the first incumbrancer by the mere priority of registration. The decisions establish this and they must not be departed from, otherwise many titles would be destroyed" (*e*).

And it was held by the Court of Appeal, reversing *Jessel*, M. R. (*f*), that an annuity deed not registered under 18 & 19 Vict. c. 15, s. 12, had priority in equity over any purchaser or mortgagee from the grantor having notice of the annuity, on the express ground that the words of that Act were similar to those in the Middlesex Registry Act and that the principle of *Le Neve* v. *Le N.* was applicable (*g*).

(*a*) 5 B. & Ald. 142.

(*b*) Forbes *v.* Denniston, 4 Bro. P. C. 189; Blades *v.* B., 1 Eq. Ca. Abr. 358, pl. 12; Chivall *v.* Nicholls, 1 Strange, 664; Sheldon *v.* Cox, Amb. 624.

(*c*) Per *Grant*, M. R., Wyatt *v.* Barwell, 19 V. 439.

(*d*) 16 B. 120.

(*e*) See also Chadwick *v.* Turner, 34 B. 634; L. R. 1 Ch. 310; Rolland *v.* Hart, L. R. 6 Ch. 678; Marjoribanks *v.* Hovenden, Drury, 11, 22.

(*f*) Greaves *v.* Tofield, 14 C. D. 563.

(*g*) See Bradley *v.* Riches, 9 C. D. 189; *Re* Weir, 58 L. T. 792.

In *Benham* v. *Keane* (*a*), it was held that a judgment creditor, registering his judgment so as to affect lands in a register county and having at the time of registering notice of a prior unregistered judgment, was not postponed to the prior judgment; but this was decided on the special position of a judgment creditor, and the same case recognised not only the decision of the principal case but also the cases of *Robinson* v. *Woodward* (*b*) and *Tunstall* v. *Trappes* (*c*), two cases which decided that a mortgagee taking land in Middlesex with notice through his solicitor of a judgment not registered in Middlesex would be postponed. *Robinson* v. *Woodward* was ultimately compromised, but on the first hearing *Knight-Bruce*, V.-C., directed an issue whether the purchaser of land in Middlesex had notice of a judgment not registered in the Middlesex Registry.

Middlesex and Yorkshire Registry Acts.—It is not proposed in these Notes to treat in detail the provisions of the Registries Acts applicable to Middlesex and Yorkshire except so far as they relate to the doctrine of notice. This doctrine is considered to be in some respects different with regard to lands in either register county, and as regards Yorkshire there are express provisions in the Act of 1884 which materially affect the doctrine so far as regards lands in that county.

As regards Middlesex (*d*) the Middlesex Registry Act of 1708 (*e*), in its main provisions, is still in force, though considerable alterations in the working of the Act are effected by the Land Registry (Middlesex Deeds) Act, 1891, and the Land Registry (Middlesex Deeds) Rules, 1892, and the Fee Order of the 8th February, 1892. The difficulty arising under the Act of 1708, where a will was not registered within six months from the testator's death (*f*), was remedied by s. 8 of the Vendor and Purchaser Act of 1874. This section enacts that "Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's

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(*a*) 1 J. & H. 685; 3 De G. F. & J. 318. See this case discussed in *Re* Wyatt, (1892) 1 Ch. 188, at p. 208.

(*b*) 4 De G. & Sm. 562.

(*c*) 3 Si. 301; but as to this case see Conveyancing Act, 1882, s. 3, supra.

(*d*) See Brickdale on Registration in Middlesex.

(*e*) 7 Anne, c. 20.

(*f*) See Chadwick *v.* Turner, L. R. 1 Ch. 310.

heir-at-law." A question has been raised whether or not this section is retrospective, and this is discussed by Mr. Dart (*a*), and by Mr. Brickdale (*b*), and by Messrs. Elphinstone and Clark (*c*). Mr. Brickdale also recommends that where a conveyance from a devisee is registered, notwithstanding sect. 8 of the Act of 1874, the will should also be registered.

As regards Yorkshire, the old Acts were, as to the West Riding, 2 & 3 Anne, c. 4; 6 Anne, c. 20; 5 Anne, c. 18 (Ruffhead); as to the East Riding and Kingston-on-Hull, 6 Anne, c. 62 (c. 35 in Ruffhead); as to the North Riding, 8 Geo. II. c. 6.

These were all repealed by the Yorkshire Registries Act, 1884, 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26 (*d*).

Limitations on Constructive Notice in a Register County.—In some of the cases on the Middlesex Registry Acts a purchaser or mortgagee taking a registered conveyance has been postponed to a prior unregistered charge or judgment by reason of what is called "constructive" notice, not meaning thereby constructive in the sense in which that word is applied to notice through a solicitor or agent, but meaning notice implied from neglect to make inquiries as to title, or as to suspicious facts, or to require explanation of the non-production of deeds, which would be sufficient in ordinary cases to put a purchaser on inquiry. See *Martinez* v. *Cooper* (*e*) and *Rochard* v. *Fulton* (*f*), a decision on the Irish Registry Act (*g*).

In *Wormald* v. *Maitland* (*h*), *Stuart*, V.-C., held that the omission to make any inquiries as to title or title-deeds on the occasion of a marriage settlement of land in Middlesex was negligence sufficient to give notice of an unregistered charge. But this case is commented upon in *Agra Bank* v. *Barry* (*i*). On the other hand there is considerable authority, both in old and modern cases, for saying, either that what might amount to constructive notice of this kind in respect to other cases would not be held sufficient to affect with notice a person taking title under a deed registered in a register county, or at least that the fact that the land is in a register county is a material element to be considered on the question of notice

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(*a*) Dart, V. & P., 7th edit., p. 702.

(*b*) See Brickdale on Registration in Middlesex, p. 28.

(*c*) Elphinstone & Clark, Searches, edit. 1887, pp. 130 et seq.

(*d*) See The Yorkshire Registries Acts, 1884 and 1885, with Rules and Forms, by R. J. Smith.

(*e*) 2 Russ. 198.

(*f*) 1 Jo. & Lat. 413.

(*g*) 6 Anne, c. 2 (Ir.)

(*h*) 35 L. J. Ch. 69.

(*i*) L. R. 7 H. L. 135, a case on the Irish Act, cited infra, p. 247.

from neglecting to make inquiries. In *Wyatt* v. *Barwell* (*a*), *Grant*, M. R., held that "a registered deed stands upon a different footing from an ordinary conveyance * * * * It shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected." So, in *Hine* v. *Dodd* (*b*), in 1741, *Hardwicke*, C., held that "apparent fraud or clear and undoubted notice would be a proper ground of relief, but suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an Act of Parliament" (*c*), and Mr. Brickdale (*d*) comes to the conclusion that the authorities, especially *Lee* v. *Clutton* (*e*), are against the admission of the doctrine of constructive notice in any degree against registered purchasers. As against them no notice, short of express notice to the principal or his agent, has any effect.

In *Agra Bank* v. *Barry* (*f*), in 1874, on the Irish Registry Act, 6 Anne, c. 2 (Ireland), it was held that the fact that on taking a mortgage the solicitors for the mortgagee did not insist on production of the deeds, but inquired for them, and were told that they were at a residence of the mortgagor in the county of Cork, and did not insist on their production, was not sufficient to postpone a legal mortgagee to an equitable mortgagee with whom the deeds had been deposited. Lord *Selborne* said: "It (not investigating title or inquiring for deeds) may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these, the existence of a public registry, in a country in which a registry is established by statute, must necessarily be very material. It would, I think, my Lords, be quite inconsistent with the policy of the Registry Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make

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(*a*) 19 V. 435; 13 R. R. 236; Chadwick *v.* Turner, L. R. 1 Ch. 310; Bradley *v.* Riches, 9 C. D. 189.

(*b*) 2 Atk. 275.

(*c*) See Jolland *v.* Stainbridge, 3 V. 478.

(*d*) Registration in Middlesex, p. 21.

(*e*) 45 L. J. Ch. 43; affirmed on appeal 46 L. J. Ch. 48.

(*f*) L. R. 7 H. L. 135.

any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent."

In the important case of *Lee* v. *Clutton* (*a*), a claim was made by the plaintiffs, equitable mortgagees of land in Middlesex, to postpone, on the ground of notice, the defendant, a purchaser who had got the legal estate, the notice alleged arising from his not having required production of the deeds. The defendant admitted having notice that the deeds were in the hands of one of the plaintiffs, but said he was informed that this plaintiff held them as the purchaser of the largest part of the property comprised in a certain lease, and was informed that the plaintiffs held the counterpart of the lease as his solicitors. The defendant also admitted that he had made no inquiries of the plaintiffs as to the terms on which they held the deeds. *Jessel*, M. R., examined the authorities, and said (*b*): "that on this bill there was no allegation of actual notice, which was essential where, as in this case, it was attempted to assert the priority of an unregistered charge on lands in a register county. You might, indeed, succeed without proof of actual notice being given, either to the person himself or his agent, but only when the conduct of that person had been fraudulent."

Having regard to the confusion arising from the different senses in which the term "constructive" notice is used, as to which see supra, p. 203, it is necessary to add that in saying that in the case of lands in a register county a purchaser taking under a registered deed is not affected by constructive notice to the same extent as he would be in cases where there was no Registry Act, it must be remembered that this does not refer to what is sometimes called constructive notice, *i.e.*, notice to the agent or solicitor of the purchaser. The rule that notice to the solicitor or agent is notice also to the client or principal, applies in the case of a purchase of land in a registered county as in a purchase of other lands (*c*).

(*a*) 45 L. J. Ch. 43; 46 L. J. Ch. 48.

(*b*) 45 L. J. Ch. 43, at p. 45; affirmed 46 L. J. Ch. 48.

(*c*) See the principal case; and Rolland *v.* Hart, L. R. 6 Ch. 678; Sheldon *v.* Cox, Amb. 624; Bradley *v.* Riches, 9 C. D. 189; *Re* Weir, 58 L. T. 792; and the old case on the Irish Register, Forbes *v.* Denniston, 4 Bro. P. C. 189; but see also, on the question who is to be held agent, Kettlewell *v.* Watson, 21 C. D. 685 26 C. D. 501.

Unless the person conveying has the legal estate in the property, the grantee, as in other cases of equitable interests in land in England, will not, under the English Acts, obtain more than the grantor's beneficial interest. Thus, in *Ford* v. *White* (*a*) property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C. with notice of B.'s incumbrance. C. registered his mortgage before B., and afterwards assigned to D., who had no notice of B.'s mortgage. It was held by *Romilly*, M. R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B. In *Chadwick* v. *Turner* (*b*) a doubt was expressed by the L. JJ. whether a registered equitable mortgagee, without notice, is affected by notice to his mortgagor, as would be the case in non-register counties; and the L. JJ. suggested, though they did not expressly decide, that an equitable mortgagee might, by registering his deed, obtain protection against equities affecting the mortgagor to the same extent as if he had obtained a legal mortgage.

It has been held (in Ireland) that if a trustee conveys to a person who has no notice of the trust, and then takes a reconveyance, he having notice of the trust, it attaches on him (*c*).

Also that when a person has taken for value without notice, either by purchase (*d*) or mortgage (*e*), lands in a register county, and before registration has received notice, he may properly perfect his purchase deed or security and gain priority.

Notwithstanding a dictum to the contrary of Lord *Hardwicke*, in *Hine* v. *Dodd*, supra (*f*), it has been decided, under the English Acts of Anne, that registration is not notice so as to affect a subsequent mortgagee or purchaser if he does not search the register (*g*), though it has been said that *primâ facie* a purchaser of lands in a register county omits ordinary precautions if he makes no inquiry

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(*a*) 16 B. 120.

(*b*) L. R. 1 Ch. 310.

(*c*) Kennedy *v.* Daly, 1 Sch. & L. 379; and see Wilkes *v.* Spooner, (1911) 2 K. B. 473; and see supra, pp. 146, 167, 199.

(*d*) Elsey *v.* Lutyens, 8 Ha. 159. Mr. Brickdale, p. 24, cites Reilly *v.* Garnett, 7 Ir. R. Eq. 1 (C. A. 1872), as a decision to this effect on the Irish Act.

(*e*) Essex *v.* Baugh, 1 Y. & C. Ch. 620.

(*f*) 2 Atk. 275.

(*g*) Morecock *v.* Dickins, Amb. 678; Cator *v.* Cooley, 1 Cox, 182; Williams *v.* Sorrell, 4 V. 389; *Re* Russell, &c., 12 Eq. 78.

respecting documents the existence of which is disclosed by the register (*a*). Registration in Ireland is not notice (*b*).

But, if it be shewn that the purchaser has searched the register, notice will be imputed to him of all instruments registered within the period for which he searched.

The Middlesex Act only makes unregistered deeds void as against purchasers for value, and sect. 14 of the Yorkshire Registry Act of 1884 in effect enacts that the Act is not to confer priority on a person claiming without valuable consideration.

Difference between the Irish and Old English Acts.—There is also a material difference between the Register Act of Ireland and the Register Acts of England as to Middlesex, and formerly as to Yorkshire. By the Irish Registration Act, 6 Anne, c. 2 (Ireland), so far as regards a purchaser for value, an absolute priority is expressly given to the instruments first registered, so that a subsequent purchaser for value having the legal estate, although he has not notice of an equitable estate *previously* registered, will be bound by and compelled to give effect to it, under the words of the Act, and not upon the ground of implied notice from registration, as registration of itself is no more notice under the Irish than under any English Act (*c*).

" But notwithstanding the apparent stringency of the Irish Act, if a person in Ireland registers a deed, and if at the time he so registers the deed either he himself, or his agent, whose knowledge is the knowledge of his principal, has actual notice of an earlier deed, which though executed is not registered, the registration which he effects will not give him priority over that earlier deed (*d*)."

But it seems that as in the case of the English Registration Acts, mere constructive notice will not have the same effect as actual notice against a registered deed as it would have in the case of lands in a non-register county in England (*e*).

(*a*) Kettlewell *v.* Watson, 26 C. D. 501.

(*b*) Underwood *v.* Lord Courtoun, 2 Sch. & L. 64; Bushell *v.* B., 1 Sch. & L. 100; Hodgson *v.* Dean, 2 Si. & S. 221.

(*c*) See Bushell *v.* B., 1 Sch. & L. 98; Latouche *v.* Lord Dunsany, 1 Sch. & L. 159, 160; Hodgson *v.* Dean, 2 Si. & S. 221, 225; Drew *v.* Lord Norbury, 9 Ir. R. Eq. 171; 3 J. & L. 267; Thompson *v.* Simpson, 1 Dr. & War. 459; Mill *v.* Hill, 12 Ir. R. Eq. 107; 3 H. L. Cas. 828; Hunter *v.* Kennedy, 1 Ir. Ch. R. 148; Corbett *v.* De Cantillon, 5 Ir. Ch. R. 126; *Re* Driscoll, 1 Ir. R. Eq. 285.

(*d*) Per Lord *Cairns*, C., in Agra Bank, Limited *v.* Barry, L. R. 7 H. L. 148. See also Forbes *v.* Denniston, 4 Bro. P. C. 180.

(*e*) See Agra Bank, Limited *v.* Barry, 6 Ir. R. Eq. 128; L. R. 7 H. L. 136; *Re* M'Kinney, 6 Ir. R. Eq. 445; Coates

Le Neve v. Le Neve.

In a case arising under the New South Wales Registry Acts, the respondent had purchased at public auction eight lots of an estate. Subsequently to the contract the vendor mortgaged by registered deeds the whole of the said estate, including the said lots, to the appellant, who knew at the time of the advance that certain unspecified portions of the estate had been sold. It was held, that according to the true construction of 7 Vict. No. 16, ss. 11, 22 (N. S. W.), and 22 Vict. No. 1, s. 18 (N. S. W.), the appellant gained no priority from registration, but took subject to the respondent's purchase (*a*).

Tacking in Register County.—Under the Middlesex Registry Act and the old Yorkshire Registration Acts, a first mortgagee who has registered his mortgage may tack a subsequent advance if he has no actual notice of an intermediate equitable incumbrance (*b*). Thus, a first mortgagee of lands in Middlesex having registered his mortgage, lent a further sum, without actual notice of a second mortgage, which had been registered. It was held by Lord *King*, C., that the first mortgagee ought not to be affected by constructive notice of the second mortgage, and that the rule of equity took effect, and the first mortgagee was entitled to be paid his whole money before the second mortgage was satisfied (*c*).

Under the Irish Acts, however, the doctrine of tacking has no application as under the English Acts, since absolute priority is given to the mesne incumbrancer who registers over a subsequent advance by a first registered mortgagee without notice (*d*).

Land Transfer Act, 1875.—The operation of the English Local Registry Acts has been partially limited by the Land Transfer Acts, 1875 and 1897 (*e*), which enact that any land situate within the jurisdiction of any of the English local registries (Middlesex and Yorkshire) shall, if registered under those Acts, from and after the date of the registration thereof, be exempt from such jurisdiction; and no document relating to any such registered land executed,

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v. Kenna, 6 Ir. R. Eq. 401; Bushell *v.* B., 1 Sch. & L. 103.

(*a*) Sydney, &c. Asson. *v.* Lyons, (1894) A. C. 260.

(*b*) See Bedford *v.* Backhouse, 2 Eq. Ca. Abr. 615; Amb. 680, cited.

(*c*) See Wrightson *v.* Hudson, 2 Eq. Ca. Abr. 609; *Re* Russell, &c., 12 Eq. 78, 83.

(*d*) Bushell *v.* B., 1 Sch. & L. 90; Latouche *v.* Dunsany, 1 Sch. & L. 137. And see Carlisle *v.* Whaley, L. R. 2 H. L. 391; Mill *v.* Hill, 3 H. L. Cas. 828.

(*e*) 38 & 39 Vict. c. 87, s. 127; Land Transfer Act, 1897, Schedule I. And see Land Transfer Rules, 1903, rule 176; also Land Charges Act, 1900, s. 4.

Le Neve v. Le Neve.

and no testamentary instrument relating to any such registered land coming into operation subsequently to such date as last aforesaid, shall be required to be registered in any of the said local registries.

Yorkshire Registries Act, 1884, *s.* 14.—This Act, as amended (*a*), gives to assurances and wills priority according to the date of registration, which will not be lost by reason of actual or constructive notice, except in cases of actual fraud.

Sect. 15 enacted that "the registration of any instrument under this Act shall be deemed to constitute actual notice of such instrument, and of the fact of such registration, to all persons and for all purposes whatsoever;" but this section was repealed by the amending Act of 1885 (*b*), it is believed on the ground of an objection of bankers, because it was found in practice to cast an unreasonable burden upon them in their dealings with their customers (*c*).

By sect. 16 all tacking is abolished as to lands in Yorkshire, and in that county the doctrine of notice is considered to have become of small importance so far as regards at least documents which can be registered under the Act. It was decided by *Stirling*, J., in *Battison* v. *Hobson* (*d*), that a mortgage by deposit of deeds of land in Yorkshire, though unaccompanied by a memorandum of deposit, requires registration, and that the Act to this extent alters the law as laid down by the earlier case of *Sumpter* v. *Cooper* (*e*); also that the priorities given by the Act are not to be altered except in cases of actual fraud, and that this means fraud importing moral blame. The Judge says (*f*), "I am far from saying that questions may not arise on the construction of this section; but it does seem to me that the Legislature has twice over anxiously provided that the priorities given by the Act are not to be altered, except in cases of actual fraud, and I certainly am not disposed to fritter away the language of the Act. 'Actual fraud' I understand to mean fraud in the ordinary popular acceptation of the term, *i.e.* fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a Court of law or a Court of equity." In the particular case he decided that a solicitor who had acted for one at least of trustees in a deposit made by their beneficiaries with a bank, to the intent that the trustees might be guaranteed against loss in carrying on the business of a testator,

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(*a*) 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. c. 26, s. 4.

(*b*) 48 & 49 Vict. c. 26, s. 5.

(*c*) Battison *v.* Hobson, (1896) 2 Ch. 403, at p. 410, in argument.

(*d*) (1896) 2 Ch. 403.

(*e*) 2 B. & Ad. 223.

(*f*) P. 412.

became bound to perfect such mortgage by registration, and could not claim priority, under the terms of the Act, for a subsequent mortgage which he took on his own account and registered.

Notwithstanding the wide terms of the Act as to assurances, it has been decided by the Court of Appeal, in *Rodger* v. *Harrison* (*a*), that a conditional agreement for purchase of land is not an assurance capable of registration within the Yorkshire Registries Act, 1884 (*b*).

9. Notice under Land Transfer Acts, 1875 and 1897.

The question how far a transferee taking from a registered proprietor can be affected by notice of equitable rights not disclosed by the register is one of considerable doubt and difficulty.

Sect. 83 (1) of the Act of 1875 provided that there should not be entered on the register any notice of any *trust*, implied, express, or constructive. This sub-section was repealed by sect. 14 and Schedule I. of the Act of 1897, and for it Schedule I. substitutes the provision that "neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a *trust*, express, implied, or constructive; and references to trusts shall as far as possible be excluded from the register." This provision applies only to notice of *trusts*, and does not in terms apply to equities or charges other than trusts. Sects. 29 and 30 of the Act of 1875 make a transfer by a registered proprietor registered with an absolute title effectual to transfer the fee simple, subject (1) to the incumbrances mentioned in the register, and (2) to the liabilities declared not to be incumbrances by sect. 18 of the Act of 1875, but free from all other estates and interests whatsoever. By sects. 31 and 32 of the Act of 1875 when the transfer is by a transferor registered with a qualified or possessory title only the transferee takes subject not only to (1) and (2), but also to such rights and interests as are not affected by qualified or possessory registration. The result is, that where the transfer is by one registered with absolute title the doctrine of notice, so far as trusts are concerned, can have no application, and where the transfer is by one with qualified or possessory title, the transferee may be affected by notice given him in some document, or otherwise, concerning some matter excepted from registration. So far as the purchaser from one

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(*a*) (1893) 1 Q. B. 161.

(*b*) See Elphinstone and Clark on Searches (1887), pp. 136—145.

with registered possessory title is concerned, he will still take an abstract in the usual form shewing the title down to registration, and thereafter the title by copies of entries in the register, whereas the purchaser from one with absolute title will have merely the entries in the register. In all cases the transferee will take free from notice of any trusts unregistered and created by a registered proprietor after his registration, and not protected by entries in the register.

The question remains unsettled how far the transferee takes free from equities, *e.g.*, the right to set aside a deed on the ground of fraud or disability, where the transferee has notice of them. It would seem that if the right of which the transferee received notice arose from some fraud on the part of the transferor, or some one through whom he derived title, and if the transferee by taking the conveyance made himself a party to the fraud, that he would then receive no protection from sects. 14, 29, 30, supra (*a*). On the other hand, where there was no moral but merely a technical fraud, then the doctrine of notice would have no application (*b*).

(*a*) Cf. Battison *v.* Hobson, (1896) 2 Ch. 403, 412. But see Report of Royal Commission on the Land Transfer Acts, 1911, at pp. 41, 42.

(*b*) See Williams, V. & P., 2nd ed., pp. 1180—92.

PENALTIES AND FORFEITURES.

SIR HARRY PEACHY *v.* THE DUKE OF SOMERSET.

1724. 1 Stra. 447 (*a*).

Penalties and Forfeitures.

No relief against a voluntary forfeiture of copyhold estate, as by making a lease without licence from the lord. But it is otherwise where the forfeiture was only intended by way of security for sums due, as of a fine or rent; for there, upon payment of what is due with interest, equity will relieve.

Quære, whether working a quarry in a copyhold which had been first opened on the freehold, or lopping trees, or grubbing up hedges are legal forfeitures of a copyholder's estate.

The plaintiff brought his bill to be relieved against a forfeiture of his copyhold, by making leases contrary to the custom of the manor, without licence of the lord, felling timber, digging stones, and grubbing up hedges; offering to make a recompense. And on the pleadings, the case was this:—Sir Harry, being seised of a copyhold estate of inheritance of 90*l.* per annum, held of the manor of Petworth, of which the Duke of Somerset is lord, made a lease of part of it for seven years, without licence, at 13*l.* per annum. The Duke, upon this, brings an ejectment against all the plaintiff's copyhold, which occasioned the plaintiff to bring a bill in his own and his infant son's name, for relief. The Duke, in his answer, insisting on other causes of forfeiture besides the making the lease without licence, Sir Harry brought a supplemental bill of discovery and relief against those other forfeitures. Upon the plaintiff's giving

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(*a*) S. C., Pr. Ch. 568; 2 Eq. Ca. Abr. 227, 228, Pl. 9 and 10.

judgment in ejectment, subject to the order of the Court, an injunction was granted; and now, upon the hearing, the case came out to be this:—

Upon Sir Harry's marriage, in 1693, all the copyhold lands were surrendered to the use of Sir Harry for life, with remainder to the first and every other son in tail male, in pursuance of an agreement before marriage for that purpose; but no admittance was ever taken upon that surrender. Before Sir Harry came into possession, there had been a quarry of stone in the freehold adjoining to the copyhold, and during Sir Harry's time it was worked in the copyhold; but whether it was first opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's house, which consisted both of freehold and copyhold, was planted with timber trees by the plaintiff's father. The plaintiff had topped the trees that were on the copyhold part of the avenue, by which, from timber, they were become pollards. There were several hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and destroyed: but whether they are boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for seven years, without licence, or any custom of the manor to warrant it.

Upon this it came in question, whether any and which of these several acts are forfeitures at law: and if so, whether any and which of them are relievable in equity; and if not, whether the son's case is to be distinguished from the father's.

1. Whether these are forfeitures at law. Which were of four sorts: the digging the quarry, the topping the timber trees, the destroying the boundaries, and making the lease without licence.

As to the quarry, the plaintiff's counsel insisted, it was opened even upon the copyhold in his father's time, and so purged by the admittance; and his digging it since was but like the case of a lessee, who may dig quarries and mines that were open at the time of his lease, though he cannot open any new ones.

As to the topping of timber trees, which the plaintiff insisted was done only for the uniformity of his walk, and without design to injure the lord, it was answered, that it was voluntary waste, and the motives for doing it are not material to the lord.

As to the destroying of the fences, a case was cited out of Litt. Rep. 264, &c., where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without distinguishing between the outward boundaries and those within the copyhold, as it tends to the destroying of the evidence relating to the lord's interest in the estate; and it was said, it is on this foundation laid down, 1 Inst. 53, that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making of the lease without licence, it was acknowledged on all sides to be a forfeiture at law.

2. The next question was, whether, supposing all these to be forfeitures, relief was proper in this Court, either upon the general case of this sort of forfeitures, or any particular equitable circumstances that may be in the present case.

For the particular equitable circumstances of this case, one was, that the steward's deputy engrossed and was a witness to the lease. This was compared to the lord's being privy to or witness to such lease, which would be held in equity as a permission, a kind of licence; and it has been held, that licence granted by a deputy steward was good. But answered, that this rather aggravated the injury, by making the lord's servant a party in the confederacy to injure him.

Another circumstance was the plaintiff's not having notice of this custom. But this is not material, for the tenant comes in under the customs of the manor, and is bound to take notice of them; and besides, this is common law.

But if those circumstances were not sufficient to ground a relief upon, whether the general nature of those forfeitures will not admit of relief.

In favour of the plaintiff it was argued, that it was a sort of maxim that all forfeitures were odious. That copyholds are now become a more fixed and established estate than they were formerly, and the law itself has been altering these hundred years very much in their favour, and therefore a Court of equity ought to go as much in their favour, to keep them out of that vassalage and subjection which the original nature of their estates laid them under, which their present fixed condition seems inconsistent with. That forfeitures were intended to secure the lord's rents and services, and therefore very proper for a Court of equity to interpose and prevent his having more than that security. And this is agreeable to the common cases of relief against the penalty of a bond, and upon mortgage, and conditions of re-entry on non-payment of rent, and *nomine pœnæ*, in which cases this Court will not allow the parties to take any other advantage of the forfeitures, than what is necessary to satisfy the original intent of the agreement. The law has annexed these conditions in the cases of copyholds (? to the estate) instead of the parties; but as it had something else in view by them than the gaining the land to the lord, this Court may make amends to the lord, and fulfil the design of the law, and save the estate to the party. In the case of making a lease without licence, the intent of the law in making that forfeiture is to prevent the lord's being disinherited of his interest in the copyhold, and to secure the fine due on a licence; both of which may easily be secured, by obliging the tenant either to accept a licence or make surrender and admittance and pay the fine; which will be a compleat recompence for any injury the lord may have suffered; and then it comes within the common rule, that this Court will relieve against forfeitures, whenever a compleat satisfaction can be made for the injury which is the cause of forfeiture. Several cases were cited: *Shelley* v. *Mason* (*a*), in Lord *Coventry's* time; *Cox* v. *Hickford* (*b*), *Rowland* v. *Dean of Exon; Nash* v. *Lord Derby* (*c*), *Cudmore* v. *Raven* (*d*), *Cox* v. *Brown* (*e*), *Thomas* v. *Porter* (*f*).

If it is a difficult matter to ascertain damages in any of these cases, it is because there is really no damage; and surely it is no reason against relief, that the person who seeks it has done no injury.

For the defendant, these distinctions, as to relief against forfeiture, were insisted on:—Whether the forfeiture was for nonfeasance or malfeasance. Whether the condition was annexed by law or the party. Whether there were any particular circumstances of equity or not.

(*a*) (5 Car. 1), 6 Vin. Abr. 114.

(*b*) 2 Vern. 664.

(*c*) 2 Vern. 537.

(*d*) Cited 2 Vern. 664; 6 Vin. Abr. 114.

(*e*) 1 Ch. R. 170.

(*f*) 1 Ch. Ca. 95; 1 Eq. Ca. Abr. 121, pl. 18.

As to the difference between nonfeasance and malfeasance, as where a tenant refuses to pay a fine upon admittance, this Court will relieve on doing that which he ought to have done. The difference is only as to the circumstance of time, which this Court easily supplies. So where there is only permissive waste, the Court has relieved; but if by obstinate refusal this forfeiture is aggravated, the Court will look upon it as voluntary waste, and not grant relief, as in the case before cited of *Cox* v. *Hickford.*

All the instances of forfeiture in the present case are of voluntary acts. One is of making a lease without licence, which is a disseisin of the lord (*a*) and an attempt to disinherit him. The others are all voluntary wastes.

The next distinction is between conditions in law and by the party. The intention of the parties is easy to be discovered, and you answer the end of the contract, if you give them everything they expected, which may in many cases be easily done. This is the case of all mortgages, conditions of re-entry on non-payment of rent, &c. But even in conditions of the parties, where the ascertaining the damage is not plain and clear, the Court will not relieve against such conditions or penalties. It was never known that this Court relieved against a *nomine pœnæ* for ploughing up ancient meadow. It was denied in the Duchy of Lancaster: *Eyre* v. *Hatton.*

But in cases of forfeiture on conditions in law this Court seldom relieves. If tenant for life makes a feoffment, or levies a fine *sur conusance de droit come ceo*, &c., it was never pretended this forfeiture could be relieved in equity. Or if the reversioner brings waste on the statute for recovery of the place wasted, equity would not interpose. Those conditions in law are a sort of limitation of the estate of the party, and though the intent of the party is never so plain, equity will not alter the legal construction of the words: as where by will one gives an estate to A. for life, remainder to the heirs male of A., equity will not give the son of A. a remainder, and confine A.'s to a life estate, though the intent was plainly so.

But though this is generally the state of forfeitures, yet there may be some circumstances of equity to ground relief upon; and wherever the Court has granted relief, it is upon some such circumstances, as where the party who is to take advantage of the condition is

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(*a*) 4 Co. 21 b.

himself the means of its being broke. It was said by Lord *Somers* in the case of *Bertie* v. *Falkland* (*a*) that conditions precedent are not relievable, unless some indirect means be used by the party to prevent the performance. So in the case of *Hamond* v. *Ainge*, before the present Chancellor, where a lord of a manor tells one that had a freehold held of his manor that it was copyhold and he must be admitted by copy of Court roll, and pay a fine : the lord was in this Court obliged to erase the admittance and pay the fine.

The third question related to the infant plaintiff, whether he was in any better condition than the father.

(The arguments on this question are omitted.)

LORD CHANCELLOR MACCLESFIELD.—This is a point of so great consequence, that if relief could be given in this Court, it is strange it should not have been found out long ago. The forfeitures in those cases arise purely from the imbecility of the copyholder's estate. He was originally merely tenant at will, and is so still on all accounts but as to the continuance of his estate. There have been, indeed, very favourable constructions for the copyholder in that particular, because he is called tenant at will, *secundum consuetudinem manerii ;* it has been held, the lord cannot determine his will but according to that custom. The true meaning of those words, *secundum consuetudinem manerii,* was not to bound the lord's pleasure in the determination of his will, but that the tenant, as long as he continued tenant, was to hold his land under those terms and conditions which the custom had established.

These matters, which are mentioned as forfeitures, are indeed limitations of the estate ; such as determined it when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right he had before, and yet he does no damage to the remainderman. So, tenant by copy, taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate ; the law has made it so ; and what is there in this case to ground relief upon, and require me to set aside the law ?

It is a hard law, and therefore the party must not be subject to it ; but is not this directly repealing the law ?

(*a*) 3 Ch. Ca. 129, 134 ; Salk. 231.

Sir Harry Peachy v. Duke of Somerset.

In an action of waste for recovery of the place wasted, it is certain and admitted this Court cannot relieve; and yet this may be called a very unconscionable thing. But is it so to take advantage of a law which is known and equal to all? Nor can I see any difference, whether the statutes make this condition or the common law makes it.

It is not sufficient to say, here is no damage in this case, and therefore it is there can be no recompense given by this Court; for it is the recompense that gives this Court a handle to grant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired; but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose; as for non-payment of rent or fines; which are only by way of security of the rent or fine; and, therefore, when these are paid afterwards, with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this Court gives in those cases.

Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of these kind of forfeitures. But what equitable circumstances are there peculiar to this case? It is certain there may be circumstances which may make it fit and equitable for this Court to relieve, either in these cases or in actions on the Statute of Waste. If the lord should give the tenant encouragement, by *parol* only, to pull down a messuage, and he did it accordingly, this might induce the Court to prevent the lord's taking advantage of a fraudulent act of his own. In the present case, if the lord had been present at the making of the lease, and advised it, relief might be reasonable; but the steward's standing by, or even engrossing the lease, is rather a circumstance against relief, as it looks like a confederacy to cheat the lord, and break the customs of the manor.

As to the other cases of forfeiture relating to the quarry, the topping of the trees, and the destroying of the boundaries, there does not enough appear to determine whether they are legal forfeitures or not (*a*); but if they are, I think they are all, as the making of the lease under the same consideration in this Court, and not proper for relief.

As to the infant, his case does not seem as yet ripe for this Court; but it may be a question how far his equitable interest will entitle him to be secured against these forfeitures (*b*).

I am apprehensive the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

Suppose one lets a trustee be admitted for him, who commits a forfeiture; no doubt the estate would be forfeited, and the *cestui que trust* would have no equity against the lord.

Suppose the trustee should die without heir, the lord would be entitled by escheat, without being entitled to the trust (*c*).

The person who is the legal tenant is subject, with regard to that estate, to all the imbecilities of that estate; if not, by the means of a trust, a copyhold would be entirely discharged from all those imperfections it labours under, and the lord's interest be taken away; for the lord can take advantage of nobody's acts but those of his tenant. He is not at all concerned with the private agreements or trusts of the parties.

In the present case suppose Sir Harry admitted according to the surrender, the infant is then tenant in remainder, and the father's act cannot prejudice the son, who is now admitted as a distinct tenant. But till admittance the son is no tenant; and suppose, when he comes of age, he should release to his father, there would be no occasion for any admittance at all, but Sir Harry would continue tenant upon his old admittance. The lord is not bound to take notice of anything but what appears on the Court rolls.

(*a*) See Dearden *v.* Evans, 5 M. & W. 11.

(*b*) In the report in Prec. Ch. 573, the Chancellor is said to have been clear that as there had been no admittance upon the surrender to the uses of the settlement of 1693, the father was to be considered as absolute tenant to the Duke.

(*c*) But see now, 4 & 5 Will. 4, c. 23, ss. 2, 3.

Sir Harry Peachy v. Duke of Somerset.

I am, therefore, apprehensive it will be a hard case to relieve the son. But I agree that if the lord's fine for admission be paid, though there was no actual admittance, since the lord received all the advantage that could be had from the admittance, it might be a good reason for relieving the son; and then it might be proper, perhaps even now, for the son to bring a bill against his father and the lord, in order to have his father admitted pursuant to the surrender. But it does not appear whether the fine was paid.

I should, therefore, for these reasons, dismiss the bill absolutely. But since the points of law are disputed as to all the forfeitures, excepting the making of the lease, which concern other parts of the copyhold, and since judgment in ejectment is given, which would take in other lands as well as those comprised in the lease, I think the bill should be retained till the points of law are tried at law upon the ejectment, which the plaintiff shall immediately receive declarations in, and plead to trial.

As to costs, they shall wait the event of the trial; and, as to them, I think the equity of them will depend upon the issue of that; if the plaintiff recovers there, he should pay costs here, because he had no occasion to come into this Court, excepting as to the discovery. If the Duke gets the better, I think, as this is a point of equity that has not been fully settled before, and in such case it is natural for a man to struggle the most to retain his estate, it would be too hard to make him lose his estates and pay costs likewise.

As to the infant, I will not dismiss the bill absolutely, but without prejudice, because, being an infant, he may not have made the best of his case.

SLOMAN *v.* WALTER.

1784. 1 Bro. Ch. 418.

Penalty when Relieved Against.

Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery of it, and an issue *quantum damnificatus,* to try the real damage.

Upon showing cause why an injunction should not be dissolved, the case appeared to be thus: That the plaintiff and defendant were partners in the Chapter Coffee-house, and, upon entering into the partnership, it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And, in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty of 500*l.* After some time, the defendant demanded the use of the room, and being refused brought an action for the penalty of the bond (*a*). Plaintiff filed this bill, praying an issue to try *quantum damnificatus,* and an injunction in the meanwhile. He obtained an injunction till answer or further order; and the answer being now come in, the only question, in respect to continuing the injunction till the hearing, was whether the penalty of the bond was merely intended as a security for the enjoyment of the room, or in the nature of assessed damages between the parties.

Mr. *Scott* and Mr. *Harvey,* for the defendant, contended the injunction ought to be dissolved, and the defendant permitted to have his remedy upon the bond. It was impossible a jury, upon an issue of *quantum damnificatus,* could assess any other damages than those already assessed by the parties themselves. They referred to the case in the H. L., where 5*l.* per acre penalty for

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(*a*) A verdict had been obtained in that action in the full penalty of the bond. The bill was filed on the ground of these damages being excessive.

ploughing up meadow land was reserved in a lease, and the Court of Chancery having relieved against the penalty, and directed an issue to try the actual damage, the decree was reversed (*a*).

Lord Chancellor Thurlow said the only question was, whether this was to be considered as a penalty or as assessed damages. The rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light. The injunction must be continued till the hearing.

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1. Generally.

Lord *Macclesfield*, in *Peachy* v. *Duke of Somerset*, puts the jurisdiction of equity to give relief in cases where forfeitures or penalties might be insisted upon at law, on the only foundation upon which it could properly be maintained, viz., *the original intent of the case, where the penalty was designed only to secure money, and the Court could give a party, by way of recompense, all that he expected or desired.* The principal case of *Sloman* v. *Walter* shows, however, that the jurisdiction of equity was not of so limited a nature, but was extended to cases where the penalty was inserted, not merely to secure the payment of money, but *the performance of some collateral act.*

(*a*) Rolfe *v.* Peterson, 2 Bro. P. C. 470, and also cited, Roy *v.* The Duke of Beaufort, 2 Atk. 190, and Tall *v.* Ryland, 1 Ch. Ca. 183.

The origin of the doctrine is probably to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time; the Court holding that, by the payment of interest, the party was put in just the same state as if the principal had been paid at the time stipulated; though, as was said by *Eldon*, C., in condemnation of the doctrine, "The failure of the payment at the time may be attended with mischievous consequences, that never can be cured in a rational sense by subsequent payment with the addition of interest" (*a*).

The authorities show that Courts of equity only granted relief in cases of penalties and forfeitures when they were able to give compensation in lieu thereof, and in such cases only they treated stipulations in contracts for penalties or forfeitures as unessential (*b*). But relief was not given generally in all cases of forfeiture even where compensation was possible (*c*). By the Judicature Act, 1873 (*d*), law and equity are to be concurrently administered in all the Divisions of the High Court, and the rules of equity, where there is any conflict or variance with the rules of the common law, are to prevail.

Another principle illustrated by the authorities on this subject, is, that where a man covenants to do or to abstain from doing an act, and that if he breaks his covenant he will pay a sum by way of penalty he cannot avoid performance of his contract by paying the money, and the Court will, if necessary, restrain the covenantor from breaking his covenant by injunction (*e*). Equity considers the intention of the parties, and regards the thing agreed to be done or not to be done as the true object of the covenant. The covenantee must, however, choose between an injunction and liquidated damages; he cannot have both (*f*).

2. On what Breaches the Court will generally grant Relief.

Bonds.—The most familiar, and perhaps earliest case, in which equity gave relief against penalties, was a common bond, in which the penalty is evidently inserted to secure the payment of the principal and interest: but the interference of equity in relieving

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(*a*) Reynolds *v.* Pitt, 19 V. 140.

(*b*) See, e.g., per Lord Alvanley in Eaton *v.* Lyon, 3 V. 693.

(*c*) See cases as to forfeiture for breach of covenants in leases, p. 268, infra, and see Notes 5, 6, and 8.

(*d*) 36 & 37 Vict. c. 66, s. 24, sub-s. 4; s. 25, sub-s. 11.

(*e*) For an illustration of this principle, see judgment of Lord *St. Leonards* in French *v.* Macale, 2 Dr. & War. 274; and per Lord *Hardwicke* in Howard *v.* Hopkyns, 2 Atk. 371.

(*f*) General Accident Assurance Co. *v.* Noel, (1902) 1 K. B. 377.

from the penalty in such case was rendered unnecessary by 4 & 5 Anne, c. 16, ss. 12 and 13, by which the contract was in effect rendered incapable of being enforced, even at law, to the extent of the penalty; but the debtor was discharged on paying principal, interest, and costs (*a*).

The Act of Anne only applied to common money bonds. All other bonds and covenants with a penalty are governed by 8 & 9 Will. 3, c. 11, s. 8, which enables the damages to be assessed for such breaches as may be proved, execution being stayed on payment of the amount assessed and costs. The judgment, however, remained to answer any future breach (*b*).

The same principle has been applied where a penalty was inserted in a contract to secure the payment of purchase-money (*c*).

The 25th section of the Common Law Procedure Act, 1860 (*d*) (repealed by the Statute Law Revision Act, 1883, 46 & 47 Vict. c. 49, but see sect. 7 as to application of repealed enactment to local Courts), permitted payment into Court to be pleaded by leave of the Court or a Judge in any action on a bond, "which had a condition or defeasance with a penalty" to make void the same upon payment of a lesser sum at a day or place certain.

This enactment, however, did not apply to an action brought on a bond, conditioned to be void upon payment of a lesser sum by instalments (*e*).

Courts of equity, in allowing redemption of mortgages at any time, as expressed in the maxim "once a mortgage always a mortgage," applied the same principle. This is expressed by Lord *Hatherley* thus :—"Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation that in case of its not being paid at the time appointed *a larger sum shall become payable, and be paid*, in either of these cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the

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(*a*) As to payment into Court with respect to breaches, Ann. Pract. (1911), pp. 322 et seq., O. xxii., r. 1; and under O. xix., r. 3, a set-off may be pleaded.

(*b*) For the practice, see Ann. Pract. (1911), p. 137, O. xiii., r. 14.

(*c*) See *Re* Dagenham (Thames) Dock Company, *Ex p.* Hulse, L. R. 8 Ch. 1022; and see Hatton *v.* Harris, (1892) A. C. 547.

(*d*) 23 & 24 Vict. c. 126.

(*e*) Preston *v.* Dania, L. R. 8 Ex. 19, and cases there cited.

nature of a penal provision, against which equity will relieve when the object in view, viz., the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve" (*a*).

Where, as in *Sloman* v. *Walter*, the penalty in an instrument was merely to secure the performance of some collateral act or undertaking, the bill has been retained, and an issue *quantum damnificatus* directed, and relief granted upon payment of the damages as assessed by a jury (*b*).

The cases of conditions for payment of a larger sum on non-payment of a smaller sum at a given date, and cases of stipulations for payment of a higher rate of interest on unpunctual payment of a lower rate, are discussed later in treating of the differences between penalties and liquidated damages, p. 272, infra.

Covenants in Leases.—The modern law, except as to relief against forfeiture in cases of non-payment of rent and of assigning the lease or subletting, is contained in the Conveyancing Acts (for which see infra, p. 288).

Before the Judicature Act, 1873, applications were frequently made to Courts of equity for relief to restrain actions of ejectment.

From an early period relief was granted in case of forfeiture for non-payment of rent, which relief was regulated by statute, first by 4 Geo. 2, c. 28, and then by the Common Law Procedure Acts, 1852—1860, the effect of which is treated later, pp. 269, 272, infra. "At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breach of covenants, such as to repair, to insure and the like, where compensation could be made (*c*); but it was soon recognised that there would be great difficulty in estimating the proper amount of compensation; and, since the decision of Lord *Eldon* in *Hill* v. *Barclay* (*d*), it has always been held that equity would not relieve merely on the ground that it could give compensation, upon breach of any covenant in a lease, except the covenant for payment of rent (*e*).

(*a*) Per Lord *Hatherley*, C., in Thompson *v.* Hudson, L. R. 4 H. L. 15. See also Lady Holles *v.* Wyse, 2 Vern. 239; Strode *v.* Parker, ibid. 316; Nicholls *v.* Maynard, 3 Atk. 519.

(*b*) Hardy *v.* Martin, 1 Bro. Ch. 419 (n.); and see S. C., 1 Cox, 26; Benson *v.* Gibson, 3 Atk. 395; Errington *v.* Aynesley, 2 Bro. Ch. 341.

(*c*) Sanders *v.* Pope, 12 V. 282; Woodfall, Landlord and Tenant (1908), p. 374.

(*d*) 18 V. 56 (see 16 V. 402). See also Bracebridge *v.* Buckley, 2 Price, 200 (overruling Sanders *v.* Pope).

(*e*) See per *Kay*, L. J., in Barrow *v.* Isaacs, (1891) 1 Q. B. 417, at p. 425.

"But this of course left unaffected the undoubted jurisdiction to relief in case of breach occasioned by fraud, accident, surprise or mistake. . . . The use of the word 'forfeiture' in cases of this kind is somewhat misleading. This is not like the condition of a will. . . . It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts then the landlord may re-enter" (*a*), and equity can only interfere in very exceptional circumstances. Thus where a notice to repair according to the covenant has been given, and negotiations follow but no agreement is arrived at, equity will relieve if the repairs are done within the specified time, after the rupture of the negotiations, for the effect of the negotiations is to suspend the notice (*b*).

Relief on breach of a covenant to insure was provided for by the Acts 22 & 23 Vict. c. 35 (*c*), and 23 & 24 Vict. c. 126, s. 3 (*d*), now repealed and replaced by the Conveyancing Act (infra, p. 288).

Excepting the cases of non-payment of rent and of failure to insure, "the result of the modern cases before the Conveyancing Act, 1881, appears to be that accident and surprise afford the only instances in which relief was given, and that the fact that a landlord gained ever so large an improved value by insisting on the forfeiture was not taken into account" (*e*).

From a very early period equity would, at any *indefinite* time after a tenant had incurred forfeiture, and been ejected for non-payment of rent at a particular time, under a stipulation in his lease, relieve him upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle, that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when it was originally due. Mr. Woodfall thus sums up the statute law:—

"Relief to a lessee from forfeiture for non-payment of rent is now regulated by the Common Law Procedure Acts, 1852 (*f*) and 1860 (*g*).

"By sect. 210 of the Act of 1852, where a half year's rent is in

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(*a*) Per *Kay*, L.J., in Barrow *v.* Isaacs, (1891) 1 Q. B. at pp. 425, 426; cf. Eastern Telegraph Co. *v.* Dent, 78 L. T. 713. As to the measure of damages, see Conquest *v.* Ebbetts, (1896) A. C. 490; Clare *v.* Dobson, (1911) 1 K. B. 35.

(*b*) Hughes *v.* Met. Ry. Co., 2 A. C. 439.

(*c*) Law of Property Amendment Act, ss. 4—9.

(*d*) C. L. P. Act, 1860, s. 2.

(*e*) Woodfall, Landlord and Tenant (1908), p. 375.

(*f*) 15 & 16 Vict. c. 76.

(*g*) 23 & 24 Vict. c. 126.

Sloman v. Walter.

arrear, and a writ in ejectment has been served, it is provided that unless the tenant shall proceed for relief in equity within six months after execution, he should be 'barred and foreclosed from all relief or remedy in law or equity'; by sect. 211, that the tenant shall not have relief without payment of rent and costs; and by sect. 212, that the tenant may stay proceedings at any time before trial by paying the rent and costs.

"Sect. 1 of the Common Law Procedure Act, 1860, extended these provisions by allowing the Court or a Judge to give relief in a summary manner, either before or after the trial, up to and within the six months after execution executed."

The effect of this section was, that the jurisdiction of Courts of common law with regard to granting relief in the case of forfeiture for non-payment of rent was enlarged, and assimilated to that exercised by Courts of equity.

By s. 4 of the Conveyancing Act, 1892, the Court has power to relieve an underlessee from the forfeiture of the head lease for non-payment of rent (*a*).

A lessee applying in equity for relief from a forfeiture at law by non-payment of rent, was not required before the hearing to pay into Court the arrears of rent or costs at law, if no injunction was granted until the hearing, and the lessor was in possession (*b*), but where the suit was brought by the personal representative of the lessee, evidence having been given tending to show that the lessee in his lifetime was insolvent, and had committed breaches of covenant, and that his estate was also insolvent, the Court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the plaintiff that he should personally pay into Court the costs at law and the arrears of rent due at the time the lessor sued out his writ of possession (*c*).

If the lessor was proceeding at law, not merely on account of the non-payment of rent, but also for the breach of other covenants, against the breach of which equity did not relieve, he could only be restrained from proceeding for a breach of covenant for non-payment of rent, but he would be allowed to proceed on any other covenant against the breach of which the Court did not relieve (*d*).

(*a*) Gray *v.* Bonsall, (1904) 1 K. B. 601.

(*b*) Bowser *v.* Colby, 1 Ha. 109.

(*c*) Ibid.

(*d*) Wadman *v.* Calcraft, 10 V. 67; Davis *v.* West, 12 V. 475; Swanton *v.* Biggs, Beat. 170.

Sloman v. Walter.

If the lessor could prove any breaches of covenant by the lessee other than that for the payment of rent, *e.g.*, a breach of a covenant to repair, for which the lessee might have been ejected, the Court would not relieve against the breach of covenant for payment of rent (*a*).

A Court of equity would relieve a lessee from a forfeiture by non-payment of rent, where there was a proviso that in that case the lease *should be void*, as well as where there was a *mere power of re-entry* (*b*).

Before 4 Geo. 2, c. 28, when a lease was forfeited for non-payment of rent, the Court considered that the only way relief could be given was by creating a new lease (*c*); and where the mesne lessor forfeited his lease for non-payment of rent, and afterwards took a new lease from the lessor, he might compel his under-lessee to take a new lease for so much of the term as was unexpired, with the same covenants as in the old lease.

This form of relief, however, was rendered unnecessary by s. 212 of the C. L. Procedure Act, 1852 (*d*) (in effect re-enacting s. 4 of 4 Geo. 2, c. 28), to which reference has been made, which enacts that—"If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease" (*e*).

Where in an action of ejectment upon a forfeiture by non-payment of rent the plaintiff obtains judgment but without costs, the defendant may obtain relief under the Common Law Procedure Act, 1860 (*f*), without being required to pay any costs other than those of the summons for relief (*g*).

The jurisdiction to grant relief on non-payment of rent extends

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(*a*) Bowser *v.* Colby, supra; Horne *v.* Thompson, Sausse & Scul. 615; Nokes *v.* Gibbon, 3 Drew. 693; and see infra, p. 282.

(*b*) Bowser *v.* Colby, supra.

(*c*) Taylor *v.* Knight, 4 Vin. Abr., pl. 31, p. 406; Bowser *v.* Colby, 1 Ha. 130.

(*d*) 15 & 16 Vict. c. 76.

(*e*) Howard *v.* Fanshawe, (1895) 2 Ch. 581, 591.

(*f*) 23 & 24 Vict. c. 126, s. 1.

(*g*) Croft *v.* The London and County Banking Co., 14 Q. B. D. 347; and see Wilson *v.* Bolton, 10 T. L. R. 17.

to cases where the landlord has peaceably obtained possession without legal proceedings (*a*).

And it seems that even in the case of copyholds, where the forfeitures, as for non-payment of rent or fines, are only by way of security for the rent or fines, when these are paid afterwards, with interest, equity acting according to its ordinary principles would relieve against forfeiture (*b*).

3. Distinction between Penalties and Liquidated Damages.

As a Court of equity would give a person relief against a penalty, intended only to secure the performance of the contract, so, on the other hand, it would not permit him to resist specific performance, or escape an injunction, by electing to pay the penalty (*c*). Where, however, the real intent of the contract was, that a person might do certain acts, upon payment of an additional sum, then the agreement for payment, not being intended to secure the performance of any other contract, but being a contract which the parties were at liberty to make, a Court of equity would, although it might bear the appearance of a penalty, neither relieve him from payment on doing such acts, nor compel him to abstain from them. Thus where premises were demised by the plaintiffs at a rent named, and at a further rent if certain trades thereinafter covenanted against were carried on thereon, and the lease contained a covenant preventing the lessee from carrying on certain offensive trades and also a proviso for re-entry on breach of that covenant; it was held that the lease could not be construed as meaning that the lessees were entitled to carry on the trades in question on payment of the additional rent, and therefore the plaintiffs could re-enter under the condition for re-entry (*d*).

Where the sum named in case of breach is held to be a penalty, it would seem that the plaintiff may recover the actual amount recoverable on the ordinary measure of damages, even if it largely exceeds the penal sum (*e*).

The question whether the sum mentioned in an agreement to be

(*a*) Howard *v.* Fanshawe, (1895) 2 Ch. 581; and see (as to costs) Humphreys *v.* Morten, (1905) 1 Ch. 739.

(*b*) See Peachy *v.* Duke of Somerset, supra.

(*c*) French *v.* Macale, 2 Dr. & W. 269; Cole *v.* Sims, 5 De G. M. & G. 1, and see Howard *v.* Woodward, 34 L. J. Ch. 47; National Provincial Bank, &c. *v.* Marshall, 40 C. D. 112.

(*d*) Weston *v.* Manager of Metropolitan Asylum District, 9 Q. B. D. 404, 8 Q. B. D. 387; and see Cole *v.* Sims, 5 De G. M. & G. 1; Woodward *v.* Gyles, 2 Vern. 119.

(*e*) Diestal *v.* Stevenson, (1906) 2 K. B. 345.

paid for a breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of law to be decided by the Judge upon a consideration of the whole instrument (*a*). Sometimes the instrument itself shows the nature of the payment, as in the case of bonds, supra, p. 266. The mere use of the terms "penalty," or "liquidated damages," is not conclusive (*b*). Recognised rules of construction have been established.

(1) Where a larger sum is agreed to be paid on the non-payment of a debt or liquidated money demand it is presumptively a penalty, since no damages other than nominal are recoverable for the retention of a debt (*c*).

Thus, in *Re Dagenham Dock* (*d*) a company agreed to purchase a piece of land for 4,000*l.*, 2,000*l.* to be paid at once and the remaining 2,000*l.* on a day named, with a proviso that if the whole of the 2,000*l.* with interest was not paid off by that day (time to be of the essence of the contract), the vendors might repossess the land as of their former estate without any obligation to repay any part of the purchase-money. Held, affirming the decision of the Master of the Rolls, that this stipulation was in the nature of a penalty from which the company was entitled to be relieved on payment of the balance of the purchase-money with interest.

An instance of an application of the principle is shewn by the ordinary rule in mortgages, that a proviso for increasing the rate of interest on non-punctual payments is not allowed as being a penalty, but a proviso for reduction from the rate first stipulated on punctual payment, and in default at the original rate is a good agreement (*e*).

Thus, in a mortgage bond given to secure the due payment by instalments of a sum due, a provision making the total sum due enforceable on any default is not to be considered a penalty (*f*).

(2) Where in cases dealing with a single condition, a fixed sum is

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(*a*) Lowe *v.* Peers, 4 Burr. 2225; Sainter *v.* Ferguson, 7 C. B. 727.

(*b*) See judgment of *Bramwell*, B., Betts *v.* Burch, 4 H. & N. 511; Elphinstone *v.* Monkland, &c. Co., 11 A. C. 332; and see Chilliner *v.* C., 2 Ves. Sen. 528; Bonsall *v.* Byrne, 1 Ir. R. C. L. 573; Parfitt *v.* Chambre, 15 Eq. 36; Lea *v.* Whitaker, L. R. 8 C. P. 70; Yzquierdo *v.* Clydebank, &c. Co., (1905) A. C. 6; Commr. of Public Works *v.* Hills, (1906) A. C. 368.

(*c*) Kemble *v.* Farren, 6 Bing. 141. See remarks of *Jessel*, M. R., on this doctrine in Wallis *v.* Smith, 21 C. D. 257.

(*d*) L. R. 8 Ch. 1022. See Dickson *v.* Lough, 18 L. R. Ir. 518.

(*e*) Powis *v.* Maynard, 3 Atk. 519; Attwood *v.* Taylor, 1 Man. & G. 279; Ford *v.* Chesterfield, 19 B. 428; Thompson *v.* Hudson, L. R. 4 H. L. 1, 15; Union Bank of London *v.* Ingram, 16 C. D. 53.

(*f*) Wallingford *v.* Mutual Society, 5 A. C. 685, 696.

agreed to be paid on a breach of contract of uncertain value, it is presumptively liquidated damages and not a penalty (*a*).

The principle underlying this rule is thus stated by *Tindal*, C. J., in *Kemble* v. *Farren* (*b*): "There is nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point."

In building contracts a stipulated payment of a fixed sum for each week or day's delay in completion is recoverable as liquidated damages (*c*), and where by a contract to deliver rails between 15th January and 15th May it was agreed in the event of the contractors exceeding the time of delivery that they should pay 7*s.* 6*d.* per ton per week, on their failing to complete until September, they were held liable to pay the stipulated fine from the 15th May (*d*).

And if the lessee covenants not to do an act, as to plough pasture land, or to cease to reside on the premises, but if he does to pay an additional rent, the Court will look upon the additional rent as liquidated damages and not as a penalty (*e*), and consequently will not restrain the lessee from doing the act.

It seems, however, that where there is not only a stipulation that an increased rent is to be paid upon certain acts being done by the tenant, but also that his interest shall be forfeited, the sum so stipulated to be paid will be considered as a penalty and not liquidated damages (*f*), and he will be restrained from committing them.

In agreements for the sale of a business containing covenants against carrying on a similar business within certain limits, on breach of which a certain sum is to be paid, the sum is recoverable in full as liquidated damages (*g*). And where a public-house keeper

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(*a*) See per *Parke*, B., in Galsworthy *v.* Strutt, 1 Exch. 665; Sainter *v.* Ferguson, 7 C. B. 716; Cass *v.* Thompson, 5 W. R. 289; Carnes *v.* Nesbitt, 7 H. & N. 778

(*b*) 6 Bing. 148.

(*c*) Jones *v.* St. John's Coll., Oxford, L. R. 6 Q. B. 115; Law *v.* Redditch, (1892) 1 Q. B. 127; *Re* White and Arthur, 84 L. T. 594; but see *Re* Newman, 4 C. D. 724; Dodd *v.* Churton, (1897) 1 Q. B. 562.

(*d*) Bergheim *v.* Blaenavon Iron Co., L. R. 10 Q. B. 319, 44 L. J. Q. B. 92; and see Elphinstone *v.* Monkland Iron, &c. Co., 11 A. C. 332.

(*e*) Jones *v.* Green, 3 Y. & J. 298; Rolfe *v.* Peterson, 2 Bro. P. C. 436; Ponsonby *v.* Adams, ibid., 431; and see Forbes *v.* Carney, Wallis Rep. 38; Garrard *v.* O'Reilly, 3 Dr. & War. 414; Hurst *v.* H., 4 Exch. 571.

(*f*) Barret *v.* Blagrave, 5 V. 555; French *v.* Macale, 2 Dr. & War. 269; but see Willson *v.* Love, (1896) 1 Q. B. 626.

(*g*) Galsworthy *v.* Strutt, 1 Exch.

agreed to pay his lessor 50*l.* if convicted of contravening the Licensing Act, the 50*l.* was held to be liquidated damages (*a*).

In *Astley* v. *Weldon* (*b*), *Eldon*, C. J., said, that the excessive amount of the sum fixed to be paid for a breach of uncertain value is not alone a sufficient ground for treating it as a penalty and not liquidated damages, as it is competent for the parties to form their own estimate of the value. But, on the other hand, there are cases which seem to show that where the breach, though of uncertain value, must necessarily cause very little loss to the aggrieved person, the sum stipulated will be treated as a penalty. Thus, where a charter-party contained a clause, "the captain shall sign charterers' bill of lading as presented without qualification . . . or pay 10*l.* for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered," and the captain wrongfully refused to sign the bill of lading as presented, but the charterers sustained no damage thereby, the sum named was held to be a penalty, and the charterers could only recover nominal damages (*c*).

Thus far the rules deal with the breach of a single condition only. *Jessel*, M. R., in *Wallis* v. *Smith* (*d*), went exhaustively into the whole question and, including cases dealing with the breach of more than one of many stipulations, divided the authorities into four classes, thus:

(1) "That where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage and the Court will not sever the stipulations" (*e*).

In *Kemble* v. *Farren* (*f*), *Tindal*, C. J., said, "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of equity have always relieved, and against which Courts of law have in modern times

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663; Price *v.* Green, 16 M. & W. 346; Reynolds *v.* Bridge, 6 E. & B. 528; Mercer *v.* Irving, E. B. & E. 563.

(*a*) Ward *v.* Monaghan, (1895) W. N. 123 (C. A.).

(*b*) 2 B. & P. at p. 351, 5 R. R. 618; criticised by *Jessel*, M. R., in Wallis *v.* Smith, 21 C. D. 243, 259.

(*c*) Rayner *v.* Rederiaktiebolaget Condor, (1895) 2 Q. B. 289; and see Jones *v.* Hough, 5 Ex. D. 115; The Princess, 70 L. T. 388.

(*d*) 21 C. D. 243.

(*e*) See Astley *v.* Weldon, supra; *Re* Newman, 4 C. D. 724.

(*f*) 6 Bing. at p. 148.

endeavoured to relieve by directing juries to assess the real damages sustained by the breach of the agreement."

And in *Reynolds* v. *Bridge* (*a*), *Coleridge*, J., says, that the principle seems to be that if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, or where there is a particular sum to be paid which is much less than the sum named as payable on the breach, there it is held that the last named sum is specified by way of penalty, because a Court of equity would limit the amount to be actually paid.

(2) The next class is "of cases in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will in all human probability be small—that is where it is not absolutely necessary that they should be small; but it is so near a necessity having regard to the probabilities of the case, that the Court will presume it to be so. Then the question is, whether in that class of cases the same rule applies? Now upon this there is no decision. There are a great many dicta upon the question, and a great many dicta on each side. * * The Court is not bound by the dicta. * * It is within the principle, if principle it be, of a larger sum being a penalty for non-payment of a smaller sum, but at the same time it is also within another class of cases" (*b*).

(3) "That in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are dicta there which seem to say that if they vary much in importance, the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages." This statement of *Jessel*, M. R., has been severely criticised. The true rule appears to be: "When a single lump sum is made payable by way of compensation on the occurrence of one or more of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal" (*c*), though of course this

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(*a*) 6 E. & B. 540.

(*b*) Per *Jessel*, M. R., in Wallis *v.* Smith, 21 C. D., p. 257.

(*c*) Per Lord *Watson* in Elphinstone *v.* Monkland, 11 A. C. at p. 342, and see the modification of this rule suggested by Lord *Esher* in Willson *v.* Love, (1896) 1 Q. B. 626, at p. 630, accepted by *Smith*, L. J., *Rigby*, L. J., doubting; and see per Lord *Coleridge*, presumption may be rebutted by the other circumstances of the case (*a*).

(4) The last class of cases relates to deposits. "Where a deposit is to be forfeited for the breach of a number of stipulations some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule does not apply and that the bargain of the parties is to be carried out."

This statement was criticised as being unsupported by authority, in a case where a deposit was held to be merely one of the circumstances to be taken into account (*b*).

The law as to forfeiture of a deposit on a sale of real estate was considered in *Howe* v. *Smith* (*c*), where the purchaser paid 500*l.* "as a deposit and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and after repeated delays the vendor resold the property for the same price. The original purchaser having brought an action, it was held that the deposit was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. *Cotton*, L. J., referring to *Ex p. Barrell* (*d*), said, "If the sale goes on of course not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to *James*, L. J., he can have no right to recover the deposit." In order to enable the vendor to retain the deposit there must be acts on the part of the purchaser which amount not only to delay sufficient to deprive him of the equitable remedy of specific performance, but also to a repudiation on his part of the contract (*e*).

In this case (*f*) the usual clause giving a power to the vendor to

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C. J., in Magee *v.* Lavell, L. R. 9 C. P. 111; Bradley *v.* Walsh, 88 L. T. 737.

(*a*) Pye *v.* British Automobile, &c. Syndicate, (1906) 1 K. B. 425.

(*b*) Ibid.

(*c*) 27 C. D. 89, distinguishing Palmer *v.* Temple, 9 Ad. & E. 508. See also Catton *v.* Bennett, 51 L. T. 70; Hill *v.* Burnell, (1911) 2 Ch. 551.

(*d*) L. R. 10 Ch. 512; cf. Hart *v.* Porthgain Harbour, (1903) 1 Ch. 690.

(*e*) Howe *v.* Smith, supra; and see Soper *v.* Arnold, 35 C. D. 384; *Re* Scott and Alvarez' Contract, (1895) 2 Ch. 603; Levy *v.* Stogdon, (1898) 1 Ch. 478.

(*f*) Howe *v.* Smith, supra.

resell was stated by *Fry*, L. J.—(*a*), to give the vendor an alternative remedy so that he can either affirm the contract and sell under this clause, or rescind the contract and sell under his absolute title. If he act under the clause he must bring the deposit into account in his claim for the deficiency; if he sells as owner he may retain the deposit but loses his claim for the deficiency under the clause in question. But such a clause does not give the purchaser a right to elect to forfeit the deposit and avoid the agreement (*b*).

Where, after accepting the title, the purchaser makes default, and receives notice of rescission and forfeiture, he cannot afterwards recover the deposit on proving that the vendor had no title, so that he could not in any case have completed (*c*).

Under this last class comes the case where a deposit was sought to be recovered on the following facts. On the purchase of a season ticket, the purchaser paid a deposit and agreed to certain conditions, the fourth of which was that the ticket was to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry; the sixth condition that the ticket and all benefit and advantages thereof, including the deposit, should be absolutely forfeited to the company, in case of any breach of any of the above conditions. Some few days after the expiry, but within reasonable time, the plaintiff delivered up the ticket. It was held that the performance of every one of the conditions was a condition precedent to a return of the deposit, and that, as the ticket had not been delivered up "on the day after expiry," the conditions had not been performed, the deposit was forfeited, and the plaintiff could not maintain his action (*d*).

4. Specific Performance where Forfeiture has been Incurred by Plaintiff.

So far the cases considered have dealt with forfeiture in connection with remedies at law. But it may happen that a person seeking a purely equitable remedy has committed acts of forfeiture; in such a case the Courts in their discretion will refuse relief. Thus if a person entitled by contract to the grant of a lease is seeking specific

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(*a*) 27 C. D. 105; cf. Hart *v.* Porthgain, &c., (1903) 1 Ch. 690. See Kingdon *v.* Kirk, 37 C. D. 141, as to an action on such a condition when defendant does not appear.

(*b*) Crutchley *v.* Jerningham, 2 Mer. at p. 506; Long *v.* Bowring, 33 B. 585.

(*c*) Soper *v.* Arnold, 14 A. C. 429; and see *Re* Scott and Alvarez' Contract, (1895) 2 Ch. 603.

(*d*) Cooper *v.* London and Brighton Ry. Co., 4 Ex. D. 88.

performance, and he is shown to have done acts, *e.g.*, cultivating in an unhusbandlike manner, which if the lease were granted would give the lessor an immediate right of re-entry, specific performance will be refused, for it is useless to require the execution of a lease which might be immediately determined (*a*). The same rule applies where the contract is to grant an underlease and the intended underlessee has after notice committed acts which are a breach of the covenants in the head lease (*b*).

Before the Judicature Acts the Courts would only apply the rule in the strongest cases because it in effect decided the purely legal issue whether forfeiture had been incurred or not (*c*), and in a case where the existence of a breach was doubtful the Court granted specific performance and directed the lease to be dated before the alleged breach in order to enable the issue to be tried at law (*d*). Now, however, the Courts are competent to decide all the issues at once.

Where the performance of covenants in a lease is a condition precedent to the lessee's privilege of having a new lease, specific performance will not be decreed of a covenant to grant a new lease if, at the time, there was a breach of the covenants of the old lease (*e*).

Nor will specific performance be decreed where acts of gross *waste* had been committed by the intended lessee which would, although giving the landlord no power of re-entry under a proviso, have amounted to a forfeiture at law (*f*).

Where the renewal was not conditioned on the due performance of the covenants and there was no proviso for re-entry on breach, the Court granted specific performance of the covenant to renew, although there had been a breach of the covenant to repair, leaving the lessor to sue at law on the breach (*g*).

Specific performance, however, to grant a lease may, it seems, be decreed where breaches of covenant have been of a trivial character, and for which merely nominal damages would be obtained, or where

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(*a*) Thompson *v.* Guyon, 5 Si. 65; Gregory *v.* Wilson, 9 Ha. 683, 687.

(*b*) Lewis *v.* Bond, 18 B. 85.

(*c*) Per Sir *George Turner*, V.-C., 9 Ha. 694; and see Rogers *v.* Tudor, 6 Jur. (N. S.) 692.

(*d*) Nain *v.* Coombs, 1 De G. & J. 34; Lillie *v.* Legh, 3 De G. & J. 204; Poyntz *v.* Fortune, 27 B. 393; Rankin *v.* Lay, 2 De G. F. & J. 65; Powell *v.* Lovegrove, 8 De G. M. & G. 365; Browne *v.* Sligo, 10 Ir. Ch. R. 1; Cartan *v.* Bury, ibid., 387.

(*e*) Bastin *v.* Bidwell, 18 C. D. 238.

(*f*) Duke of Somerset *v.* Gourlay, 1 V. & B. 68, 73.

(*g*) Hare *v.* Burges, 5 W. R. 585.

breaches have been waived (*a*), or were of such a nature as the Court would relieve against (*b*), or where the landlord made no complaint until proceedings were taken by the tenant (*c*).

And the erection by an intended lessee on the premises which he had agreed to take on a building lease, of buildings which although alleged to be injurious were not proved to be necessarily a nuisance to the neighbouring lands of the lessor, was held to be no objection to specific performance of the agreement for a lease (*d*).

Where two contracts relating to the same subject are contained in one instrument, a forfeiture in respect of one of them will not debar a party obtaining specific performance of the other if they are independent of one another. Thus, in *Green* v. *Low* (*e*), the defendant agreed to grant a lease of ground to the plaintiff upon his building a villa thereon, which he was to keep insured in the joint names of himself and the defendant in a particular office. And it was also agreed, that if the plaintiff should not perform the agreement on his part, the agreement for a lease was to be void, and that the defendant might re-enter. There was a further stipulation, that the plaintiff was to have the option of purchasing the fee within two years. The plaintiff erected the villa, but insured in the wrong office, and in his own name only. It was held that the right to purchase being independent of the right to a lease, the plaintiff was entitled to specific performance of the contract to sell to him the fee.

5. On what Breaches the Court will generally not Grant Relief.

As a general rule equity would not relieve against forfeiture arising from the breach of covenants (for which see the discussion at p. 268). Cases in which relief has been refused include: A breach of a covenant to make a roadway in front of a particular house, though, if made before the roadway in front of adjacent houses were made, it would be continually cut up and useless (*f*); and a breach of a covenant to erect houses within a specified period (*g*).

Equity would not relieve a lessee, who, contrary to his covenant,

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(*a*) Walker *v.* Jeffreys, 1 Ha. 341, 352; and see Besant *v.* Wood, 12 C. D. 605.

(*b*) Gregory *v.* Wilson, 9 Ha. 683; and see Parker *v.* Taswell, 2 De G. & J. 559.

(*c*) Mundy *v.* Jolliffe, 5 My. & C. 167, 176.

(*d*) Gorton *v.* Smart, 1 S. & S. 66.

(*e*) 22 B. 625.

(*f*) Nokes *v.* Gibbon, 3 Drew. 681.

(*g*) Croft *v.* Goldsmid, 24 B. 312; see Jones *v.* St. John's College, L. R. 6 Q. B. 115.

did not cultivate land in a husbandlike manner (*a*), or who carried on a trade without a licence (*b*), or a lessee who assigned without licence: "for, he cannot," observed *Eldon*, C., "show that, by the assignment, the lessor sustains no damage; that, on the contrary, he the lessee, is a beggar, who could not pay the rent, and the assignee a solvent tenant; that the lessor is therefore in a better condition, having two persons answerable to him instead of one tenant, under the circumstances I have mentioned. The answer is, that the Court cannot estimate the damage. The fact, as it is alleged, may be true at this moment; but the consideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the whole continuance of the lease: it is sufficient that the lessor insists upon his covenant, and no one has a right to put him in a different situation" (*c*). The Common Law Procedure Acts and the Conveyancing Acts have not altered the law as to covenants not to assign, underlet, &c., and it has been stated that, with one doubtful exception, there is no case in which equitable relief has been granted against forfeiture for breach thereof (*d*), but it has been refused in the cases cited below (*e*). The usual covenant provides that consent is not to be refused in the case of a respectable and responsible person (*f*), and it would seem that if the proposed assignee fulfils that description and leave is asked, the lessee is free from that covenant, but not if leave is not asked (*g*). Thus, in *Barrow* v. *Isaacs* (*h*), the tenant underlet without consent to a person, for whom consent could not have been refused. The omission to ask for consent was solely due to the solicitor omitting to examine the head lease. It was held that the landlord was entitled to re-enter, because the omission was not due to such a "mistake" as would entitle the tenant to equitable relief. Upon the same principle, *Jekyll*, M. R., in *Descarlett* v. *Dennett* (*i*), refused to relieve a lessee,

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(*a*) Hills *v.* Rowland, 4 De G. M. & G. 430.

(*b*) Macher *v.* The Foundling Hospital, 1 V. & B. 187.

(*c*) Hill *v.* Barclay, 18 V. 36, 11 R. R. 147. This judgment is still applicable to cases not within Con. Acts, 1881, s. 14, and 1892, s. 4. See note 11 R. R. 147.

(*d*) Smith's L. C., 11th ed. (1903), i., 53.

(*e*) Wafer *v.* Mocato, 9 Mod. 112; Reynolds *v.* Pitt, 19 V. 134, 141; Lovat *v.* Lord Ranelagh, 3 V. & B. 24.

(*f*) Willmott *v.* L. R. C. Co., (1910) 2 Ch. 525; Evans *v.* Levy, (1910) 1 Ch. 452; Jenkins *v.* Price, (1908) 1 Ch. 10.

(*g*) As to demanding a payment for such consent, see Conveyancing Act, 1892, s. 3; Andrew *v.* Bridgman, (1908) 1 K. B. 596; West *v.* Gwynne, (1911) 2 Ch. 1.

(*h*) (1891) 1 Q. B. 417; but see Parker *v.* Jones, (1910) 2 K. B. 32.

(*i*) 9 Mod. 22.

who, contrary to a covenant not to suffer persons to make use of a way over part of the lands demised, had put up a gate at the entrance of the close, and permitted any person to pass over the way, requiring them to pay, because "this tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence for a prescription over the close. The case of an entry for non-payment of rent is very different; for there the loss is certain, and may be recompensed by damages. This has been a settled rule in equity" (*a*).

If there were breaches of several covenants in a lease, and there were any one of them with respect to which there existed no equitable ground for relief, although there might be as to all the others the most unquestionable right to relief in equity, the Court would not interfere to prevent the lessor from recovering in an action of ejectment founded on those breaches (*b*).

It seems, that in the absence of any fraud or acquiescence on the part of the lord, the Court, as was decided in *Peachy* v. *Duke of Somerset* (*c*), could not relieve, in the case of the forfeiture of customary estates and copyholds, by acts of the tenant, contrary to the contract imposed upon him by the law (*d*). In some of the cases cited in that case, however, relief was granted.

But although a Court of equity would not give relief to a copyholder against a forfeiture properly incurred, it had concurrent jurisdiction with Courts of law to relieve a copyholder against an illegal seizure of the property by the lord (*e*).

But the Court will not upon an interlocutory application at the suit of copyhold tenants, in a bill to establish certain customs disputed by the lord of the manor, restrain the lord from prosecuting his legal rights against one of such tenants in respect of an alleged forfeiture (*f*).

Equity will not relieve against the operation of a proviso for forfeiture or cesser of a term on the bankruptcy or attempted alienation of a tenant for life, or on his doing some act forbidden by the instrument under which he takes (*g*).

Companies, &c.—Equity refuses to grant relief against forfeiture of shares, &c., in public undertakings for non-payment of calls or other causes. Thus, in *Sparks* v. *The Liverpool Waterworks* (*h*),

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(*a*) Approved in Bracebridge *v.* Buckley, 2 Price, 221.

(*b*) Nokes *v.* Gibbon, 3 Drew. 693.

(*c*) Supra, p. 255.

(*d*) Hill *v.* Barclay, 18 V. 64.

(*e*) Andrews *v.* Hulse, 4 K. & J. 392.

(*f*) Lord Sefton *v.* Lord Salisbury, 7 W. R. 272.

(*g*) Kearsley *v.* Woodcock, 3 Ha. 185; Caulfield *v.* Maguire, 5 Ir. Ch. R. 78; Rochford *v.* Hackman, 9 Ha. 475; cf. *Ex p.* Gould, 13 Q. B. D. 454.

(*h*) 13 V. 428; but see Lamb *v.* Sambas, &c. Co., (1908) 1 Ch. 845;

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relief was refused against a forfeiture under a bye-law of an incorporated company for waterworks, which provided that the members receiving notice of default in paying a call should incur forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from town when the notice was sent, and other accidental circumstances. *Grant*, M. R., said (*a*): "The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in the majority of cases it is no compensation, from the uncertainty in which they may be left. The effect is the same, whether money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can in equity enter into a discussion of the circumstances, each may bring his suit. They must remain a considerable time, to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted, there cannot be any certainty that every member who has made default may not file a bill. . . . Accident here is only the want of precaution. The plaintiff did not inform himself of the orders and rules of the company. It was easy for the plaintiff to direct the secretary to send the notices as he pleased. The Court cannot relieve against such accidents. The plaintiff ought to have taken all due pains to inform himself." With reference to this case, Mr. Eden, in his work on Injunctions (*b*), observes that there is a case in the Hargrave MSS., in which Lord *Harcourt* relieved a member of a benefit society against a forfeiture incurred by neglecting to pay the weekly instalments; but that the reasoning of Sir *W. Grant* is so conclusive and satisfactory, that it is probable, if the question should ever be agitated again, that his decision would be adhered to (*c*).

There is no implied power to forfeit shares in a company; to

Jones *v.* Pacaya Co., (1911) 1 K. B. 455.

(*a*) 13 V. 434.

(*b*) Eden on Injunctions, p. 22, note (*b*).

(*c*) See Prendergast *v.* Turton, 1 Y. & C. Ch. 98; Naylor *v.* South Devon Ry. Co., 1 De G. & Sm. 32.

do so express power must be taken (*a*). Nor is such a power necessarily incident to a mining adventure conducted on the cost-book principle (*b*).

Where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement) that his shares are liable to forfeiture will not affect his rights under the agreement (*c*).

Where such power exists, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed (*d*), otherwise the forfeiture will be invalid. Thus, where no shares could be forfeited except by a resolution passed by *all* the directors, a resolution passed by four out of five is illegal (*e*). So, too, is a resolution of directors declaring shares of a shareholder forfeited for non-payment of calls, if the notice to the shareholder claim interest from the day of the call instead of from the day fixed for its payment (*f*).

Forfeiture, moreover, to be valid must be for the benefit of the company and *bonâ fide*. If, therefore, the forfeiture is fraudulent, *e.g.*, in order to relieve the shareholder from liability (*g*), or *ultra vires* (*h*), then it is invalid. But a forfeiture *ultra vires* will be validated by lapse of time where every shareholder knows the facts and acquiesces in the forfeiture (*i*).

Mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture (*k*).

A valid forfeiture prevents the shareholder being placed on the list of contributories as a present member (*l*), but neither forfeiture

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(*a*) *Re* National Patent Steam Fuel Co., 7 W. R. 369; *Re* Saloon S. P. Co., 37 L. J. Ch. 49.

(*b*) Clarke *v.* Hart, 6 H. L. Cas. 633. As to payment of calls made pending an action for rescission, see Lamb *v.* Sambas, &c. Co., (1908) 1 Ch. 845.

(*c*) Clarke *v.* Hart, 6 H. L. Cas. p. 650.

(*d*) Ibid., pp. 650, 651; but see Jones *v.* N. Vancouver Land, &c. Co., (1910) A. C. 317.

(*e*) Goulton *v.* London Architectural Brick and Tile Co., (1877) W. N. 141.

(*f*) Johnson *v.* Lyttle's Iron Agency, 5 C. D. 687.

(*g*) Richmond's Case, Painter's Case, 4 K. & J. 305; see, generally, Buckley on Companies, 9th ed., 592.

(*h*) Spackman *v.* Evans, L. R. 3 H. L. 171; see also Lord Belhaven's Case, 3 De G. J. & S. 41; Stanhope's Case, L. R. 1 Ch. 161; Dixon's Case, L. R. 5 Ch. 79.

(*i*) Brotherhood's Case, 31 B. 365.

(*k*) The Garden Gully United Quartz Mining Co. *v.* M'Lister, 1 A. C. 39.

(*l*) Woollaston's Case, 4 De G. & J. 437; Marshall *v.* Glamorgan Iron Co., 7 Eq. 129; *Re* Cobre Copper Co., 9 Eq. 107.

nor transfer will save him from being a contributory as a past member if the company is wound up within a year after forfeiture or transfer (*a*).

Statutes and Conditions in Law.—Although, in cases of contract between parties, equity will often relieve against penalties and forfeitures, where compensation can be granted, relief can never be given against the provisions of a statute or conditions in law (*b*).

Thus penalties imposed by a Benefit Building Society, in accordance with their rules under the Friendly Societies Act (*c*), cannot be relieved against in equity, nor can a borrowing member redeem a mortgage to the society without paying the fines which he has incurred (*d*), but the fines must be specified in the rules and be reasonable, otherwise they cannot be enforced (*e*).

6. How far Accident, Fraud, Surprise, or Acquiescence are Sufficient to Prevent a Party from taking Advantage of a Forfeiture.

If, either by unavoidable accident, by fraud, by surprise, or ignorance not wilful, parties might have been prevented from executing a covenant literally, a Court of equity would interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, would give relief (*f*), because, although at law a covenant must be strictly and literally performed, in equity it would suffice if it were really and substantially performed according to the true intent and meaning of the parties, so far as circumstances would admit. And see *Hill* v. *Barclay* (*g*), where *Eldon*, C., expressly guards his observations, which are strongly against relief being granted in ordinary cases, from being taken to apply to cases of accident and surprise; the effect of the weather, for instance, in that case, or permissive want of repair, the landlord standing by and looking on (*h*).

(*a*) Creyke's Case, L. R. 5 Ch. 63; Dridger's Case and Neill's Case, L. R. 4 Ch. 266.

(*b*) Keating *v.* Sparrow, 1 Ball & B. at pp. 373, 374; *Re* Brain, 18 Eq. 410.

(*c*) 6 & 7 Will. 4, c. 32 (now 1896 Act).

(*d*) Parker *v.* Butcher, 3 Eq. 762.

(*e*) See Lovejoy *v.* Mulkern, (1877) W. N. 127; Pilkington *v.* Baker, (1877) W. N. 210.

(*f*) Per Lord *Alvanley*, M. R., in Eaton *v.* Lyon, 3 V. 693.

(*g*) 18 V. 62, 11 R. R. 147.

(*h*) See Hannam *v.* South London Waterworks Co., 2 Mer. 61, 65 note (*a*); Bamford *v.* Creasy, 3 Gif. 675; Meek *v.* Carter, 6 W. R. 852; Burke *v.* Prior, 15 Ir. Ch. R. 106.

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And equity would relieve a lessee against forfeiture for a breach of a covenant to repair, when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on (*a*). And circumstances other than the conduct of the lessor may have this effect, as in *Bargent* v. *Thomson* (*b*), where a lessor brought ejectment for breach of covenant to repair within three months after notice, and it appeared that out of twenty-two items twenty had been proceeded with and fourteen completed, that the works had been partially *delayed by the weather*, and that no further remonstrance had been made by the lessors. *Stuart*, V.-C., restrained the action.

A breach, however, of a covenant to repair was not excused because the covenantor had *bonâ fide* employed persons to repair, who neglected to do so (*c*).

A party entitled to take advantage of a forfeiture would not be allowed to do so when the act of forfeiture was committed in reliance upon the assurances of an agent of such party. Thus, where a life policy was subject to a condition, making it void if the assured went beyond the limits of Europe without licence, and the assignee of the policy, on paying the premium to a local agent of the Assurance Society, informed him that the assured was resident in Canada, and the agent stated that this would not avoid the policy, and received the premiums till the assured died, it was held that the society was precluded from insisting on the forfeiture (*d*).

But although relief might be obtained in equity against a forfeiture where a person incurring it had been misled by the person legally entitled to insist upon it, a subsequent distinct forfeiture might be taken advantage of. Thus, although relief might be had in equity against a forfeiture of a lease during the period when the landlord dealt with the tenant so as to lead him to suppose the forfeiture would not be insisted on, if a subsequent forfeiture was incurred after such dealings had ceased, the prior transaction would raise no equity for relief (*e*).

In the case of a lunatic's estate, relief will be given to a tenant who has incurred a forfeiture, if it were beneficial to the lunatic not

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(*a*) Hughes *v.* Met. Ry. Co., 2 A. C. 439; cf. Bruner *v.* Moore, (1904) 1 Ch. 305.

(*b*) 4 Gif. 473.

(*c*) Nokes *v.* Gibbon, 3 Drew. 681; cf. Barrow *v.* Isaacs, (1891) 1 Q. B. 417.

(*d*) Wing *v.* Harvey, 5 De G. M. & G. 265; see also Duke of Beaufort *v.* Neeld, 12 Cl. & Fin. 248.

(*e*) Flattery *v.* Anderdon, 12 Ir. R. Eq. 218.

to insist upon it. Thus, in *Ex parte Vaughan* (*a*), the tenant of a lunatic's estate upon petition was relieved against an ejectment brought by the committee, founded on a forfeiture, by breach of covenant to repair. *Reynolds* v. *Pitt* (*b*) was cited against the petition. But *Eldon*, C., said that there were forfeitures arising from breaches of covenant against which Courts of equity could not relieve, but which a judicious landlord would not take advantage of. The case which had been cited would not apply if the question was, whether that were a case in which the landlord, acting for himself, would not have taken advantage of the forfeiture; and that care must be taken not to get rid of a good tenant by being too strict.

And even at law, long acquiescence in a breach of covenant, as for instance not to apply a house to purposes of trade, will raise a presumption of a licence so to use it, that the lessor cannot insist upon his right to a forfeiture (*c*).

7. Waiver of Forfeiture.

The expression "waiving a forfeiture" is not strictly accurate. It is a matter of election which may be by deed or word, and, in cases where the lessor has a right of re-entry on breach, the question is, has the lessor having notice of the breach elected not to avoid the lease, or to avoid it, or has he made no election? (*d*).

The right to insist upon a forfeiture might be waived at law (*e*), as well as in equity (*f*), by the acceptance of (even under protest) (*g*), or distraining for (*h*), rent becoming due after the forfeiture was incurred, even although the landlord when the rent was tendered took it not as rent but as compensation for use and occupation subsequent to the forfeiture. Thus in *Croft* v. *Lumley* (*i*), after all the forfeitures had been incurred, the time having come when the rent would become due, the lessee tendered the rent to the

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(*a*) T. & R. 434.

(*b*) 19 V. 134.

(*c*) Gibson *v.* Doag, 6 W. R. 107; Whitehead *v.* Bennett, 9 W. R. 626; Page *v.* Bennett, 6 Jur. (N. S.) 419.

(*d*) See judgment of *Bramwell*, B., in Croft *v.* Lumley, 6 H. L. Cas. 705; cf. James *v.* Young, 27 C. D. 663; Matthews *v.* Smallwood, (1910) 1 Ch. 777.

(*e*) Croft *v.* Lumley, 6 H. L. Cas. 672; Davenport *v.* The Queen, 3 A. C. 115; A.-G. of Victoria *v.* Ettershank, L. R. 6 P. C. 354, 368.

(*f*) Bridges *v.* Longman, 24 B. 27.

(*g*) Price *v.* Worwood, 4 H. & N. 516; Guillemard *v.* Silverthorne, 99 L. T. 584.

(*h*) Walrond *v.* Hawkins, L. R. 10 C. P. 342.

(*i*) 5 El. & Bl. 648. In the House of Lords the point was not decided, but its correctness was doubted: 6 H. L. Cas. 672.

lessor. He refused to take it except on the terms that it should be taken not as rent, but as compensation for use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition; the lessor then took the money, declaring he would not take it as rent, or as waiving the forfeitures. It was held by the Court of Queen's Bench, that in legal effect money must be taken according to the intent of the party paying it—in this case as rent—and that the receipt of rent, as a matter of law, operated as a waiver of all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect; and, moreover, that the lessor must be taken to waive all forfeiture by that breach of which he had notice, although it was more extensive than he was aware of.

Where, however, a landlord brings an action of ejectment for a forfeiture, he unequivocally elects to treat his tenant as a trespasser; and a subsequent distress for rent will not only not affirm the tenancy or waive the breaches in respect of which the forfeiture had taken place, but be unlawful (*a*).

In an ejectment action on a lease containing a general covenant to repair, and a covenant to repair within a certain period after notice, a notice to repair within the certain period was held to be a waiver of the forfeiture incurred by a breach of the general covenant (*b*); *secus*, when the notice was to repair forthwith (*c*), or in accordance with the covenants of the lease (*d*).

As the actual ground of forfeiture need not be stated, the mere claim of forfeiture by reason of the non-payment of rent will not of itself preclude the plaintiff from relying on a previous forfeiture (*e*).

8. The Law as to Relief against Forfeiture under the Conveyancing Acts, 1881—1892.

By the Conveyancing and Law of Property Act, 1881 (*f*), commencing and taking effect from the 31st December, 1881:—

Section 14 (1): "A right of re-entry or forfeiture under any

(*a*) Grimwood *v.* Moss, L. R. 7 C. P. 360; Serjeant *v.* Nash, Field & Co., (1903) 2 K. B. 304; cf. Jones *v.* Carter, 15 M. & W. 718; but see Moore *v.* Ullcoats Mining Co., (1908) 1 Ch. 575; Dendy *v.* Evans, (1910) 1 K. B. 263.

(*b*) Doe d. Morecraft *v.* Meux, 4 B. & C. 606.

(*c*) Roe d. Goatly *v.* Paine, 2 Camp. 520.

(*d*) Few *v.* Perkins, L. R. 2 Ex. 92.

(*e*) Toleman *v.* Portbury, L. R. 5 Q. B. 288, L. R. 7 Q. B. 344; cf. Serjeant *v.* Nash, Field & Co., (1903) 2 K. B. 304.

(*f*) 44 & 45 Vict. c. 41.

proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the *lessor serves on the lessee a notice* specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case requiring the lessee to make compensation in money for the breach, and if the lessee fails within a reasonable (*a*) time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

The statutory notice must be given in order that peaceable possession may be obtained by the lessor by re-entry (*b*). If possession is taken, or recovered in an action of ejectment without the statutory notice, the lessee or those claiming through him will be entitled to relief (*c*).

The notice hereunder must be in detail, not general (*d*). Where the notice does not sufficiently specify certain breaches the fact that it does sufficiently specify certain other breaches will not prevent its being wholly bad (*e*). But where the notice is good in form the fact that some of the breaches alleged have not occurred or cannot be relied on will not invalidate the notice as to the breaches which actually exist (*f*).

In spite of the terms of the section, compensation need only be asked for where appropriate (*g*).

If by the writ arrears of rent accruing after notice given are claimed, the forfeiture is waived (*h*).

The compensation for breach of covenant which a lessee is liable to pay under this sub-section did not include the costs incurred by the lessor in consulting a solicitor and surveyor in respect of the preparation of the notice, but was to be measured by the same rule as damages in an action for the breach (*i*).

(*a*) See Horsey Estate *v.* Steiger, (1899) 2 Q. B. 79; Hopley *v.* Tarvin P. C., 74 J. P. 209.

(*b*) *Re* Riggs, (1901) 2 K. B. 16.

(*c*) Ibid., Rogers *v.* Rice, (1892) 2 Ch. 170.

(*d*) Fletcher *v.* Nokes, (1897) 1 Ch. 271; but see Piggott *v.* Middlesex C. C., (1909) 1 Ch. 134; and as to service of notice see sect. 67 of the Act.

(*e*) *Re* Serle, (1898) 1 Ch. 652.

(*f*) Pannell *v.* City of London Ry. Co., (1900) 1 Ch. 496; cf. Lock *v.* Pearce, (1893) 2 Ch. 271.

(*g*) Skinners' Co. *v.* Knight, (1891) 2 Q. B. 542; Lock *v.* Pearce, (1893) 2 Ch. 271.

(*h*) Bevan *v.* Barnett, 13 T. L. R. 310; cf. Moore *v.* Ullcoats, &c. Co., (1908) 1 Ch. 575; (1908) W. N. 35 (C. A.).

(*i*) Skinners' Co. *v.* Knight, (1891) 2 Q. B. 542; but see now Conveyancing Act, 1892, s. 2, sub-s. 1. See as to the limited operation of this sub-section, Nind *v.* Nineteenth Century Building Society, (1894) 2 Q. B. 226.

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Section 14 (2): "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses (*a*), damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit."

In *Rose* v. *Spicer*, *Rose* v. *Hyman* (*b*), the defendant lessees, who were seeking relief against forfeiture in the lessors' action, had made certain alterations in buildings comprised in the premises demised. Those alterations were alleged to amount to a breach of the covenant to repair and maintain contained in the lease. The defendants offered to secure the reinstatement of the buildings in their former condition at the expiration of the lease, but insisted that they were entitled to make and continue the alterations. The Court of Appeal, *Cozens-Hardy*, M. R. and *Fletcher-Moulton*, L. J. (*Buckley*, L. J., dissenting), found that the alterations constituted a continuing breach of the covenant, not trivial in its nature, and held, that, as the defendants asserted a claim to persist in continuing the breach, they had no right to relief. *Cozens-Hardy*, M. R. (*c*), in the course of his judgment laid down in detail the principles which should in his opinion be followed by the Court in granting or refusing relief under the section. These conditions of relief are in substance as follows: (1) the breaches of covenant alleged in the notice must be remedied, and reasonable compensation be paid for those which cannot be remedied; (2) if a negative covenant has been broken the applicant must undertake to observe the covenant in future, or at least not avow his intention to repeat the breach; (3) in cases not falling under (2) if the act complained of is one which would be restrained by the Court during the currency of the lease as an act of waste, the applicant for relief must undertake to make good the waste if possible; (4) if the act done falls neither under (2) nor (3) but is one for which damages could be recovered on the covenant, the applicant must undertake not to repeat the wrongful act or be-

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(*a*) See Clare *v.* Dobson, (1911) 1 K. B. 35.

(*b*) (1911) 2 K. B. 234; Batson *v.* London School Board, 69 J. P. 9.

(*c*) Ibid., at p. 241.

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guilty of a continuing breach. "Subject only to the maxim *de minimis*, the applicant must come into Court with clean hands, and ought not to be relieved if he avows an intention to continue or to repeat a breach of covenant" (*a*).

If the proper statutory notice has been given, the tenant can only obtain relief under this section before the landlord has re-entered or has recovered possession (*b*), but it is sufficient if he has applied for relief before re-entry (*c*).

And with regard to re-entry for breach of covenant, the Court has under this sub-section a discretion either to grant or refuse relief in a lessee's action (*d*).

Where the right of renewing a lease for lives had been lost by non-payment of renewal fines, though demanded by the reversioners, the Court refused to relieve (*e*).

Where a forfeiture had been incurred through breach of a covenant to repair, relief was granted on the terms of the defendant executing proper repairs and paying arrears of rent and costs (*f*).

Where a forfeiture had been incurred by the default of the lessee to complete houses under a covenant in a lease, the equitable mortgagees of the lessee were, under the special circumstances of the case, where no proper notice had been given, relieved from forfeiture upon their undertaking to perform the covenants (*g*), and a judgment by default in an action against the lessee for recovery of the land on the forfeiture was set aside on the application of the equitable mortgagees, although not parties to the action (*h*).

When the Court has made an order for relief the tenant may elect to take the order or suffer the forfeiture, for the Court has no jurisdiction to compel the tenant to take relief on the terms of the order (*i*). If relief is actually obtained, the effect is that the forfeiture is deemed never to have been incurred (*k*).

(*a*) And see per *Fletcher-Moulton*, L. J., as to conditions of relief, ibid., p. 246, and per *Buckley*, L. J., at p. 252.

(*b*) Rogers *v.* Rice, (1892) 2 Ch. 170; *Re* Riggs, (1901) 2 K. B. 16.

(*c*) Lock *v.* Pearce, (1892) 2 Ch. 328.

(*d*) Scott *v.* Matthew Brown & Co., (1884) W. N. 209; see also Lock *v.* Pearce, supra; Rogers *v.* Rice, supra.

(*e*) Ruttledge *v.* Whelan, 10 L. R. Ir. 263.

(*f*) Bond *v.* Freke, (1884) W. N. 47.

(*g*) North London Land Co. *v.* Jacques, (1883) W. N. 187.

(*h*) Jacques *v.* Harrison, 12 Q. B. D. 136. See the remarks of *North*, J., on the cases in Lock *v.* Pearce, (1892) 2 Ch. 333.

(*i*) Talbot *v.* Blindell, (1908) 2 K. B. 114.

(*k*) Dendy *v.* Evans, (1910) 1 K. B. 263.

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Section 14 (3): "For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns."

Under this section an under-lessee had no right to relief against the superior landlord (*a*).

Section 14 (4): "This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament."

Section 14 (5): "For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach."

Section 14 (6): "This section does not extend—

"(i.) To a covenant or condition against assigning, underletting (*b*), parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy (*c*) of the lessee, or on the taking in execution of the lessee's interest or

"(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof."

Section 14 (7) effects the repeal of sects. 4 to 9 of the Act to further

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(*a*) Nind *v.* Nineteenth Century Building Society, (1894) 2 Q. B. 226; Burt *v.* Gray, (1891) 2 Q. B. 98. But see now Conveyancing Act, 1892, sect. 4, at pp. 293, 294.

(*b*) See Horsey Estate *v.* Steiger, (1899) 2 Q. B. 79; Gentle *v.* Faulkner, (1900) 2 Q. B. 267; Barrow *v.* Isaacs, (1891) 1 Q. B. 417; Eastern Telegraph Co. *v.* Dent, 78 L. T. 713; West *v.* Gwynne, (1911) 2 Ch. 1; Willmott *v.* L. R. C. Co., (1910) 2 Ch. 525 as to who is a "person."

(*c*) See *Ex p.* Gould, *Re* Walker, 13 Q. B. D. 454; Smith *v.* Gronow, (1891) 2 Q. B. 394. As to the effect of annulment, see the *quære* in Smith *v.* Gronow, at p. 397. As to liquidation of companies, see Horsey Estate *v.* Steiger, (1899) 2 Q. B. 79; Ewart *v.* Fryer, (1902) A. C. 187; and see Conveyancing Act, 1892, s. 2, sub-s. 2, infra, p. 293.

amend the Law of Property, and to relieve Trustees (*a*), and sect. 2 of the Common Law Procedure Act, 1860 (*b*).

Section 14 (8): "This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent."

Section 14 (9): "This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

But by the Conveyancing Act, 1892, s. 2, sub-s. 2, "Sub-s. 6 of sect. 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year; but in case the lessee's interest be sold within such one year, sub-s. 6 shall cease to be applicable thereto" (*c*).

The contract of sale must be absolute or be completed by conveyance, and so a conditional contract of sale by a liquidator of a company was held not to be within the sub-section (*d*). The ordinary proviso in a lease for forfeiture on bankruptcy applies where the person for the time being in possession becomes bankrupt. Where the original lessee assigns and then becomes bankrupt there is no forfeiture (*e*).

By sub-s. 3, certain property is excepted from this sub-s. 2, as agricultural or pastoral land, mines or minerals, public houses, some dwelling-houses let furnished, house property in which the qualifications of the tenant are material to be considered with regard to the neighbourhood.

By s. 4: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may (*f*), on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution

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(*a*) 22 & 23 Vict. c. 35.

(*b*) 23 & 24 Vict. c. 126.

(*c*) See Smith *v.* Gronow, (1891) 2 Q. B. 394.

(*d*) *Re* Castle, 94 L. T. 396.

(*e*) Smith *v.* Gronow, supra.

(*f*) Matthews *v.* Smallwood, (1910) 1 Ch. 777.

of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the Court in the circumstances in each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

This section is not a mere amendment of sect. 14 of the 1881 Act but an independent provision (*a*). Consequently relief can be given to an under-lessee against a forfeiture of a head lease for non-payment of rent (*b*), for the powers of the Court are not limited (*c*) as in sect. 14. The Court can give relief where a covenant against assignment has been broken, but will be cautious in exercising its jurisdiction (*d*). The discretion of the Court as to the terms of the relief is only limited by the provision as to the length of the new term (*e*).

9. Forfeiture as affected by the Settled Land Acts.

Under the Settled Land Act, 1882 (*f*), the powers of the Act may be exercised by a limited owner, without his estate being determined or any cesser taking place thereupon.

By s. 51 (1): "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act, a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting or tending or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, *or by forfeiture*, or in any other manner whatever, to prohibit or prevent him from exercising or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under this Act, that provision, as far as it purports or attempts or tends, or is intended to have, or would or might have the operation aforesaid, shall be deemed to be void."

(*a*) Enacted in consequence of the decision in Burt *v.* Gray, (1891) 2 Q. B. 98.

(*b*) Gray *v.* Bonsall, (1904) 1 K. B. 601.

(*c*) See Warden of Highgate School *v.* Sewell, (1894) 2 Q. B. 906.

(*d*) Imray *v.* Oakshotte, (1897) 2 Q. B. 218.

(*e*) Ewart *v.* Fryer, (1901) 1 Ch. 499; 86 L. T. 676 (as to costs); and see London Bridge Buildings Co. *v.* Thomson, 89 L. T. 50; and sect. 5 as to agreements for leases and underleases and the definition of an underlessee.

(*f*) 45 & 46 Vict. c. 38.

Sloman v. Walter.

Section 51 (2): "For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same."

The section applies, as its initial words shew whether the "provision" void under sub-s. 1, or the limitation inoperative under sub-s. 2, is contained in the settlement itself or in a separate instrument (*a*), and whether the property affected by such a provision or limitation is the settled property itself or other property (*b*).

Dispositions designed to make the continuance of the tenant-for-life's rights under the settlement or in other property dependent upon his continued residence in (*c*) or continued receipt of the rents and profits (*d*) of the settled property are void. A provision requiring residence *until* lease or sale is, however, valid (*d*); such a provision can only be invalid in so far as it is designed to restrain the exercise of the statutory power (*e*). A limitation of the *income* of property to a tenant-for-life until he alienates or charges it, etc., is not affected by this section. Such a limitation in no way impedes the sale under the statutes of the subject matter of the settlement, and if that is sold then the limitation in question is transferred to the income of the proceeds (*f*).

Section 52: "Notwithstanding anything in a settlement, the exercise by a tenant-for-life of any power under this Act shall not occasion a forfeiture."

(*a*) *Re* Smith, (1899) 1 Ch. 331.

(*b*) *Re* Ames, (1893) 2 Ch. 479; *Re* Eastman's S. E., (1898) W. N. 170.

(*c*) *Re* Paget's S. E., 30 C. D. 161; *Re* Dalrymple, 49 W. R. 627; *Re* Fitzgerald, (1902) 1 Ir. R. 162.

(*d*) *Re* Haynes, 37 C. D. 306; *Re* Edwards' Settlement, (1897) 2 Ch. 412.

(*e*) *Re* Trenchard, (1902) 1 Ch. 378.

(*f*) See *Re* Levy's Trusts, 30 C. D. 119.

POWERS.

TOLLET *v.* TOLLET.

1728. 2 P. W. 489.

Defective Execution of a Power aided.

> Husband has a power to make a jointure to his wife by deed: he does it by will, and she has no other provision; equity will make this good. Equity will supply the want of a surrender of a copyhold, in case it be devised for payment of debts, or for a wife, or for younger children; so also will it help a defective execution of a power; but not a non-execution.

The husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband to make a jointure on his wife by *deed* under his hand and seal.

The husband having a wife, for whom he had made no provision, and being in the *Isle of Man*, by his last *will*, under his hand and seal, devised part of his lands within his power to his wife for her life.

Objection.—This conveyance, being by a will, is not warranted by the power, which directs that it should be by *deed*; and a will is a voluntary conveyance, and, therefore, not to be aided in a Court of equity.

Sir Joseph Jekyll, M. R.—This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for (*a*); and as a Court of equity would, had this been the case of a copyhold *devised*, have supplied the want of a surrender; so where there is a defective execution of the power, be

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(*a*) See Hervey *v.* H. &c., 1 Atk. 561, cited infra.

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it either for payment of debts, or provision for a wife or children unprovided for, I shall equally supply any defect of this nature.

The difference is betwixt a *non-execution* and a *defective execution of a power;* the latter will always be aided in equity, under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this Court will not help the *non-execution* of a power (*a*), since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.

NOTES.

1. Generally.
2. Of the classes in whose favour equity will aid a defective execution of a power or supply a surrender, p. 298.
3. Defective execution, p. 303.
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5. What powers will be aided, p. 307.
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7. Non-execution of a power, p. 314.

1. Generally.

Wherever the formalities required by a power are not strictly complied with, the appointment will, at law (unless made valid by statute (*b*)), be void, and the property which is the subject of the power will consequently go as in default of appointment. Equity, however, although not holding the power to be well executed, will, where there is the *ability* to exercise a power over property, and a distinct *intention* to exercise it in favour of certain classes of persons, aid a *defective* execution of it by compelling, as in the principal case, the person having the legal interest to transfer it in the manner pointed out by the defective appointment. The principle upon which equity acts in these cases is thus stated by *Alvanley*, M. R. (*c*) :

(*a*) But see cases dealt with in notes to Harding *v*. Glyn, infra, in Note 5.

(*b*) See infra, p. 309.

(*c*) Chapman *v*. Gibson, 3 Bro. Ch. 229.

"Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir to make him perfect this intention"; but *Grant*, M. R., in *Holmes* v. *Coghill* (*a*), seems to have considered it difficult to discover a sound principle upon which to base the exercise of this authority.

The execution of a power and a surrender of a copyhold *devised*, go hand in hand (*b*), but it is now settled in accordance with the inference which may be drawn from the remark of the M. R., in the principal case, that equity will not supply a surrender in the case of a covenant in a *deed* at the instance of persons having merely a *meritorious* consideration, any more than it will carry into execution a voluntary contract at the instance of the same persons (*c*). See *Jefferys* v. *J.* (*d*), in which case A. made a voluntary settlement of freeholds and covenanted to surrender copyholds to like uses for the benefit of his daughters: *Cottenham*, C., although he made a decree for carrying the settlement into effect so far as the freeholds were concerned, the title of the plaintiffs being *complete*, refused to do so as regarded the copyholds, the title thereto being incomplete; but this case seems rather to be an example of the principle that the Court will not enforce an incomplete settlement in favour of volunteers (*e*).

Surrenders of copyholds to the use of wills were rendered unnecessary by 55 Geo. 3, c. 192, repealed and in effect re-enacted as to this by 1 Vict. c. 26, ss. 3, 4, 5. For forms of judgments supplying defects in the execution of powers see Seton (1901), 6th Ed., Vol. II., p. 1741.

2. Of the Classes in whose Favour Equity will aid a Defective Execution of a Power or supply a Surrender (*f*).

Purchasers for value.—"There is a distinction between persons claiming for meritorious consideration and for valuable (good)

(*a*) 7 V. 506, 6 R. R. 171.

(*b*) Chapman *v.* Gibson, supra; Sayer *v.* S., 7 Ha. 387; Cotter *v.* Layer, 2 P. W. 623; Rodgers *v.* Marshall, 17 V. 297; and *Jekyll*, M.R., in the principal case.

(*c*) As to which see notes to Ellison *v.* E., post.

(*d*) Cr. & Ph. 138.

(*e*) See Tatham *v.* Vernon, 29 B., p. 615; Gale *v.* G., 6 C. D., p. 152; Gandy *v.* G., 30 C. D., p. 64; see notes to Ellison *v.* E., post.

(*f*) See in this connection Note 4, infra, p. 306, "Cases in which Defects will not be Aided."

consideration" (*a*). A mere agreement or covenant to execute a power in favour of persons claiming only upon a *meritorious* consideration will not be aided in equity unless an intention be thereby shown of executing the power (*b*). But where the consideration is *valuable*, a valid agreement or covenant to exercise a general power of appointment by *deed* in a certain way will be enforced (*c*). So where D. contracted to sell, at a price to be fixed by arbitration, certain lands over which he had a power of appointment, to a railway company, and then died without executing the power, the Court supplied the defect (*d*). See further as to purchasers for valuable consideration, under which term mortgagees and lessees are included, cases cited below (*e*); as to mortgagees (*f*); as to lessees (*g*). In order to constitute a purchaser in whose favour a defective execution of a power can be aided, there must be a consideration and an intention to purchase, either proved or to be presumed (*h*).

Creditors.—Secondly, equity will aid *creditors*. Where a testator shows an intention to provide for debts the Court will supply a defective execution (*i*). In *Wilkes* v. *Holmes* (*k*), power was given, in a marriage settlement, to the husband and wife to raise 2,000*l*. out of certain lands of the wife's; and if no part should be raised in the life of the husband and wife, then it should be lawful for the survivor of them, *by will duly executed*, to raise that sum, for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for younger children. The wife, upon the death

(*a*) Farwell on Powers (1893), 335.

(*b*) Sayer *v*. S., 7 Ha. 387, 389; and see, infra, "Meritorious consideration," p. 301.

(*c*) As to the effect of a covenant to exercise a general power of appointment by will, see Beyfus *v*. Lawley, (1903) A. C. 411; notes to Aleyn *v*. Belchier, infra, Note 8.

(*d*) *Re* Dykes' Estate, 7 Eq. 337. *Secus* where there is no binding contract, Morgan *v*. Milman, 3 De G. M. & G. 24.

(*e*) Fothergill *v*. F., 2 Freem. 257; Jackson *v*. J., 4 Bro. Ch. 462; Cotter *v*. Layer, 2 P. W. 623; Sergeson *v*. Sealey, 2 Atk. 414, 9 Mod. 390; Wade *v*. Paget, 1 Bro. Ch. 363.

(*f*) Taylor *v*. Wheeler, 2 Vern. 564 (surrender supplied); Jennings *v*. Moore, 2 Vern. 609 (surrender supplied); The London Chartered Bank of Australia *v*. Lemprière, L. R. 4 P. C. 572.

(*g*) Campbell *v*. Leach, Amb. 740; Doe *v*. Weller, 7 T. R. 478; Dowell *v*. Dew, 12 L. J. Ch. 158; King *v*. Roney, 5 Ir. Ch. R. 64, 72. See *Re* King, 16 Eq. 525.

(*h*) See per *Turner*, V.-C., in Hughes *v*. Wells, 9 Ha. 769.

(*i*) Chapman *v*. Gibson, 3 Bro. Ch. 229; Bixby *v*. Eley, 2 Bro. Ch. 325; Ithell *v*. Beane, 1 Ves. Sen. 215; Tudor *v*. Anson, 2 Ves. Sen. 582; Fothergill *v*. F., 2 Freem. 257.

(*k*) 9 Mod. 485.

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of the husband, defectively executed the power; it was objected, that the debts which were to be paid by means of the power were the debts of the husband, whereas the estate was originally the wife's. However, Lord *Hardwicke* supplied the defect, observing that the debts were expressly provided for by the deed of settlement.

Where, moreover, a person has a *general* power of appointment over property which in default of appointment is given over, if he exercises such appointment in favour of volunteers by deed, or by will, such property will be liable in aid of the assets of the appointor for the benefit of his creditors (*a*), but if he does not exercise his power equity cannot interfere, and the persons entitled in default of appointment will take the property (*b*). The appointee is a trustee for the testator's creditors at the date of his death, not for those at the date of his will. Therefore, where a testator executes a general power of appointment and becomes bankrupt, the appointed fund is not available for creditors who have proved in the bankruptcy, but is available only for creditors whose claims have accrued subsequently (*c*).

A purchaser from a volunteer under a deed of appointment has a better equity than a general creditor of the appointor (*d*), but this does not apply in the case of appointments by will. In the latter case purchasers from an appointee are in the same position as purchasers of a legacy and subject to the same equities in respect thereof as their vendor (*e*). Creditors cannot claim to have a defective execution of a power in favour of a volunteer (who could not himself be aided) supplied in their favour (*f*). A lender to a testator who has taken by way of security for his loan a covenant by the testator to execute a general power of appointment by will in his favour is, as between himself and the other creditors of the testator, only a volunteer, and entitled to no preference (*g*).

By sect. 4 of the Married Women's Property Act, 1882, the execution of a general power by will by a married woman has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable by the Act (*h*).

(*a*) See Thompson *v.* Towne, 2 Vern. 319; Fleming *v.* Buchanan, 3 De G. M. & G. 976; Beyfus *v.* Lawley, (1903) A.C. 411. See also judgment of *Farwell*, L. J., in *Re* Hadley, (1909) 1 Ch. 20, 35.

(*b*) Holmes *v.* Coghill, 7 V. 499.

(*c*) Jenney *v.* Andrews, 6 Madd. 264; *Re* Guedalla, (1905) 2 Ch. 331.

(*d*) George *v.* Milbanke, 9 V. 190. Cf. Halifax Joint Stock Banking Co. *v.* Gledhill, (1891) 1 Ch. 31.

(*e*) Jennings *v.* Bond, 2 Jo. & Lat. 720.

(*f*) Farwell, Powers (1893), 339.

(*g*) Beyfus *v.* Lawley, (1903) A.C. 411.

(*h*) See as to this section Hodges *v.* H., 20 C. D. 749; *Re* Roper, 39 C. D.

Charities.—Thirdly, *charities* will be aided. The uniform rule of this Court, both before, at, and after the passing of the Statute of Charitable Uses (*a*), seems to have been, that where the uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such uses (*b*). This Statute is repealed by the Mortmain and Charitable Uses Act, 1888, but the preamble of it is preserved by sect. 13, sub-s. 2, of the latter Act.

"The principle upon which the Court appears to go is this, that if a person has power, by his own act, to give property, and has, by some paper or instrument, *clearly shown that he intended to give it*, although that paper, by reason of some informality, is ineffectual for the purpose . . . the Court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done" (*c*).

Meritorious Consideration.—Fourthly, equity will aid a *wife and legitimate child* of the donee of the power, although they claim merely as volunteers, upon a meritorious consideration; as, for instance, upon a provision made for them after marriage (*d*), and a wife or child, although provided for, will be entitled to the aid of equity, the Court considering that the husband or the father are the proper judges what is a reasonable provision (*e*).

To no other persons, except a wife or legitimate child, will the aid of the Court be granted, upon the ground of the provision being for a *meritorious consideration;* neither to a husband (*f*); nor to a natural child (*g*); nor to a grandchild (*h*); nor to a father (*i*); nor

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482; *Re* De Burgh Lawson, 41 C. D. 568; *Re* Hughes, (1898) 1 Ch. 529; *Re* Fieldwick, (1909) 1 Ch. 1; and notes to Hulme *v.* Tennant, Vol. I.

(*a*) 43 Eliz. c. 4.

(*b*) A.-G. *v.* Tancred, 1 Eden, 14. As to the report of this case see 2 R. & M. 111 (n.).

(*c*) Per *Wigram*, V.-C., Innes *v.* Sayer, 7 Ha. 377, 388. See S. C., affirmed on appeal, 3 Mac. & G. 606; A.-G. *v.* Burdet, 2 Vern. 754.

(*d*) Tollet *v.* T., supra; Fothergill *v.* F., 2 Freem. 257; Sarth *v.* Blanfrey, Gilb. Eq. R. 166; Affleck *v.* A., 3 Sm. & G. 394; Hervey *v.* H., 1 Atk. 567; Lucena *v.* L., 5 B. 249; Barron *v.* Constabile, 7 Ir. Ch. R. 467; Charlton *v.* C., (1906) 2 Ch. 523.

(*e*) Hervey *v.* H., 1 Atk. 568; Sneed *v.* S., Amb. 64; Chapman *v.* Gibson, 3 Bro. Ch. 230; Smith *v.* Baker, 1 Atk. 385 (surrender of copyholds); Hume *v.* Rundell, 6 Madd. 331; Morse *v.* Martin, 34 B. 500; *Re* Walker, (1908) 1 Ch. 560.

(*f*) Moodie *v.* Reid, 1 Madd. 516; Hughes *v.* Wells, 9 Ha. 749, 769.

(*g*) Fursaker *v.* Robinson, Pr. Ch. 475; Tudor *v.* Anson, 2 Ves. Sen. 582; Blake *v.* B., Beat. 575. Cf. *Re* Deakin, (1894) 3 Ch. 565.

(*h*) Tudor *v.* Anson, 2 Ves. Sen. 582; Perry *v.* Whitehead, 6 V. 544.

(*i*) Sloane *v.* Cadogan, App. to Sug. on Powers, 8th edit., p. 914.

to a mother, brother, or sister (*a*); nor to a nephew or niece (*b*); nor to a cousin (*c*); nor to a settlor defectively executing a power in his own favour (*d*). *A fortiori* equity will not afford its aid to *mere volunteers* (*e*).

If the obligation upon the donee of the power to provide for the persons taking in default of appointment be equal to the obligation owed to the objects of the power, equity will not interfere. "The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expense of another; and, if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife, or other children" (*f*). If a daughter is unprovided for, but a son is provided for, a defective execution of a power in favour of the daughter will be aided in equity (*g*).

In *Braddick* v. *Mattock* (*h*), *Leach* V.-C., said, "This Court will not supply a surrender against the heir-at-law *unprovided* for; but it considers the parent as the best judge of the provision of that heir, and will not examine the sufficiency of the provision, unless perhaps in a case in which it may be challenged as illusory." In *Rodgers* v. *Marshall* (*i*), *Grant*, M. R., seemed inclined to think that, as against a *grandchild*, being the heir-at-law, and unprovided for, the want of surrender ought not to be supplied, and directed an inquiry as to whether he was provided for (*k*). It is clear, however, that a surrender will be supplied as against a *collateral* heir, whether provided for or not; as a person is not supposed to be under any obligation to provide for a collateral heir (*l*).

(*a*) Goodwyn *v.* G., 1 Ves. Sen. 226; Goring *v.* Nash, 3 Atk. 189, overruling Watts *v.* Bullas, 1 P. W. 60.

(*b*) Strode *v.* Russel, 2 Vern. 621, 625; Marston *v.* Gowan, 3 Bro. Ch. 170.

(*c*) Tudor *v.* Anson, 2 Ves. Sen. 582.

(*d*) Ward *v.* Booth, cited 3 Ch. Ca. 69, 92; Ellison *v.* E., post, 6 V. 656; Sergeson *v.* Sealey, 9 Mod. 390.

(*e*) Smith *v.* Ashton, 2 Freem. 309; Godwin *v.* Kilsha, Amb. 684; *Re* Anstis, 31 C. D. 596. And see definition of volunteers given by *Cotton*, L. J., Tucker *v.* Bennett, 38 C. D. 1, 10.

(*f*) Chapman *v.* Gibson, 3 Bro. Ch. 230.

(*g*) Hume *v.* Rundell, 6 Madd. 331; Lucena *v.* L., 5 B. 249; Morse *v.* Martin, 34 B. 500; *Re* Walker, (1908) 1 Ch. 560.

(*h*) 6 Madd. 363.

(*i*) 17 V. 294.

(*k*) But see Hills *v.* Downton, 5 V. 565.

(*l*) Fielding *v.* Winwood, 16 V. 90; see also Chapman *v.* Gibson, 3 Bro. Ch. 229; and also against *hæres factus* Smith *v.* Baker, 1 Atk. 385.

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3. Defective Execution (*a*).

As a general rule, where the *intention to execute* a power is sufficiently declared, though not in the form prescribed by the donor of the power, the persons to be benefited, and the amount they are to take, are sufficiently indicated, and there is *good consideration* for the attempted execution of the power, the defect in form will be supplied in equity, unless such defect is of the *essence* of the power (*b*).

Intention to Execute.—If the intention to execute the power appear clearly in writing, as where a donee of a power covenants to execute it (*c*), even before the power actually comes into existence (*d*); or, by his will, he desires the remaindermen to create the estate authorised by the power (*e*); or if he enters into an agreement to execute it (*f*); even though he keep the agreement in his own possession (*g*); or if by a mere writing, not sealed and delivered, he expresses an intention to give property which he had power to appoint by instrument sealed and delivered (*h*); or if he promises by letters to grant an estate (*i*); or to give a security (*k*), which he could only do by the exercise of his power, aid will be given. And an agreement for valuable consideration to exercise a power by deed will be aided in equity as an informal execution of a general power of appointment (*l*). A recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his appointment, has been held sufficient evidence of his intention to execute the power, and was therefore aided as a defective execution of a power (*m*). And a statement in a lease that certain persons were "the present trustees" of a will

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(*a*) See "Non-execution," Note 7, infra.

(*b*) Shannon *v.* Bradstreet, 1 Sch. & L. 63; Garth *v.* Townsend, 7 Eq. 220; Cooper *v.* Martin, L. R. 3 Ch. 47, 57; Kennard *v.* K., L. R. 8 Ch. 227; Hallett to Martin, 24 C. D. p. 632. See Beddington *v.* Baumann, (1903) A. C. 13.

(*c*) Fothergill *v.* F., 2 Freem. 256; Coventry *v.* C., 2 P. W. 222; Sarth *v.* Blanfrey, Gilb. Eq. R. 166.

(*d*) Charlton *v.* C., (1906) 2 Ch. 523.

(*e*) Vernon *v.* V., Amb. 1.

(*f*) Shannon *v.* Bradstreet, 1 Sch. & L. 52; Mortlock *v.* Buller, 10 V. 315; Lowry *v.* Dufferin, 1 Ir. R. Eq. 281; Dowell *v.* Dew, 1 Y. & C. Ch. 345.

(*g*) King *v.* Roney, 5 Ir. Ch. R. 64, 77.

(*h*) Kennard *v.* K., L. R. 8 Ch. 227.

(*i*) Campbell *v.* Leach, Amb. 740; Sugd. on Powers, App., 8th edit., p. 950; and see Blake *v.* French, 5 Ir. Ch. R. 246.

(*k*) The London Chartered Bank of Australia *v.* Lemprière, L. R. 4 P. C. 572.

(*l*) *Re* Dykes' Estate, 7 Eq. 337. Cf. Beyfus *v.* Lawley, (1903) A. C. 411 (as to execution of power by will).

(*m*) Wilson *v.* Piggott, 2 V. 351; Poulson *v.* Wellington, 2 P. W. 533.

was held to operate as an appointment of new trustees (*a*). So also where a donee of a power, in an answer to a bill in Chancery, states that he "appoints, and intends, by writing in due form, to appoint" (*b*); but of course there can be no intention to execute a power unless there is a knowledge of its existence (*c*). So where a donee of a power concurred in a deed of settlement, for purposes unconnected with the fund subject to the power, and in ignorance of the existence of the power, such concurrence was held not to operate as a defective exercise of the power which would be aided in equity (*d*). And where a married woman had two powers of appointment, both exercisable by will, but from the terms of her will it was quite uncertain which power she intended to exercise, it was held her will did not operate as an exercise of either power (*e*).

In order that the Court should be able to rectify any informality in the execution of a power, it is essential, not only that the persons to be benefited, and the amount of the benefit, should be sufficiently indicated, *but that the intention to pass the property, though not necessarily under the power* (*f*), should be clearly shown.

For the Court will not aid a defective instrument where there does not appear thereby to have been on the part of the donee a *distinct intention to execute the power*. Thus, in *Garth* v. *Townsend* (*g*), Mrs. G., having power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed and published in the presence of, and to be attested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "For my sons and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The funds I wish divided as follows" (and after apportioning the funds among her children, and making a bequest to them out of another fund, and a gift of the residue, she thus ends the memorandum): "This paper contains my last wishes and blessings upon my dear children, and thanks for their love to me." It was

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(*a*) *Re* Farnell, 33 C. D. 599.

(*b*) Carter *v*. C., Mos. 365; and see Fortescue *v*. Gregor, 5 V. 553.

(*c*) As to knowledge of the future existence of a power, see Charlton *v*. C., (1906) 2 Ch. 523. Cf. *Re* Hayes, (1901) 2 Ch. 259.

(*d*) Griffith-Boscawen *v*. Scott, 26 C. D. 358.

(*e*) *Re* Herdman's Trusts, 31 L. R. Ir. 87.

(*f*) Carver *v*. Richards, 27 B. 488.

(*g*) 7 Eq. 220.

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held by *James*, V.-C., that the Court could not aid any defects in the execution of the memorandum, so as to give it validity as an appointment. "The true test," said his Honour, "is, is there a *distinct intention to execute the power?* Now, here the persons to take and the amount to be taken are sufficiently pointed out, but where the instrument fails is in *intention to execute the power*. Mrs. Garth purposely abstained from executing it. She simply wished her children to be quite unfettered, saying, 'I tell you my wishes, but I do not mean to tie you up by any legal document. I know I have power to appoint these funds, but I do not exercise that power.' The jurisdiction of the Court is to *supply defects occasioned by mistake or inadvertence; not to supply omissions intentionally made*" (*a*).

But a donee may have sufficiently indicated a present intention to execute a power, although he may in a certain event express an intention to give the property by a more formal document. In *Kennard* v. *K.* (*b*), a case very similar to *Garth* v. *Townsend*, a lady, having a power of appointment by deed or will over certain leasehold property, which in default of appointment was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she proceeded: "If I die suddenly, I wish my eldest son to have it. My intention is to make it over to him legally if my life is spared." It was held by the Court of Appeal, affirming the decision of the M. R., that the memorandum was a defective execution of the power by the donee, and that equity would relieve against the defect in favour of the eldest son. "She expresses," said *James*, L. J., "her intention that her son shall have the property which is the subject of the power. * * * In *Garth* v. *Townsend* I considered that, upon the true construction of the instrument, there was no intention to give the property, but only to request the persons taking it in default of appointment to make a certain application of it, without legally binding them to do so." And *Mellish*, L. J., observed, "She means in any event to give the property, but to do so by a more formal instrument if her life is spared" (*c*).

Defects relieved against.—Equity will supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal or of a

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(*a*) And see Pennefather *v.* P., 7 Ir. R. Eq. 300; Farwell, Powers (1893), 193.

(*b*) L. R. 8 Ch. 227.

(*c*) Explained per *Kay*, L. J., in *Re* Kirwan's Trusts, 25 C. D., at p. 381.

sufficient number of witnesses, or where it has been executed by a deed instead of a will (*a*). Since the Wills Act (*b*), powers to be executed by will must comply with the formalities of the Act, but need not be executed with additional formalities, even though so expressly required by the instrument creating the power. A mere memorandum not testamentary, in execution of a power, may, by being turned into a deed, be aided in equity (*c*), but if the document be testamentary, and be not executed with two witnesses in accordance with the provisions of the Wills Act, it will not be so aided. And this is the case even if the document be admitted to probate, under Lord Kingsdown's Act (24 & 25 Vict. c. 114), as a will made abroad (*d*).

But in the case of a will admitted to probate in England, where neither the Wills Act nor Lord Kingsdown's Act apply, such as the will of a person domiciled abroad or in Scotland, such a defect as insufficient attestation will be aided in equity (*e*).

A power will, as in the principal case, be aided, if it has been executed by a *will*, when it ought strictly to have been executed by deed (*f*).

In *Barron* v. *Constabile* (*g*) the power was to *charge* a jointure not exceeding 600*l.* a year by deed or will; the donee of the power *devised* instead of charging a jointure, and the devise was held an execution of the power.

4. Cases in which Defects will not be Aided.

Equity will not aid a defect if the intention of the donor would be thereby defeated. Thus, although there is no doubt that a Court of

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(*a*) Cockerell *v.* Cholmeley, 1 R. & M. 418, 424. As to the want of sufficient witnesses to a deed, see 22 & 23 Vict. c. 35, infra.

(*b*) 1 Vict. c. 26, ss. 9 and 10. As to powers insufficiently executed by will before the Act, see Lucena *v.* L., 5 B. 249; Morse *v.* Martin, 34 B. 500.

(*c*) Kennard *v.* K., L. R. 8 Ch. 227.

(*d*) *Re* Kirwan, 25 C. D. 373, 381; Hummel *v.* H., (1898) 1 Ch. 642.

(*e*) *Re* Walker, (1908) 1 Ch. 560. But see Barretto *v.* Young, (1900) 2 Ch. 339. Where no formalities are prescribed by the creator of the power an appointment by a foreign will admitted to probate in England is well executed though the will be not attested as required by the Wills Act. But inasmuch as s. 27 of the Wills Act does not apply to such a case, a general power must be expressly referred to, or the will must contain an indication that it is to be construed by English rules of construction; *Re* Price, (1900) 1 Ch. 443; *Re* D'Este, (1903) 1 Ch. 898; *Re* Scholefield, (1905) 2 Ch. 408, (1907) 1 Ch. 664; *Re* Baker's Settlement Trusts, (1908) W. N. 161.

(*f*) Sneed *v.* S., Amb. 64; Mills *v.* M., 8 Ir. Eq. R. 192; Bruce *v.* B., 11 Eq. 371.

(*g*) 7 Ir. Ch. R. 467.

equity will aid the defective execution of a power in favour of a creditor or purchaser (although the donee be a married woman (*a*)), the Court, in such cases, must be satisfied that the formalities which have not been observed, are no more than matters of form; and that the donee of the power has not by their nonobservance been deprived of any of the protection which the due exercise of the power would have afforded him. Thus a power to be executed by will cannot be executed by deed, and equity will not give its aid, as this would involve the destruction of a power intended to remain capable of execution till the moment of the donee's death (*b*). Neither (semble) would equity treat an instrument, testamentary in character, but which neither satisfied the Wills Act nor the terms of the power, as a deed (*c*). The Court looks with especial jealousy on any such transaction in which a wife may have acted under the influence of her husband (*d*). Equity will not relieve where the execution sought to be aided would involve a breach of trust (*e*). Nor where it would be a fraud upon the power (*f*). Nor where there is a defect in the execution of a power under an Act of Parliament (*g*), save so far as excepted by statute (*h*). Nor as to powers under the Civil List Act, or under particular family entails (*i*). Nor wherever the defect is of *the essence* of the power (*k*).

5. What Powers will be Aided.

There is no doubt that powers of jointuring (*l*), of raising

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(*a*) Pollard *v.* Grenville, 1 Ch. Ca. 10; Dowell *v.* Dew, 12 L. J. Ch. 158; Doe *v.* Weller, 7 T. R. 480; Dillon *v.* Grace, 2 Sch. & L. 456; Stead *v.* Nelson, 2 B. 245.

(*b*) Reid *v.* Shergold, 10 V. 370, 380; *Re* Walsh, 1 L. R. Ir. 320; Coffin *v.* Cooper, 13 W. R. 571, but see as to releases and covenants not to execute testamentary powers, Notes 6 and 8 to Aleyn *v.* Belchier, post, pp. 333, 335 and *Re* Evered, (1910) 2 Ch. 147.

(*c*) See per *Mellish*, L. J., in Kennard *v.* K., L. R. 8 Ch. 227, and per *Kay*, L. J., in *Re* Kirwan's Trusts, 25 C. D. 373, at p. 381.

(*d*) Hopkins *v.* Myall, 2 Russ. & M. 86; Thackwell *v.* Gardiner, 5 De G. & Sm. 58; and Majoribanks *v.* Hovenden, 6 Ir. Eq. R. 238.

(*e*) Mortlock *v.* Buller, 10 V. 292; Ord *v.* Noel, 5 Madd. 438; Bellringer *v.* Blagrave, 1 De G. & Sm. 63.

(*f*) Harnett *v.* Yielding, 2 Sch. & L. 549; *Re* Kirwan, 25 C. D. 373; see Dyas *v.* Cruise, 2 Jo. & Lat. 460.

(*g*) See Farwell, Powers (1893), pp. 343, 344. The Fines and Recoveries Act specifically excludes the jurisdiction of equity (3 & 4 Will. 4, c. 74, s. 47). See as to this section Carson R. P. S., 2nd ed. (1910), p. 300.

(*h*) Farwell, Powers (1893), pp. 343, 351. See Note 6, p. 309, infra.

(*i*) Farwell, Powers (1893), p. 344.

(*k*) Cooper *v.* Martin, L. R. 3 Ch. 47; Farwell (1893), p. 330.

(*l*) Charlton *v.* C., (1906) 2 Ch. 523, portions, of sale, of revoking uses and generally appointing an estate, will, if defectively executed, be aided.

Powers of Leasing.—Although it was at one time a subject of doubt, it seems now to be settled that, independently of the statutory aid hereafter mentioned, defective appointments under powers of leasing will be aided *as against the remainderman*, the lessee being a purchaser *pro tanto* (*a*). But to bind the remainderman there must be a *valid and binding contract in writing* (*b*). But if a remainderman lie by and suffer the lessee to improve the estate after the death of the tenant for life, a parol contract may be enforced against him (*c*).

And a power of leasing will not be aided where the best rent has not been reserved, or a fine has been paid, contrary to the requisitions of the power; or where there has been an agreement or covenant to grant a lease, commencing *in futuro*, where the power authorises only leases in possession, and the donee dies before the date when the lease is to commence (*d*). But if the donee, after agreeing to grant a lease *in futuro*, lives until the date of the commencement of such lease, e.g., when the estate falls into possession by the expiration of a former lease, the agreement will be held in equity a valid execution of the power (*e*). When the question is raised, whether the rent reserved is adequate or not, equity will not decline to aid the imperfect execution of the power of leasing, unless the rent be so low as to afford evidence of fraud (*f*). A covenant for renewal in a lease executed by a lessor under a power of granting leases *in possession at the best rent*, is good, if at the time of its performance the new lease reserves the best rent that can *then* be obtained and contains only stipulations then authorised by the power (*g*).

(*a*) Shannon *v.* Bradstreet, 1 Sch. & L. 52; Clark *v.* Smith, 9 Cl. & Fin. 126, 141; Campbell *v.* Leach, Amb. 740; Dowell *v.* Dew, 12 L. J. Ch. 158.

(*b*) Shannon *v.* Bradstreet, 1 Sch. & L. 52; Morgan *v.* Milman, 3 De G. M. & G. 24; Blore *v.* Sutton, 3 Mer. 237; Trotman *v.* Flesher, 3 Gif. 1; Farwell (1893), 347. Where the tenant for life dies after the agreement leaving an infant remainderman the agreement may be carried out by the trustees, Davis *v.* Harford, 22 C. D. 128.

(*c*) Stiles *v.* Cowper, 3 Atk. 692; Shannon *v.* Bradstreet, 1 Sch. & L. 72; Hope *v.* Cloncurry, 8 Ir. R. Eq. 555. *Secus* where such acts of part performance have been allowed by the tenant for life only, Morgan *v.* Milman, 3 De G. M. & G. 24, a case of sale.

(*d*) Campbell *v.* Leach, Amb. 740; Shannon *v.* Bradstreet, 1 Sch. & L. 52; Doe & Weller, 7 T. R. 478; Dowell *v.* Dew, 12 L. J. Ch. 158, 356; Temple *v.* Baltinglass, Rep. t. Finch, 271.

(*e*) Dowell *v.* Dew, 12 L. J. Ch. 158.

(*f*) King *v.* Roney, 5 Ir. Ch. R. 64, 77.

(*g*) Gas Light, &c. Co. *v.* Towse, 35 C. D. 519.

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Where unusual and unheard-of covenants were introduced into the lease, the Court refused to aid a lease purporting to have been granted in execution of a power to grant leases containing "usual and reasonable covenants" (*a*).

If a tenant for life has power to lease, with the consent of trustees or others, an agreement by the tenant for life alone to lease will not be aided (*b*).

Where a power of leasing has been exercised defectively the lessee, in the absence of a covenant for quiet enjoyment or the like on the part of the tenant for life, cannot enforce any claim against his estate by way of damages (*c*), though he may do so under such covenant (*d*).

Although the Court is unable to decree specific performance of an agreement to grant a lease against the remainderman, in consequence of the best rent not having been reserved by the donee tenant for life according to the requirement of the power, nevertheless, in the absence of fraud, and if there is a *bonâ fide* intention to execute the power, it is the better opinion that the *interest of the tenant for life may be bound to the extent he was able to bind it*, unless there be some inconvenience in making a decree for partial performance of the contract (*e*); and a purchaser under a power of sale from a tenant for life, with notice of an agreement to lease under a power, is bound to perform it in the same manner as the vendor was (*f*).

6. Defects in the Execution of Powers cured by Statute.

The legislature has extended the remedies of lessees by the Act 12 & 13 Vict. c. 26. The preamble to the Act states that, "Whereas through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers: And whereas leases granted in the intended exercise of such powers are sometimes

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(*a*) Medwin *v.* Sandham, 3 Swans. 685.

(*b*) Lawrenson *v.* Butler, 1 Sch. & L. 13.

(*c*) Blore *v.* Sutton, 3 Mer. 237; Stamford *v.* Omly, cited 1 Sch. & L. 65.

(*d*) Lock *v.* Furze, L. R. 1 C. P. 441; Vernon *v.* Egremont, 1 Bl. (N. S.) 554.

(*e*) Dyas *v.* Cruise, 2 Jo. & Lat. 460; Graham *v.* Oliver, 3 B. 128; Lawrenson *v.* Butler, 1 Sch. & L. 19; Doe *d.* Bromley *v.* Bettison, 12 East, 305; Farwell (1893), p. 348; but see, contra, Harnett *v.* Yielding, 2 Sch. & L. 549.

(*f*) Taylor *v.* Stibbert, 2 V. 437; cf. Smith *v.* Widlake, 3 C. P. D. 10.

invalid as against the successors in estate of the persons granting the same by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power."

By sect. 2 of the Act it is enacted that "where in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person, who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease in case the same have been made *bonâ fide* and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee . . . of a valid lease under such power to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power, and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: Provided always that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease where the persons who would have been bound by such contract are willing to confirm such lease without variation."

Sect. 3 of the Act is repealed by 13 Vict. c. 17.

By sect. 4: "Where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last mentioned time, and all the provisions herein contained shall apply to every such lease."

Sect. 5: "When a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise), cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this Act be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease."

Sect. 6 saves the rights of lessees and lessors under their covenants. By sect. 7 the Act is not to extend to leases "by any ecclesiastical corporation or spiritual person, or to the lease of any college, hospital, or spiritual foundation."

By 13 Vict. c. 17, which repeals the third section of the last-mentioned Act, it is enacted:

Sect. 2: "Where upon or before the acceptance of rent under any such invalid lease as in the Act [12 & 13 Vict. c. 26] mentioned, any receipt, memorandum, or note in writing confirming such lease is signed by the person accepting such rent, or some other person thereunto by him lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease."

Sect. 3: "Where during the continuance of the possession taken under any such invalid lease . . . the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require) or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised; and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid."

The effect of the original Act before the repeal of sect. 3 was, it is observed by a learned writer (*a*), "that the lessee, under an invalid lease granted in the intended exercise of a power, became, on the mere acceptance of rent by the remainderman, tenant from year to year on the terms of the lease, with a right to require either a

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(*a*) Farwell on Powers (1893), p. 358.

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confirmation of the contract or a lease in accordance with the power, the remainderman having no option to require a lease in accordance with the terms of the power. The effect of the original and Amendment Acts is that the mere acceptance of rent, without the memorandum mentioned by sect. 2 of the Amendment Act, makes the lessee tenant from year to year on the terms of the void lease, with the right to demand a lease either in accordance with that contract or with the terms of the power, at the option of the remainderman; but if the remainderman is willing to confirm the contract without variation, the lessee cannot insist upon having a lease in accordance with the terms of the power, but is bound to accept such confirmation. The acceptance of rent, coupled with the memorandum mentioned in sect. 2 of the amended Act, operates as a confirmation of the lease."

This statute (*a*) applies to leases granted under the Leases and Sales of Settled Estates Acts, or the Settled Land Acts (*b*); and also to leases by trustees (*c*); but not to leases by a stranger to the power (*d*).

Sale of Land without Timber.—Before 22 & 23 Vict. c. 35, s. 13, trustees with a power of sale only could not sell the estate separate from the timber (*e*). See now the Settled Estates Act, 1877, s. 16 (*f*), which authorises the Court to sell timber, not being ornamental, apart from the land.

Sale without Minerals.—Trustees could not formerly under the ordinary power of sale sell lands reserving minerals (*g*). To remedy this, the Confirmation of Sales Act, 1862, was passed (*h*). See now the Trustee Act, 1893, s. 44, and the Amendment Act, 1894, s. 3 (*i*).

A tenant for life can under the Settled Land Act, 1882, lease the surface of the settled land, reserving the minerals (*k*).

Other Statutory Enactments relating to Powers.—It may here be mentioned that if a will is in other respects properly executed, probate cannot be refused upon the ground that the power under

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(*a*) 12 & 13 Vict. c. 26.

(*b*) See Farwell on Powers (1893), p. 345; but see Sutherland (Duchess of) *v.* Sutherland (Duke of), (1893) 3 Ch. 169; *Re* Newell and Nevill, (1900) 1 Ch. 90, 94; overruled *Re* Gladstone, infra, on another ground.

(*c*) Farwell on Powers, p. 354, citing Hallett to Martin, 24 C. D. 624.

(*d*) *Ex p.* Cooper, 34 L. J. Ch. 373.

(*e*) Cholmeley *v.* Paxton, 5 Bing. 48; S. C. nom. Cockerell *v.* Cholmeley, 10 B. & C. 564; Carson (1910), 534.

(*f*) 40 & 41 Vict. c. 18.

(*g*) Buckley *v.* Howell, 29 B. 546.

(*h*) 25 & 26 Vict. c. 108, repealed by Trustee Act, 1893. See Settled Land Act, 1882, s. 17.

(*i*) Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 44; Amendment Act, 1894, 57 & 58 Vict. c. 10, s. 3.

(*k*) Sect. 6; *Re* Gladstone, (1900) 2 Ch. 101.

which it has been made has not been properly followed (*a*). It is a question of construction for the Court to determine whether the formalities required by the power have been duly complied with (*b*).

If a power of appointment is exercised by a will executed in English form, though the appointor is domiciled abroad and the will is not validly executed according to the law of domicile, the document may be admitted to probate as a will for the purposes of the appointment, though not admissible for other purposes (*c*).

By the Wills Act (*d*) no appointment made by will, in exercise of any power, will be valid, unless the same be executed with the solemnities required by the Act (*e*); but if those are complied with, the appointment will be valid, although some additional or other form of execution or solemnity may have been required by the power (*f*). The Wills Act governs all testamentary dispositions of land in England (*g*) including leaseholds (*h*) and all wills of personal estate of persons dying domiciled in England (*i*). The will of personalty of a person dying domiciled abroad is (subject to the provisions of Lord Kingsdown's Act (*k*)), governed by the law of his domicile at the time of his death.

By the Property and Trustees' Relief Amendment Act, 1859 (*l*), it is enacted that "a deed hereafter executed in the presence of, and attested by, two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power ot appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution, or attestation, or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be

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(*a*) Barnes *v.* Vincent, 5 Moo. P. C. 201.

(*b*) See De Chatelain *v.* De Pontigny, 1 Sw. & Tr. 411; Paglar *v.* Tongue, L. R. 1 P. & D. 158; *Re* Fenwick, ib., p. 319. On the question of the functions of the Court of Probate and the Court of Construction, see Jarman, Wills (1910), i. 799 et seq.

(*c*) Murphy *v.* Deichler, (1909) A. C. 446.

(*d*) 1 Vict. c. 26, s. 10; Carson, R. P. S. (1910), p. 153.

(*e*) *Re* Barnett, (1908) 1 Ch. 402. Cf. *Re* Broad, (1901) 2 Ch. 86.

(*f*) *Re* Tharp, 3 P. D. 80.

(*g*) See Westlake Int. Law, 4th ed., p. 207.

(*h*) Pepin *v.* Bruyère, (1902) 1 Ch. 24; but cf. *Re* Grassi, (1905) 1 Ch. 584.

(*i*) Westlake. 4th ed., p. 112.

(*k*) 24 & 25 Vict. c. 114.

(*l*) Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 12; Carson, R. P. S. (1910), 533.

performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend" (*a*).

By the Lunacy Regulation Act, 1890, s. 120, the judge may by order authorise and direct the committee of the estate of lunatic to exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit (*b*).

7. Non-execution of a Power.

Non-execution is where *nothing* is done. Defective execution (*c*) is where a person does some act with the intention of passing the property subject to the power (*d*).

The non-execution of a power will not be aided (*e*): a person, for instance, is not entitled to the aid of the Court on the ground of the execution of the power having been prevented by accident or by the sudden death of the donee (*f*). So, disability to sign from gout has not been aided (*g*). So the non-execution of a power through *mistake* will not be aided; as where a donee under a mistaken apprehension that certain persons whom he desired to benefit would take on his leaving the power unexecuted, and *expressed his intention not to make any further appointment* (*h*), but where the execution is *defective*, within the definition given supra, note 3, then, *semble*, a mistake will be aided (*i*).

Where, however, the execution of a power has been prevented by fraud, as where the deed creating the power has been fraudulently retained by the person interested in its non-execution, then, *semble*, equity will afford its aid (*k*).

(*a*) See Farwell on Powers (1893), p. 134.

(*b*) See Pope, Lunacy (1890), p. 184.

(*c*) See supra, note 3.

(*d*) See Shannon *v.* Bradstreet, 1 Sch. & L. 52, 63; Farwell (1893), 193, 194, 333.

(*e*) See supra, p. 297; infra, p. 358; Holmes *v.* Coghill, 12 V. 206.

(*f*) Piggott *v.* Penrice, Com. 250; Gilb. Eq. R. 138.

(*g*) Blockvill *v.* Ascott, 2 Eq. Ca. Abr. 659 (n.); and see Buckell *v.* Blenkhorn, 5 Ha. 131.

(*h*) Langslow *v.* L., 21 B. 553; *Re* Jack, (1899) 1 Ch. 374.

(*i*) See judgment of *James*, L. J., in Garth *v.* Townsend, 7 Eq. 220, supra, and cf. Daniel *v.* Arkwright, 2 Hem. & M. 95.

(*k*) Bath and Montague's case, 3 Ch. Ca. 84, 122; Ward *v.* Booth, cited 3 Ch. Ca. 69. See also Piggott *v.* Penrice, Pr. Ch. 471; Vane *v.* Fletcher, 1 P. W. 354; Luttrell *v.* Olmius, cited 11 V. 683; Seagrave *v.* Kirwan, 1 Beat. 157; Bulkley *v.* Wilford, 2 Cl. & Fin. 102; but see Middleton *v.* M., 1 J. & W. 94; Farwell on Powers (1893), 334.

ALEYN *v.* BELCHIER.

1758. 1 Eden, 132 (*a*).

Fraud upon a Power.

Power of jointuring executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts: held a fraud upon the power, and the execution set aside, except so far as related to the annuity; the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.

The Rev. Thomas Aleyn being seised of a real estate in Essex, of the yearly value of 540*l.*, subject to a mortgage for a term of 500 years to Sir Charles Palmer for 500*l.*, and having a nephew, Edmund Aleyn, and two brothers, the plaintiff, Giles Aleyn, and William, who was a defendant, by his will, bearing date the 28th of May, 1746, devised the same to Eyre and Bragg in trust by sale or mortgage to raise money, and pay his debts and legacies, and to permit his wife to receive the rents and profits of the residue for her life, and after her death in trust to convey to his nephew Edmund for life, with remainder to his first and other sons in tail male, with proper limitations to support contingent remainders, with *a power to his nephew to make a jointure on any woman he should then after marry, for her life, in bar of dower*, with powers to provide for younger children, and to make leases, with remainder to the testator's brother Giles for life; remainder to his first and other sons in tail male; remainder to his brother William for life; remainder to his first and other sons in tail male; remainder to his own right heirs: he gave his brother, the plaintiff, an annuity of 30*l.* a year for his life, to be paid out of his estate, to be increased to 50*l.* a year in case his nephew should survive his, the testator's wife.

(*a*) S. C. Sugd. on Pow. App.; Amb. MSS.; Reg. Lib. A. 1757, fol. 432.

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A bill was filed soon after the testator's death by the widow, and on the 14th of February, 1749, a decree made to establish the will, and for payment of debts and legacies by mortgage or sale in the usual way. The Master reported, there was due for debts and legacies 1516*l.* 1*s.* 10*d.* which he approved to be raised by mortgage. The widow died in April, 1750, and Edmund became entitled to the possession of the estate. The defendant, William Belchier, having advanced money to pay off the incumbrances, a mortgage, bearing date the 26th and 27th of June, 1750, was made of the estate to him in fee, and the term for years was assigned to John Belchier in trust for W. Belchier.

Edmund was very extravagant, and became indebted to William Belchier in the sum of 1760*l.*

On the 4th of June, 1750, Edmund married the defendant Jane, who was a low woman without fortune, and no provision for her was either made or agreed to be made; but, soon after the marriage, by articles of agreement, bearing date the 1st of August, 1750, and made between Edmund Aleyn and his wife of the one part, and William Belchier of the other, reciting the will of Thomas Aleyn, giving Edmund a power of jointuring, and that he and Jane were lately married, and that he was indebted to William Belchier in the sum of 1760*l.*, besides the mortgage, Edmund Aleyn, in satisfaction and discharge of the said sum of 1760*l.*, and in consideration of the several annuities and money thereinafter agreed to be paid, covenanted within six months to procure an effectual conveyance and settlement to be made by the trustees in Thomas Aleyn's will, and immediately after such settlement should be made, to appoint the whole estate to his wife for her life, in case she should survive him, for her jointure; and that he and his wife, as soon as they should become respectively seised of the legal estate of freehold, would, by fine and conveyances, convey and assure all the said premises by the said will devised and intended to be settled, unto and to the use of William Belchier, his heirs and assigns, during the lives of Edmund Aleyn and Jane his wife, and the longer liver of them; and in consideration thereof, William Belchier covenanted that, in case the said settlement should be perfected, whereby the estates should become well vested in him and his heirs, for the lives of Edmund and Jane his wife, and the longer liver of them, to pay the several annuities after mentioned namely: to Jane Aleyn, during the joint lives of her and Edmund her husband, 60*l.* a year, clear of all deductions, for her separate use; to Edmund Aleyn, for his life, in case he should survive Jane his wife, 60*l.* a year, clear of all deductions; and to Jane, in case she should survive Edmund her husband, for her life, 100*l.* a year, clear of all deductions; and to pay to John Miles, son of Jane by a former husband, 105*l.* at the age of twenty-one years; and also to pay Jane 5*l.* yearly towards his maintenance and education, till the 105*l.* should become payable.

The estate was conveyed by lease and release of 6th and 7th of August, 1750, to the uses of Thomas Aleyn's will pursuant to the decree; and by deed, dated 8th August, 1750, reciting the conveyance and power to jointure, Edmund Aleyn, in consideration of the marriage, and in order to make a provision for Jane, his wife, appointed the whole estate to Jane his wife, for a jointure, subject to the payment of the annuities given by the will of Thomas Aleyn, and of the mortgage of 1516*l.* 1*s.* 10*d.* and interest.

On the 10th of August, 1750, Edmund Aleyn and Jane, his wife, executed a deed, by which Edmund covenanted with George Townsend, that he and his wife would levy a fine of the premises to Townsend and his heirs, for and during the lives of Edmund and his wife, and the longer liver of them, in trust for William Belchier and his heirs, which was levied accordingly.

William Belchier took possession of the estate, and received the rents and profits, and paid the plaintiff, during Edmund's life, two sums of 25*l.* and 21*l.* 5*s.*, in part of the annuity he was entitled to under Thomas Aleyn's will.

Edmund died in June, 1755.

On 26th November, 1756, the plaintiff filed the present bill to redeem the estate, on payment of 1516*l.* 1*s.* 10*d.*, the mortgage money borrowed under the decree, and to be let into the possession of the estate; for an account of the rents and profits from the death of Edmund, submitting to pay Jane 100*l.* a year for her life, and to have the deeds and writings of the estate delivered up.

Jane Aleyn and William Belchier admitted, in their several answers, the facts as before stated. Jane Aleyn said, that the settlement was intended to make a reasonable provision for her, and to save Edmund from ruin; and that if Edmund had not been in debt at the time of their marriage, he would have settled the whole estate on her for her jointure. William Belchier said, that the consideration of the settlement and conveyance was truly and *bonâ fide* advanced, part before the execution of the settlement, and the remainder at or about the time of the execution of the settlement and conveyance to Townsend; and they both admitted that Edmund was, at the time of the settlement, in distressed circumstances, and in want of money.

Mr. *Perrot* and Mr. *Ambler* for the plaintiff.—This is an improper execution of the power, which was to bar dower by giving a jointure; but even supposing it well executed, the fraud will vitiate it. The appointment and conveyance were a deceit upon the testator, and a fraud upon the remainder-man. The power given to the nephew, who was only tenant for life, was to make a fair jointure, to encourage him to marry, not to pay his debts. The remainder-man was only to be kept out of the estate in case a fair and honest jointure were made. It must not be colourable, and for other purposes. This was an artful contrivance of Belchier and the defendant Jane; a low, mean woman, of no fortune. There is no settlement, nor agreement for one, at the time of the marriage, nor till Belchier put it into Edmund's head, with a view to secure his own debt by taking an absolute interest in the estate for two lives, instead of a mortgage for Edmund's life only. It is at best an unreasonable bargain. The articles of the 1st August discover the whole scheme. Upon the face of them it appears it was not the intention to jointure, but to pay debts. The only jointure averred is 100*l.* a year; Edmund is stripped of everything during the joint lives of himself and his wife; only 60*l.* a year to be paid during their joint lives, and that to the separate use of the wife. Suppose a power to make a jointure of so much for every thousand pounds fortune: it has been repeatedly held, that if the husband or others advance a sum of money, colourably to authorise the husband to settle largely, a Court of equity will set aside all above the proportion of the real value of the fortune (*a*). So, if a father, having a power to appoint amongst his children, bargains with one for a share, equity will set it aside. Though it may be honest in Edmund to pay his debts, it must be done with his own money;

(*a*) Lane *v.* Page, Amb. 233; Lord Tyrconnel *v.* Duke of Ancaster, Amb. 237.

this is a method of doing it with other persons' money, contrary to the intention of the testator. Even admitting the estate had been fairly and *bonâ fide* appointed as a jointure, and the wife had afterwards parted with her jointure, or part of it to pay her husband's debts, it would have been good to bind the remainder-man; yet in this case the whole is one transaction, a collusion between the husband and wife and Belchier. The case of *Lane* v. *Page*, determined by Lord *Hardwicke*, is precisely in point.

The *Attorney-General*, Sir *Charles Pratt*, and the *Solicitor-General*, the Hon. *Charles Yorke*, for the defendant Belchier; *Clark*, for the jointress.—The first question is, as to the extent of the power given by the will. The objection that the power is only to bar dower, and consequently can only comprehend jointures made before marriage, is too extensive, as it will comprehend every jointure, though made *bonâ fide*. The devise is to a nephew, having no estate of his own, for life, without impeachment of waste; he had no estate to which dower could attach, which shows that the words were put in by the scrivener *currente calamo*.

As to the execution, the power was substantially executed; the husband and wife agreed to sell their interest to Belchier. If an appointment had been made of the whole estate, and the wife had afterwards joined with the husband and sold her interest, it would have been good if only a day had intervened. This is the same thing. Suppose the wife had made a stand after the power was executed, the Court would not have compelled her to levy a fine. It was in her power to do it or not. In the case put, of a father appointing to a child, making himself a partaker, the appointment would only be avoided as against other children, not against a remainder-man.

THE LORD KEEPER HENLEY (*a*).—The question is whether Edmund Aleyn has properly executed the power as a jointure, and has properly conveyed to the defendant, Belchier, or whether the transaction is void *in toto*, or in part. I am inclined to think the power was not well executed in point of law (*b*). It ought to have

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(*a*) Afterwards Lord Chancellor and Earl of Northington.

(*b*) Sed vide 2 Sugd. Pow. 321.

been before marriage. The power is given under restrictions. It must be a jointure in bar of dower, which can only be before marriage. Dower is not barrable by a jointure after marriage. But, I build my opinion upon the next question.

The whole transaction is an agreement between the husband and wife. No point is better established than that *a person having a power must execute it bonâ fide for the end designed, otherwise it is corrupt and void.* The power here was intended for a jointure, not to pay the husband's debts. The motive that induced Edmund to execute it was not a provision for his wife. This case is not distinguishable from the cases alluded to, nor from *Lane* v. *Page.* If a father has a power to appoint amongst children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void. It was admitted the execution would be void, but it was said to be only so amongst the children. In that case the money is to go to the children: no other person has any interest in it; here the remainder-man has an immediate right to the estate after the death of Edmund, if there is no appointment. It was said to differ from the case of parent and children; and that, if the husband had fairly executed the power, the wife might have immediately afterwards joined in a fine to pay his debts. The reason is plain: she would then have had a first interest, and the husband would have had no control over it; but it does not from thence follow that they might make an agreement to divide the money between them. It cannot be supposed he would have settled the whole on her without some such view. She was of no family and had no fortune. It would have kept the children, if they had any, entirely out of the estate till her death. It is like the case put of parents and children; and I think *Lane* v. *Page* is in point, and ought to govern my decision in the present case.

Declare the appointment good as to the 100*l.* only, for the benefit of Jane. The plaintiff to redeem, on payment of principal and interest of the mortgage and costs, so far as relates to the mortgage. Account of rents and profits from the death of Edmund; and Belchier to pay the rest of the costs.

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NOTES.

1. Generally.
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1. Generally.

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The term "fraud" is here used in a purely technical sense, for it frequently happens that the persons implicated in what is called a fraud upon a power are acting unselfishly and from honest motives (*a*).

A person having a limited or special power, *must execute it bonâ fide for the end designed,* otherwise the appointment will be held corrupt and void (*b*).

"The donee, the appointor under the power," said *Westbury*, C., in *Portland* v. *Topham* (*c*), "must at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power), which he may desire to effect in the exercise of the power" (*d*).

But the donee of a power to jointure may exercise it in favour of his wife in accordance with a bargain by which he himself is benefited, provided this is done, not by diverting from her any part of the jointure itself, but by applying it to its proper use in consideration of his getting something which he is at liberty to take for his own benefit (*e*).

The donee of a power of appointment is not a trustee of it, except in the sense that he must not attempt to gain any indirect object by

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(*a*) See *e.g.* Duggan *v.* D., 7 L. R. Ir. 152; *Re* Crawshay, 43 C. D. 615; *Re* Perkins, (1893) 1 Ch. p. 288.

(*b*) See p. 320, supra, and Topham *v.* Portland, 1 De G. J. & S. 517; L. R. 5 Ch. 40; *S. C.*, nom. Portland *v.* Topham, 11 H. L. Cas. 32; D'Abbadie *v.* Bizoin, 5 Ir. R. Eq. 205.

(*c*) 11 H. L. Cas. 54.

(*d*) See, also, *Re* Perkins, (1893) 1 Ch., p. 288.

(*e*) Saunders *v.* Shafto, (1905) 1 Ch. 126, overruling Whelan *v.* Palmer, 39 C. D. 648. See also Baldwin *v.* Roche, 5 Ir. R. Eq. 110.

its execution in a way which in form may be good, but which is a mere mask for something that is bad, or unauthorized (*a*). So where a man has a power to make a jointure under restrictions, as 100*l.* a-year for every 1000*l.* of the wife's portion, and he has himself advanced a sum of money, in order colourably to enable him to make the jointure larger, the Court will reject such part as is more than proportionate to the real fortune (*b*). So an appointment to a child by a father in consideration of his wife postponing her jointure to some mortgages which he proposed to effect, has been held void (*c*): and if a parent, having a power of appointment amongst his children, appoints to one or more of them, to the exclusion of the others, upon a bargain either for the benefit of a stranger or *for his own advantage*, equity will relieve against the appointment as a fraud upon the power, as where there is a secret understanding that the child shall assign a part of the fund to a stranger (*d*), or where the appointment is expressed to be made in payment of a debt (*e*). And an antecedent bargain between a father and his children, that if the appointment is made in their favour they will lend the fund to their father (though on good security), will vitiate the appointment (*f*).

In *Duggan* v. *D.* (*g*) a tenant for life of a farm, with power of appointment among her children, made an agreement with such of them as had attained a full age to appoint the fund to them on condition that they would purchase her life interest at a valuation, and pay her the purchase money out of the fund so appointed. It was held that the appointment was bad, as its *primary object and only certain effect* was to confer an immediate personal benefit upon herself alone, even though, pursuant to the agreement, she applied

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(*a*) See judgment of *Cotton*, L. J., in Palmer *v.* Locke, 15 C. D., p. 303; see Settled Land Act, 1882, s. 53. A provision attached to the appointment determining it if the appointee changes his religion is not a fraud on the power. Hodgson *v.* Holford, 11 C. D. 959; Wainwright *v.* Miller, (1897) 2 Ch. 255.

(*b*) Lane *v.* Page, Amb. 234; Tyrconnel *v.* Ancaster, Amb. 237; *S. C.*, 2 Ves. Sen. 500, where the judgment is more fully reported; and see Weir *v.* Chamley, 1 Ir. Ch. R. 295, 317.

(*c*) Rowley *v.* R., Kay, 242.

(*d*) Daubeny *v.* Cockburn, 1 Mer. 626; *Re* Marsden's Trusts, 4 Drew. 594; Hanley *v.* M'Dermott, 9 Ir. R. Eq. 35; Farmer *v.* Martin, 2 Si. 502; and see Thompson *v.* Simpson, 1 Dr. & W. 459; Askham *v.* Barker, 12 B. 499; Conolly *v.* M'Dermott, Beat. 601; Jackson *v.* J., 7 Cl. & Fin. 977; Carver *v.* Richards, 1 De G. F. & J. 548.

(*e*) Reid *v.* R., 25 B. 469; and see Beddoes *v.* Pugh, 26 B. 407, 411.

(*f*) Arnold *v.* Hardwick, 7 Si. 343.

(*g*) 7 L. R. Ir. 152.

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a greater part of the money so obtained in payment of the debts which the appointees had joined her in securing, and which had been contracted by her for the benefit of her family and in keeping up a farm where they all resided (*a*).

An appointment to a child, *although not for the advantage of the appointor*, will be invalid, if it be not made *bonâ fide*; thus in *Salmon* v. *Gibbs* (*b*), the donee of a power of appointment over a fund among his children, to whom it was given in default of appointment, had only two daughters, and appointed nearly the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trust for the separate use of the other daughter, who was married, exclusively of her husband, and after her death on trust for her children. A re-settlement was accordingly made without the privity of the married daughter, who did not hear of the transaction until several years after. It was held on the suit of her husband, that the appointment was invalid, and a settlement of his wife's share was directed.

And an appointment by will to an object of the power, *unobjectionable when it was executed*, may be rendered invalid as a fraud on the power by the appointee entering into an arrangement with the appointor under which a person, not an object of the power, is to take an interest in the sum appointed (*c*).

Moreover, where an appointment is exercised with the view of defeating the object of the power, it will be invalid, *although the objectionable arrangement has not been made known to the appointee*, if the appointment was made by the appointor relying upon the moral influence which his wishes, when made known to the appointee, would exercise over him, in carrying out such arrangement. In *Re Marsden's Trusts* (*d*), a mother, who had under a settlement a power of appointment among children, desired to make a provision for the father out of the settled fund. This intention was openly discussed, and a solicitor consulted, who advised that no appointment could be made to the father. An arrangement was then made *between the father and the mother*, that the whole fund should be appointed to the eldest daughter, an infant, with the object that when the mother was dead, the father might tell the daughter that the

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(*a*) And see *Re* Crawshay, 43 C. D. 615.

(*b*) 3 De G. & Sm. 343; and see Knowles *v.* Morgan, 54 Sol. Jo. 117.

(*c*) *Re* Kirwan's Trusts, 25 C. D. 373

(*d*) 4 Drew. 594; explained *Re* Crawshay, 43 C. D. 615; see *Re* Perkins, (1893) 1 Ch. 283.

whole fund had been appointed to her under an arrangement between himself and her mother, made for the purpose of enabling the daughter to make a provision for him, and that thus she, the daughter, might be induced to carry out the intention. *Kindersley*, V.-C., held the appointment bad, as a fraud on the power. "In some of the cases which have been cited," said his Honour, "there has been a direct bargain between the donee of the power and the person in whose favour it is exercised, under which the donee of the power was himself to derive a benefit; and certainly there has been nothing of that kind in this case. In my opinion, however, it is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not; and the case of *Wellesley* v. *Mornington* (*a*) shews that it is not necessary, in order to bring the case within the scope of the jurisdiction on which this Court acts, that the appointee should be aware of the intentions of the appointment, or of its being actually made. Neither is it necessary that the object should be the personal benefit of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the trust was created, as if it had been for the personal benefit of the donee himself." But "unless it can be shewn that the trustee having the discretion" (meaning for this purpose the person having power to appoint) "exercises the trust corruptly or improperly or in a manner which is for the purpose not of carrying into effect the trust, but defeating the purposes of it, the Court will not control or interfere with the discretion." "There may be a *suspicion* that the trust has been exercised in a particular manner and from a certain motive, which if it could be proved would be held not to be a proper motive—but if it be *mere suspicion*,—and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it" (*b*).

Condition annexed to Appointment.—Where there is no bargain between appointor and appointee, and no suspicion of improper motive, but the appointor has annexed a condition to the appointment which would, if observed, be a fraud upon the power, although in itself *bonâ fide* and honest, the question which arises is, is there a complete execution of the power with something, "*ex abundanti*,"

(*a*) 2 K. & J. 143.

(*b*) And see per *Knight-Bruce*, L. J., in Pryor *v.* P., 2 De G. J. & S. 205, at p. 210; and see Roach *v.* Trood, 3 C. D. 429.

added, in which case the excess will be void and the execution good; or is the execution and excess not distinguishable, in which case the execution will be bad (*a*). In *Re Cohen* (*b*) the donee of a special power to appoint to his wife and children appointed an annuity of 1,200*l.* to his wife, and in case his residuary estate should be insufficient to pay his debts, he directed an additional annuity of 500*l.* to be paid to her so long as his debts remained unpaid, or for ten years from his death, on condition that she should expend 400*l.* in every year on the payment of his debts, and on the expiration of the period he appointed her an additional annuity of 100*l.* instead of the 500*l.* if she should have fulfilled the condition. It was held that the condition could not be separated, and that the appointment of the additional annuities was bad as being for a purpose foreign to the power.

Relations between Appointor and Appointee.—Although questions of this nature generally arise upon a fraudulent arrangement between husband and wife, or between parent and child, the interference of equity is by no means confined to cases in which the donee and object of the power stand in that relation towards each other; for an arrangement between *any person* having a power, even although he may have been by a voluntary deed the original donor of the power, and any of the objects of it, in fraud of the original intention with which the power was created, will render an appointment void in equity. Thus in *Lee* v. *Fernie* (*c*), A. B., being desirous of settling property on the female descendants then in existence of C. D., by a voluntary deed reciting this desire, and that certain persons therein named were the only descendants then living of C.D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property, amongst such several persons before named, which, in default of appointment, was given to those several persons. A. B. afterwards discovered that there were other descendants in existence of C. D. who had been omitted, and, to remedy the omission, he appointed a

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(*a*) See *Re* Crawshay 43 C. D. 615; *Re* Perkins, (1893) 1 Ch. 283. See also Roach *v.* Trood, 3 C. D. 429; Alexander *v.* A., 2 Ves. Sen. 640; Stroud *v.* Norman, Kay, 313; *Re* Sondes' Will, 2 Sm. & G. 416; Watt *v.* Creke, 3 Jur. (N. S.) 56; Agassiz *v.* Squire, 18 B. 431; Rowley *v.* R., Kay, 242; D'Abaddie *v.* Bizoin, 5 Ir. R. Eq. 205; Cooke *v.* C., 38 C. D. 202, where the condition was inseparable; Ranking *v.* Barnes, 12 W. R. 565; Topham *v.* Portland, 31 B. 525, 1 De G. J. & S. 517; 11 H. L. Cas. 32, nom. Portland *v.* Topham; but see Proby *v.* Landor, 28 B. 504.

(*b*) (1911) 1 Ch. 37; and see note 2, p. 327.

(*c*) 1 B. 483.

part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered of the amount when received. *Langdale*, M. R., held that the appointment was void, probably because the Court could not distinguish between the exercise of the power and the excess (*a*). See note 2, infra.

Where the donee of a power intends to appoint, and the appointee intends to settle the property, and there is no bargain or understanding, the appointment will be valid, although the appointee by a deed executed soon after, or even by the same deed, settles the property upon persons who are not objects of the power. This often takes place when a parent, on the marriage of a child, makes an appointment in favour of the child who is the object of the power, and the child, either by the same or a subsequent deed, settles the property upon (amongst others) her intended husband and the children of the marriage, who are not objects of the power (*b*).

And where, after an appointment made by a father to his infant daughter previous to marriage, the intended husband in the marriage settlement gave up to the father an interest in the sum appointed, to which otherwise he (the husband) would be entitled, by his marital right, the appointment has been held not to be thereby invalidated, at any rate, where the father was not, on making it, influenced by what the husband gave up to him (*c*).

The mere conferring a benefit upon a person not the object of the power will not avoid its exercise, if made with the approbation of the real objects (*d*). And if the object of the appointment be to secure a benefit for all the objects of the power, the appointment is not bad, although the appointor may to some extent participate in such benefit (*e*).

(*a*) See Alexander *v*. A., 2 Ves. Sen. 640, cited *Re* Perkins, supra; and see Topham *v*. Portland, 1 De G. J. & S. 517.

(*b*) See Family Arrangements, note 4, infra, and see White *v*. St. Barbe, 1 V. & B. 399; Wade *v*. Paget, 1 Bro. Ch. 363; Irwin *v*. I., 10 Ir. Ch. R. 29; Wright *v*. Goff, 22 B. 207; FitzRoy *v*. Richmond, 27 B. 190; Daniel *v*. Arkwright, 2 Hem. & M. 95; Roach *v*. Trood, 3 C. D. 429; *Re* Crawshay, 43 C. D. 615; *Re* Perkins, (1893) 1 Ch. 283, supra; but, *secus*, where there is an understanding, Salmon *v*. Gibbs, 3 De G. & Sm. 343; or negotiation, Cuninghame *v*. Anstruther, L. R. 2 H. L. Sc. 223.

(*c*) Cooper *v*. C., L. R. 5 Ch. 203; and see Topham *v*. Portland, 1 De G. J. & S. 555; see also Wicherley's case, 2 Eq. Ca. Abr. 391, pl. 4; Shirley *v*. Fisher, 47 L. T. 109; *Re* Turner's S. E., 28 C. D. 205.

(*d*) Per C. A., *Re* Turner's S. E., 28 C. D., p. 216; Beere *v*. Hoffmister, 23 B. 101; and see White *v*. St. Barbe, 1 V. & B. 399; Wright *v*. Goff, 22 B. 207; FitzRoy *v*. Richmond, 27 B. 190.

(*e*) *Re* Huish's Charity, 10 Eq. 5. And see Palmer *v*. Locke, 15 C. D. 294, 304; Henty *v*. Wrey, 21 C. D. 332.

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Previous Compact with Appointee "Causa sine quâ non."—Where, however, the reason of an appointment being made to the appointee arises from a previous contract by him with the donee of the power to settle the property upon persons who are not objects of the power, not being within the consideration of marriage, on the marriage of the appointee, then the appointment is invalid, as being a fraud upon the power, the contract being the "*causa sine quâ non*" of the appointment (*a*), and to answer the question whether it is or not, all the circumstances must be looked at (*b*).

Liability of Appointor.—A person making a fraudulent appointment will be held liable to make good the whole loss occasioned to the trust estate by such fraudulent appointment (*c*).

2. Excess where Severable.

A question sometimes arises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment *in toto*, or such part merely to which the fraud extends (*d*).

Where a fraudulent appointment has been made in pursuance of a power of jointuring, the wife, in whose favour the power is exercised, being the sole object of the power, it appears to be now settled that the appointment may be severed, and held good to the extent to which the jointress is entitled, but bad with reference to the corrupt and improper use that may be made of the surplus (*e*). A power to jointure stands on a peculiar footing in that a donee thereof may exercise it in favour of his wife in pursuance of a bargain by which he himself is benefited, provided that such benefit is not obtained by diverting from the wife any part of the jointure. A husband may obtain from his wife as consideration for her jointure a payment to himself or his creditors, provided such payment is out of the wife's own property (*f*).

Where the power is to appoint to several objects, an appointment to one of them, fraudulent in part, will ordinarily be set aside *in toto*. This question was fully considered in *Daubeny* v. *Cockburn* (*g*). In that case there was a voluntary settlement of

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(*a*) See Birley *v.* B., 25 B. 299; Pryor *v.* P., 2 De G. J. & S., p. 210; Cooper *v.* C., L. R. 5 Ch. 203.

(*b*) *Re* Turner's S. E., 28 C. D., p. 217.

(*c*) *Re* Deane, 42 C. D. 9.

(*d*) See *e.g.*, *Re* Cohen, (1911) 1 Ch. 37, supra, p. 325.

(*e*) Lane *v.* Page, Amb. 233; Aleyn *v.* Belchier, supra; and see the remarks of *Page-Wood*, V.-C., in Rowley *v.* R., Kay 259.

(*f*) Baldwin *v.* Roche, 5 Ir. R. Eq. 110; Saunders *v.* Shafto, (1905) 1 Ch. 126; overruling Whelan *v.* Palmer, 39 C. D. 648.

(*g*) 1 Mer. 626.

personal property, in trust for such one or more of his children as the settlor should appoint. He appointed to one child exclusively, upon a secret understanding that she should assign a part of the fund to or in favour of a stranger. It was contended, upon the authority of *Lane* v. *Page* (*a*), and the principal case, that the appointment was only void as to the part of the fund agreed by the daughter to be assigned. However, *Grant*, M. R., held the appointment void *in toto*. "Upon principle," said his Honour, "I do not see how any part of a fraudulent agreement can be supported, *except where some consideration has been given that cannot be restored: and it has consequently become impossible to rescind the transaction in toto, and to replace the parties in the same situation*" (*b*).

But in *Whelan* v. *Palmer* (*c*), *Kekewich*, J., said: "Notwithstanding a contrary view in some cases it has now been, I think, definitely settled, and particularly by the judgment in *Topham* v. *Portland* (*d*), that where you can see your way to sever the honest part from the dishonest part, using the words in the legal sense—that is to say, that which is legally right from that which is legally wrong—then you may give effect to that which is legally right, notwithstanding that you are obliged to avoid that which is legally wrong." If the Court can see the boundaries, it will be good for the execution of the power, and void as to the excess (*e*).

3. Purchasers for Value.

An appointment may either (*a*) vest the legal estate in the appointee, as where it operates at common law or under the Statute of Uses, or (β) give the appointee merely an equitable interest, as in appointments of personalty or equitable interests in realty. In cases falling within (*a*) a fraudulent appointment is only voidable,

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(*a*) Amb. 233.

(*b*) See Farmer *v.* Martin, 2 Si. 502; Arnold *v.* Hardwick, 7 Si. 343; and see Lee *v.* Fernie, 1 B. 483.

(*c*) 39 C. D. 648, 659. Although this case was overruled in Saunders *v.* Shafto, (1905) 1 Ch. 126, the above dictum (which was unnecessary to the decision) is believed to be a correct expression of the law. See Viant *v.* Cooper, 103 L. T. Jo. 222.

(*d*) 1 De G. J. & S. 570.

(*e*) *Per Cur.*, Alexander *v.* A., 2 Ves. Sen. 640, 644, cited with approval by *North*, J., *Re* Perkins, (1893) 1 Ch. 283, 289. See also Rowley *v.* R., Kay, 242; Carver *v.* Richards, 1 De G. F. & J. 548; Harrison *v.* Randall, 9 Ha. 397; Askham *v.* Barker, 12 B. 499; Agassiz *v.* Squire, 18 B. 431; Watt *v.* Creyke, 3 Sm. & G. 362; Sadler *v.* Pratt, 5 Si. 632; McDonald *v.* M., L. R. 2 H. L. Sc. 482; *Re* Cohen, (1911) 1 Ch. 37.

and a purchaser from the appointee can set up the defence of purchaser for value without notice; but in cases falling within (β) a fraudulent appointment is wholly void and the above-named defence is not available to a purchaser (*a*). On these principles a fraudulent execution of a power will be set aside as against a purchaser for valuable consideration, *with notice* of the fraud (*b*); or even if he had *not notice* of the fraud, if he has not got the legal estate, for then there are only equities to deal with; and "the payment of a money consideration cannot make a stranger become the object of a power created in favour of children; he can only claim under a valid appointment executed in favour of some or one of the children" (*c*). The purchaser in this case can rely only on defences which avail the owner of an equitable interest later in point of time against the owner of a prior equitable interest (*d*). The fact that the appointed fund while still reversionary is carried to the separate account of the purchaser in an action in which the validity of the appointment is not in question is not equivalent to giving him the legal estate (*e*).

But a purchaser, having the legal estate, must, it seems, have actual notice of a fraud upon a power, in order to be affected by it; circumstances which may give rise to *mere grounds of suspicion* or probability of fraud are not sufficient (*f*).

And it seems that the Court would be reluctant to impeach an appointment as fraudulent, after a great lapse of time, and where there have been subsequent dealings with the funds, such, for instance, as subsequent appointments thereof on the marriage of daughters or the establishment of sons in the world (*g*).

4. Family Arrangements.

Family arrangements, if *bonâ fide*, are regarded favourably by the Court, and effect has been given to them in cases where,

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(*a*) Cloutte *v.* Storey, (1911) 1 Ch. 18.

(*b*) Palmer *v.* Wheeler, 2 Ball & B. 18; Hall *v.* Montague, 8 L. J. (O. S.) Ch. 167. Cf. notes to Basset *v.* Nosworthy, supra, p. 166, and Le Neve *v.* L. N., supra, p. 197.

(*c*) Per *Sir W. Grant*, M. R., in Daubeny *v.* Cockburn, 1 Mer. 626.

(*d*) Cloutte *v.* Storey, (1911) 1 Ch. 18.

(*e*) Ibid.

(*f*) M'Queen *v.* Farquhar, 11 V. 467. See also Alexander *v.* Mills, L. R. 6 Ch. 124; Cockcroft *v.* Sutcliffe, 2 Jur. (N. S.) 333, 25 L. J. Ch. 313; Laurie *v.* Bankes, 4 K. & J. 142; Green *v.* Pulsford, 2 B. 70; Hamilton *v.* Kirwan, 8 Ir. R. Eq. 278; Warde *v.* Dickson, 5 Jur. (N. S.) 698 (cases of mortgage); Thomson *v.* Simpson, 8 Ir. R. Eq. 55.

(*g*) Cooper *v.* C., L. R. 5 Ch. 203, 212, 213.

if entered into between strangers, they would not have been held binding (*a*). Where there is such an arrangement for settling the interests of *all* the branches of a family, children may contract *with each other* to give a parent, who had a power to distribute property among them, some advantage, which the parent, without their contract with each other, could not have (*b*). And a re-settlement upon persons not objects of the power, in pursuance of an agreement entered into before the execution of the power with the only object thereof, may be supported upon the ground of its being a family arrangement (*c*). But if any such transaction taken as a whole appears not to be a *bonâ fide* family arrangement, but to have been entered into in fraud of the power, for the purpose of giving a benefit to a person who was by the donor excluded from being an appointee or from deriving any advantage from the exercise of the power, it will be held wholly void (*d*).

5. Appointments to Infants and Sick and Dying Persons.

Where a donee of a power of charging portions on real estate has by its terms authority to fix the times at which portions shall vest, there is no rule of law which prevents an appointment of the portion to vest immediately. But the circumstances may show that such an appointment was a fraud upon the power. Thus where a father appointed to a son, then in a state of mental and bodily disease of which he died within a year, the appointment was inferred to have been made for the benefit of the father, and was set aside as a fraud on the power (*e*). Similarly where a daughter of the appointor was entitled, in default of appointment, to a portion of 10,000*l.* on attaining the age of twenty-one or marrying under that age, and her father appointed the sum to her when she was fourteen years of age, and well known to be in a state of consumption, a bill by the father, as her administrator, to have the sum raised for his own use was dismissed (*f*).

(*a*) See Stapilton *v.* S., Vol. I., p. 234.

(*b*) Davis *v.* Uphill, 1 Swans. 129; Rhodes *v.* Cook, 2 S. & S. 488; Skelton *v.* Flanagan, 1 Ir. R. Eq. 362.

(*c*) See Wright *v.* Goff, 22 B. 207; cf. *Re* Turner's S. E., 28 C. D. 205.

(*d*) Agassiz *v.* Squire, 18 B. 431; and see Cuninghame *v.* Anstruther, L. R. 2 H. L. Sc. 223, and Scroggs *v.* S., Amb. 272.

(*e*) Wellesley *v.* Mornington, 2 K. & J. 143.

(*f*) Hinchinbroke *v.* Seymour, 1 Bro. Ch. 395. The report in Bro. Ch. is seriously imperfect. The omissions are corrected by *Jessel*, M. R., in Henty *v.* Wrey, 21 C. D. 332, after consideration of the record and the remarks on the case in M'Queen *v.* Farquhar, 11 V. 467, 479, and the Queensberry Case, 1 Bli. 339, 397. See also Keily *v.* K., 4 Dru. & War. 55.

In *Henty* v. *Wrey* (*a*) Sir B. P. Wrey, having a power of charging portions for younger children on real estate under a settlement which gave him in the clearest terms *power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment,* and having three daughters, aged nine, seven, and one, appointed by deed in 1828 10,000*l.* (being the full amount he was entitled to charge) for the portions of his daughters, to be a *vested interest in the three daughters respectively,* immediately on the execution of the deed, the portions to be paid to them at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them, share and share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised and paid in his lifetime; maintenance at 4*l.* per cent. to be raised from his death; and the deed contained a power of revocation. In 1832 he made by deed a similar appointment by way of confirmation of the former, the portions to be vested immediately on the execution of the deed. One daughter married and attained twenty-one, and in 1851 Sir B. P. Wrey appointed 5,000*l.* (part of the 10,000*l.*) to her. The other two died infants and spinsters, one in 1836, the other in 1845. Sir B. P. Wrey assigned to the plaintiff for value in 1875 the 5,000*l.* appointed to his two deceased daughters, and after his death the plaintiff brought an action to have it raised. It was held by the Court of Appeal (reversing the decision of *Kay*, J., who had dismissed the action as against the owners of the settled estate), 1st, that where the donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which the portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried, and that the decision could not be supported upon the ground that the appointment, so far as it made the portions vest immediately, was not within the power. And 2ndly it was held that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was a fraud on the power, as being made with a view to secure a benefit to the appointor, for that having regard to the fact that if the father had died without

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(*a*) 21 C. D. 332.

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making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment, and that as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately, and the Court therefore came to the conclusion that the plaintiff was entitled to have the 5,000*l.* raised.

Lindley, L. J., in the same case, examines at length all the principal authorities as to the appointment and vesting of portions, and states the result thus:—" 1. That powers to appoint portions charged on land ought, if their language is *doubtful*, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them, that is before they attain twenty-one or (if daughters) marry. 2. That where the language of the power is clear and unambiguous, effect must be given to it. 3. That where, upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee the portion is not raisable, but sinks into the inheritance. 4. That where upon the construction of both instruments the portion has vested in the appointee, the portion is raisable even though the appointee dies under twenty-one or (if a daughter) unmarried. 5. That appointments vesting portions in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so."

With reference to the appointment being void for fraud it is immaterial whether the power relates to charges on land or to the appointment of personal estate (*a*), and an appointment to an infant child before he wants it, of a sum *already set apart*, will not be invalid, merely because the appointor may, in the event of the child's death, derive some benefit from it to the disappointment of those entitled in default of appointment (*b*). *A fortiori* will the appointment be good if the father himself can derive no benefit from it,

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(*a*) Per *Lindley*, L. J., ibid., p. 354.

(*b*) Butcher *v.* Jackson, 14 Si. 444; Hamilton *v.* Kirwan, 2 Jo. & Lat. 393; Beere *v.* Hoffmister, 23 B. 101, where the intention and effect of the appointment was to defeat the remainderman; Hemming *v.* Griffith, 2 Gif. 403; Knapp *v.* K., 12 Eq. 238.

although upon the death of the child the mother takes as his representative to the exclusion of the persons who would have been entitled in default of appointment (*a*).

It would doubtless be a fraud upon the trusts if trustees having power of advancing moneys to an infant under powers of maintenance and advancement laid out money, for instance, in the purchase of a share in a business, with the intention that the infant should by sale of the share obtain the money for other purposes, but this will not be the case where the advance has been *bonâ fide* made, although the infant is soon afterwards obliged to sell his share in consequence of his debts; and he or his assignees for value, if without notice of any impropriety in the sale, will be entitled to the proceeds thereof (*b*).

Where a father has power to appoint and divide at his discretion among his children a fund to which they are entitled in default of appointment, he cannot in making appointments to them enter into a bargain by which he can derive any benefit in the residue of the trust fund which may remain unappointed (*c*).

6. Release of Power.

The donee of a power of appointment may release the power, though testamentary, if the release is in good faith (*d*), although such release may result in a benefit to him (*e*).

In *Re Radcliffe* (*f*), a marriage settlement in 1852 gave the husband a life interest in real and personal estate, and also a life interest to his wife who predeceased him. Power was also given to the husband to appoint to children of the marriage, and in default, the fund was to go to the children equally, vesting at twenty-one or marriage. There were three sons; one died an infant, two attained twenty-one, but one of these died intestate and unmarried. The father took out administration to the intestate, released the power, and called upon the trustees for a transfer of a moiety of the settled property. Held, that on

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(*a*) Fearon *v.* Desbrisay, 14 B. 641; Carroll *v.* Graham, 11 Jur. (N. S.) 1012; Domville *v.* Lamb, 1 W. R. 246; FitzRoy *v.* Richmond, 28 L. J. Ch. 752.

(*b*) See Lawrie *v.* Bankes, 4 K. & J. 142.

(*c*) Cuninghame *v.* Anstruther, L. R. 2 H. L. Sc. 223.

(*d*) Smith *v.* Death, 5 Madd. 371; Smith *v.* Houblon, 26 B. 482; *Re* Radcliffe, infra; *Re* Evered, (1910) 2 Ch. 147. See Conveyancing, &c., Act, 1881, s. 52, Conveyancing, &c., Act, 1882, s. 6. A married woman can release a power vested in her, even though married before 1883, *Re* Chisholm, (1901) 2 Ch. 82.

(*e*) *Re* Somes, (1896) 1 Ch. 250.

(*f*) (1892) 1 Ch. 227.

surrendering his life estate so as to effect a merger, he was so entitled (*a*). So in *Re Somes* (*b*) certain property, the subject of a settlement made in 1862, belonged in 1887, in the events which had happened, to a father for life and then to his daughter and her issue in such shares and in such manner as the father should by deed from time to time appoint. In 1893 the father released this power to enable his daughter to join with him in raising money for his immediate wants. The mortgage was for 10,000*l.*, the whole of which was paid to the father. *Chitty*, J., following *Smith* v. *Houblon* and *Re Radcliffe*, supra, held the release was valid: that there was a fallacy in attempting to apply the doctrine applicable to the fraudulent exercise of such a power, to the release of it: that there is no duty imposed upon the donee of such a power to make any appointment: that there is no fiduciary relationship between the possessor of such a power and the object except that of exercising it honestly: that the mere fact that the release of it will benefit him does not make it fraudulent or void.

But where the power is coupled with a duty, or is in the nature of a trust, it cannot be released, and the Conveyancing Act, 1881, s. 52, has made no difference in this respect (*c*).

The Court cannot release a special power exercisable by a lunatic (*d*), nor can a trustee in bankruptcy release a special power exercisable by a bankrupt (*e*).

Powers conferred by the Settled Land Act, 1882, on a tenant for life are not capable of assignment or release (*f*).

7. Consent of Trustees and others to Exercise of Power.

If the consent of another person to the exercise of a power is requisite, and that consent is obtained by misrepresentation, the appointment will be set aside (*g*). The consent of trustees is only to be given for the benefit of their *cestui que trust*; so where by a marriage settlement land was settled by the father of the lady upon

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(*a*) Smith *v.* Houblon, 26 B. 482, followed; Cunynghame *v.* Thurlow, 1 R. & M. 436, not followed.

(*b*) (1896) 1 Ch. 250.

(*c*) *Re* Eyre, 49 L. T. 299; Saul *v.* Pattinson, 34 W. R. 561; *Re* Somes, (1896) 1 Ch. at p. 255. As to a power coupled with a trust, see *Re* Weekes, (1897) 1 Ch. 289.

(*d*) *Re* Hirst, (1892) W. N. 177.

(*e*) *Re* Rose, (1904) 2 Ch. 348, *Farwell*, J. In the Court of Appeal the order of *Farwell*, J., was discharged by consent, the Court expressing no opinion on the point decided by *Farwell*, J., (1905) 1 Ch. 94.

(*f*) Settled Land Act, 1882, s. 50.

(*g*) Scroggs *v.* S., Amb. 272.

the wife for life, remainder to the husband for life, remainder to the children of the marriage, and there was a power to the father of the lady and the husband and wife, with the consent of the trustees in writing, by deed absolutely to revoke and make void all or any of the uses or trusts, and also by the same or any other deed to limit and declare new uses and trusts in substitution for those revoked, and the father of the lady, and the husband and wife, with the consent of the trustees, revoked the settlement so far as was necessary, and appointed the property to one of the trustees in fee to secure a sum of money advanced to the husband, and the estate was afterwards sold under a power contained in the mortgage deed, it was held by *Romilly*, M. R., that a good title could not be made under it . . . "How," said his Honour, "could it be said that this is a fair exercise of the discretion of the trustees in favour of their *cestuis que trust*, if they exercise it in such a manner so as totally to defeat the whole beneficial interest of those persons whom, as trustees, they are bound to protect?" (*a*).

8. Bond or Covenant to Appoint.

A covenant to exercise a special testamentary power in a particular way is void (*b*). Such a covenant cannot be the subject of specific performance or have any legal operation (*c*). But an exercise of the power by will is not rendered invalid by reason of the fact that the appointor has covenanted to make such an appointment, there being no other circumstances which might render the appointment invalid apart from the covenant (*d*), and the donee of a special testamentary power may covenant not to exercise it, or not to exercise it in a particular way, and thereafter the power can only be exercised subject to the limitation or fetter imposed by that negative covenant (*e*). The covenant cannot, however, operate affirmatively as an appointment (*f*). A tenant for life with a power to charge portions may covenant with his mortgagees not to exercise the power (*g*).

If the power is a general testamentary one, the donee may deal with it as he pleases (*h*), and if he covenants to exercise it in a

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(*a*) Eland *v.* Baker, 29 B. 137, at p. 142.

(*b*) Thacker *v.* Key, 8 Eq. 408; L. R. 6 Ch. 160; *Re* Bradshaw, (1902) 1 Ch. 436, 446.

(*c*) *Re* Evered, (1910) 2 Ch. 147, 156; Davies *v.* Huguenin overruled on this point.

(*d*) Coffin *v.* Cooper, 2 Dr. & Sm. 365; Palmer *v.* Locke, 15 C. D. 294; *Re* Evered, (1910) 2 Ch. 147, 156.

(*e*) *Re* Evered, (1910) 2 Ch. 147, 156.

(*f*) Ibid.

(*g*) Hurst *v.* H., 16 B. 372; and see Miles *v.* Knight, 12 Jur. 666.

(*h*) *Re* Bradshaw, (1902) 1 Ch. 436, 446.

particular way his estate will be liable to make good the loss occasioned by a breach of covenant, although specific performance of such covenant will not be granted (*a*). If a general power be exercised in pursuance of such a covenant the appointee will not gain thereby any preference over the creditors of the appointor. "A covenant to bequeath property by will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by will and not a preferential debt" (*b*). A covenant to exercise a general power by deed is valid and specifically enforceable (*c*).

9. Illusory Appointments.

In another class of cases Courts of equity formerly interposed, with unfortunate consequences; viz. where a person having a non-exclusive power of appointing property amongst a class, although with full discretion as to the amount of their shares, has exercised it by appointing to one or more of the objects a merely nominal share. Such an appointment, although valid at law, would, if executed previous to the passing of 1 Will. 4, c. 46, have been set aside as *illusory*, as not being exercised *bonâ fide* for the end designed by the donor.

The doctrine applied to appointments of real as well as of personal estate (*d*); and much litigation arose in consequence of the great difficulty of deciding what was a substantial, and not merely an illusory share; and great dissatisfaction with the doctrine was expressed by the most eminent judges, who endeavoured, in many cases, to narrow it.

The interference of Courts of equity, in cases of illusory appointments, was so unsatisfactory in its results, that the Legislature at length interfered, by passing the Illusory Appointments Act of 1830 (*e*), and again by the 37 & 38 Vict. c. 37 (1874), entitled "An Act to alter and amend the Law as to Appointments under Powers not Exclusive." By the latter Act, after reciting that by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded, by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each

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(*a*) *Re* Parkin, (1892) 3 Ch. 510. Cf. Robinson *v.* Ommanney, 21 C. D. 780, 23 C. D. 285.

(*b*) Per Lord *Lindley*, Beyfus *v.* Lawley, (1903) A. C. 411, 413.

(*c*) *Re* Dykes, 7 Eq. 337, and see supra, pp. 299, 303.

(*d*) Pocklington *v.* Bayne, 1 Bro. Ch. 450.

(*e*) 11 Geo. 4 & 1 Wm. 4, c. 46.

object of the power who cannot be excluded; and that instruments intended to operate as executions of such powers are frequently invalid in consequence of the donee of the power appointing in favour of some one or more of the objects of the power to the exclusion of the other or others or some other or others of such objects; and that it was expedient to amend the law so as to prevent such intended appointments failing, it is enacted that—

S. 1. "No appointment, which from and after the passing of this Act shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power" (*a*).

S. 2. "Provided always, and be it enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount of the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

10. Burden of Proof.

As in all other cases imputing fraud, the burden of proof lies on the person who seeks to set aside an appointment as fraudulent. Thus in *Campbell* v. *Home* (*b*), where a lady who had a life interest in a fund, with power to appoint to one or more of her children, exclusively of the others, appointed the whole to one child, who had attained the age of twenty-one, and assigned her life interest to such child, one of the trustees refused to join in the transfer to the daughter. *Knight-Bruce*, V.-C., upon a bill being filed against the trustee by the daughter, held that he was bound to join in the transfer. "What may be the intention," said his Honour, "of this lady in regard to the disposition of her money, is not a question with which the Court has to deal. If it can ever be shown that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside."

(*a*) See *Re* Deakin, (1894) 3 Ch., p. 577, as to scope of Act. As to the law before the Act, Gainsford *v.* Dunn, 17 Eq. 405.

(*b*) 1 Y. & C. Ch. 664.

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But if the transaction on the face of it shows good ground for suspicion, the trustee may refuse to convey, and will be protected by the Court (*a*). The intention of the donor is to be gathered from the instruments, but that of the appointor may be proved by parol evidence (*b*).

The burden of proof may be altered by circumstances. Thus where the fair inference from the facts is, that the appointor *before* the execution of an appointment intended to derive for himself a benefit therefrom, the burden rests on those who support the transaction to show that the intention had been abandoned at the time of the execution of the deed (*c*).

It is, however, clear that where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained, otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first (*d*). And the same rule it seems is applicable to all cases, whether the fraudulent appointment has been set aside by the Court, or revoked by the appointor (*e*).

Where there is no fraud equity will not advert to the circumstances of anger and resentment, under which it may be alleged that an appointment has been made, as there would be no end of such objections if they were admitted as grounds for questioning appointments, since in almost all these cases, where there has been an inequality in the appointment, something of that kind has existed (*f*).

(*a*) Hannah *v.* Hodgson, 30 B. 19; King *v.* K., 1 De G. & J. 663.

(*b*) Topham *v.* Portland, 11 H. L. Cas. 32.

(*c*) Humphrey *v.* Olver, 7 W. R. 334; Shirley *v.* Fisher, 47 L. T. 109.

(*d*) Topham *v.* Portland, L. R. 5 Ch. 40.

(*e*) Hutchins *v.* H., 10 Ir. R. Eq. 453, 457.

(*f*) Vane *v.* Dungannon, 2 Sch. & L. 130; Supple *v.* Lowson, Amb. 729.

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1739. 1 Atk. 469 (*a*).

Powers in the Nature of a Trust—Precatory Trusts.

H., by will, gives a leasehold house and furniture, goods and chattels therein, and also plate, jewels, &c., to his wife ; but did desire her, at or before her death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of. The wife by her will gave the leasehold house to S., who was the son of one of the next of kin, and, after giving several legacies, bequeathed the residue of her personal estate to the defendant G. and two other persons, but neither gave, at or before her death, the goods in the house, or the jewels, to her husband's relations. It was held, that the wife was intended to take beneficially only during her life ; that the appointment to S., being a relation of the testator's, though not one of his next of kin, was a good execution of the power ; and that so much of the goods and jewels not disposed of by the wife, according to the power given to her by her husband, in case they remained in specie, or the value thereof, ought to be divided equally among such of the relations of the testator as were his next of kin at the time of the death of his wife.

NICHOLAS HARDING, in 1701, made his will and thereby gave "to Elizabeth his wife all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but *did desire her*, at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, *unto and amongst such of his own relations as she should think most deserving and approve of;*" and made his wife executrix, and died the 23rd of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry

(*a*) S. C., 5 V. 501, stated from Reg. Lib. 1738 A.

Swindell (*a*), in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and, after giving several legacies, bequeathed the residue of the personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given, at or before her death, the goods in the said house, or without having disposed of any of her husband's jewels to his relations (*b*).

The plaintiffs, insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she had not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestate's effects.

THE HON. JOHN VERNEY, M. R.—The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life. There are no technical words in a will; but the manifest intent of the testator is to take place; and the words "willing" or "desiring" have been frequently construed to amount to a trust (*c*); and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the Court to determine what persons are meant, it is very strong for the Court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a

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(*a*) The bequest to Swindell was held good, although he was not one of the next of kin of the testator, and would not, therefore, have taken anything in the absence of the bequest; but, being a son of one of the next of kin, he was a relation, and, therefore, within the power when exercised by the testatrix. See Brown *v.* Higgs, 5 V. 501, 8 V. 572; and see Wright *v.* Atkyns, G. Coop. 118; 13 R. R., p. 210.

(*b*) It appears that the testatrix by her will bequeathed the plate to Caleb Harding, and it was declared by the decree that it was a good bequest, as being pursuant to the power in her husband's will. See statement from the Reg. Lib., 5 V. 501.

(*c*) Eeles *v.* England, Prec. Ch. 200; 2 Vern. 466

legal description, and this is a devise to such relations, and operates as a trust, in the wife, by way of power of naming and apportioning; and her non-performance of the power shall not make the devise void, but the power shall devolve on the Court; and though this is not to pass by virtue of the Statute of Distributions (*a*), yet that is a good rule for the Court to go by; and, therefore, I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order, that so much of the said household goods in Hatton Garden, and other the personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding his wife, which she did not dispose of according to the power given her thereby, in case the same remains *in specie*, or the value thereof be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.

NOTES.

1. Precatory trusts.—Generally.
2. Certainty of subject-matter, p. 348.
3. Certainty of object, p. 351.
4. Interests taken by donees of precatory trusts, p. 354.
5. Trust implied from powers of selection and distribution, p. 358.

1. Precatory Trusts.

Generally.—The doctrine of precatory trusts is thus stated by *Lindley*, L. J. (*b*): "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to shew an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation. . . . But still in each case the whole will must be looked at; and unless it appears from the whole

(*a*) 22 & 23 Car. 2, c. 10.

(*b*) *Re* Williams, (1897) 2 Ch. 12, 18.

will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference.

"It would, however, be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts—*i.e.*, equitable obligations to deal with property in a particular way—can be imposed by any language which is clear enough to show an intention to impose them.

"The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form. A request is often a polite form of command. A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of equity" (*a*).

This statement shows that in order to establish the existence of a precatory trust three requisites must be shown to co-exist (*b*).

1. There must on the construction of the whole instrument (*c*) be an intention to impose an obligation.

2. The obligation so imposed must be ascertainable with precision.

3. The persons in whose favour the obligation is imposed must also be ascertainable with precision.

Such a trust may be created by a settlement as well as by a will (*d*), and possibly by parol, but where the Court is asked to establish such a trust from the report of a conversation it will be slow to impute an intention which is not actually expressed in the words used (*e*).

Imperative Words.—As laid down in the principal case, no technical words are necessary, but the Court will be guided by the intention of the testator apparent in the will, and not by any decisions on any particular form of words, and if it comes to the conclusion that no trust is intended, it will say so, although previous judges have said the contrary on some wills more or less similar to the one

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(*a*) See also *Re* Oldfield, (1904) 1 Ch. 549.

(*b*) Cp. per *Langdale*, M. R., Knight v. K., 3 B. 172, and comments thereon of *Rigby*, L. J., in *Re* Williams, (1897) 2 Ch. p. 29.

(*c*) *Re* Croome, 61 L. T. 814; *Re* Adams and Kensington Vestry, 27 C. D. p. 410; *Re* Hamilton, (1895) 2 Ch. 370; Comiskey *v.* Bowring Hanbury, (1905) A. C. 84.

(*d*) Liddard *v.* L., 28 B. 266.

(*e*) Hill *v.* H., (1897) 1 Q. B. 483, 487.

before the Court (*a*). The following expressions have been held to be imperative, and to amount to a trust in the circumstances of the particular instrument in which they were used: "Willing or desiring" (*b*), "advise" (*c*), "order and direct" (*d*), "request" (*e*), "wish" (*f*), "wish and request" (*g*), "desire him to give" (*h*), "absolutely desire" (*i*), "wish and desire" (*j*), "last wish" (*k*), "dying request" (*l*), "recommend" (*m*), "entreat" (*n*), "not doubting" (*o*), "under the firm conviction" (*p*), "in the full confidence" (*q*), "in the fullest confidence" (*r*), "heartily beseech" (*s*), "beg she will apportion" (*t*), "authorise and empower" (*u*), "hope" (*v*), "full assurance and confident hope" (*w*), "trusting" (*x*), "absolutely trusting" (*y*), "well know" (*z*), "of course he will give" (*aa*), "in consideration he has promised to give" (*bb*),

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(*a*) See judgment of *Lindley*, L. J., *Re* Hamilton, (1895) 2 Ch. p. 373, and see Hill *v.* H., (1897) 1 Q. B. 483.

(*b*) Eeles *v.* England, 2 Vern. 466.

(*c*) Parker *v.* Bolton, 5 L. J. Ch. 98.

(*d*) Broad *v.* Bevan, 1 Russ. 511 (n.).

(*e*) Eade *v.* E., 5 Madd. 118. See Hill *v.* H., (1897) 1 Q. B. p. 497.

(*f*) *Re* Burley, (1910) 1 Ch. 215.

(*g*) Foley *v.* Parry, 5 Si. 138, 2 My. & K. 138.

(*h*) Mason *v.* Limbury, cited Amb. p. 4. See *Re* Diggles, 39 C. D. p. 253; but see *Re* Oldfield, (1904) 1 Ch. 549; *Re* Conolly, (1910) 1 Ch. 219.

(*i*) Cruwys *v.* Colman, 9 V. 319; Godfrey *v.* G., 11 W. R. 554.

(*j*) Liddard *v.* L., 28 B. 266.

(*k*) Hinxman *v.* Poynder, 5 Si. 546.

(*l*) Pierson *v.* Garnet, 2 Bro. Ch. 38, 226.

(*m*) Tibbits *v.* T., 19 V. 656; Horwood *v.* West, 1 S. & S. 387; Malim *v.* Keighley, 2 V. 333, 539, not followed in *Re* Hamilton, (1895) 2 Ch. 370; Ford *v.* Fowler, 3 B. 146; Cholmondeley *v.* C., 14 Si. 590; but see Cunliffe *v.* C., Amb. 686, and the comments upon it in Pierson *v.* Garnet, 2 Bro. Ch. 46; Pushman *v.* Filliter, 3 V. 9; and Johnston *v.* Rowlands, 2 De G. & Sm. 356.

(*n*) Prevost *v.* Clarke, 2 Madd. 458.

(*o*) Parsons *v.* Baker, 18 V. 476; Taylor *v.* George, 2 V. & B. 378; Massey *v.* Sherman, Amb. 520.

(*p*) Barnes *v.* Grant, 26 L. J. Ch. 92.

(*q*) Curnick *v.* Tucker, 17 Eq. 320; Le Marchant *v.* Le M., 18 Eq. 414; Ware *v.* Mallard, 21 L. J. Ch. 355; Comiskey *v.* Bowring Hanbury, (1905) A. C. 84.

(*r*) Wright *v.* Atkyns, 17 V. 255, 19 V. 299; Palmer *v.* Simmonds, 2 Drew. 221; Shovelton *v.* S., 32 B. 143; but see *Re* Williams, (1897) 2 Ch. 12, "fullest confidence" held no trust.

(*s*) Meredith *v.* Heneage, 1 Si. 553.

(*t*) Corbet *v.* C., 7 Ir. R. Eq. 456.

(*u*) Brown *v.* Higgs, 4 V. 708, 5 V. 495, 8 V. 561, 18 V. 192.

(*v*) Harland *v.* Trigg, 1 Bro. Ch. 142; Paul *v.* Compton, 8 V. 375.

(*w*) Baker *v.* Mosley, 12 Jur. 740.

(*x*) Macnab *v.* Whitbread, 17 B. 299.

(*y*) Irvine *v.* Sullivan, 8 Eq. 673.

(*z*) Bardswell *v.* B., 9 Si. 323; Briggs *v.* Penny, 3 Mac. & G. 546, 554, but see Stead *v.* Mellor, 5 C. D. 225, 227; Greene *v.* G., 3 Ir. R. Eq. 629; *Re* Fleetwood, 15 C. D. 594.

(*aa*) Robinson *v.* Smith, 6 Madd. 194.

(*bb*) Clifton *v.* Lombe, Amb. 519.

"I would wish she should have power to give" (*a*). But all these cases must be read in the light of the remarks of the Court of Appeal in *Re Hamilton* (*b*), and the tendency of the latter decisions is *strongly* against construing any particular precatory or recommendatory words as trusts, unless the whole will points to that construction (*c*). Such expressions are now generally regarded as expressing the motive of the gift, rather than as a fetter upon it (*d*), and the opinion expressed by *James*, V.-C., in *Lambe* v. *Eames* (*e*), that "the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts was a very cruel kindness indeed," has been frequently approved (*f*).

If, therefore, the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or to interfere with the absolute discretion of the legatee (*g*), or if it appears from the context, that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, no trust will be created (*h*). Thus, the words "free and unfettered," accompanying the strongest expressions of request, were held to prevent the words of request from being imperative (*i*). So, where there was a gift of stock to a person, and to it was added, parenthetically "to enable him to assist such children of my deceased brother as he may find deserving of encouragement," it was held an absolute bequest, and that no trust was created for the children (*k*).

(*a*) Corbet *v.* C., 7 Ir. R. Eq. 456.

(*b*) (1895) 2 Ch. 370.

(*c*) Sale *v.* Moore, 1 Si. 534 ; Lambe *v.* Eames, L. R. 6 Ch. 597 ; *Re* Diggles, 39 C. D. 253 ; *Re* Hamilton, (1895) 2 Ch. 370 ; Nepean *v.* Nantes, 13 T. L. R. 315 ; *Re* Williams, (1897) 2 Ch. 12 ; *Re* Oldfield, (1904) 1 Ch. 549 ; *Re* Conolly, (1910) 1 Ch. 219.

(*d*) See passage in Farwell on Powers (1893), p. 480, approved by *Lopes*, L. J., in Hill *v.* H., (1897) 1 Q. B. p. 488.

(*e*) L. R. 6 Ch. 597, 599.

(*f*) See *Re* Adams, &c., 27 C. D., p. 407 ; *Re* Hamilton, (1895) 2 Ch. 370 ; Hill *v.* H., (1897) 1 Q. B. p. 488.

(*g*) Johnston *v.* Rowlands, 2 De G. & Sm. 356 ; Huskisson *v.* Bridge, 4 De G. & Sm. 245 ; Williams *v.* W., 1 Si. (N. S.) 358, 370 ; Webb *v.* Wools, 2 Si. (N. S.) 267 ; Thorp *v.* Owen, 2 Ha. 607 ; Lefroy *v.* Flood, 4 Ir. Ch. R. 1 ; Scott *v.* Key, 35 B. 291 ; Shepherd *v.* Nottidge, 2 John. & H. 766 ; Eaton *v.* Watts, 4 Eq. 151 ; M'Cormick *v.* Grogan, 1 Ir. R. Eq. 313 ; Greene *v.* G., 3 Ir. R. Eq. 90, 629 ; Creagh *v.* Murphy, 7 Ir. R. Eq. 182 ; *Re* Bond, 4 C. D. 238.

(*h*) See Bull *v.* Vardy, 1 V. 270 ; Meggison *v.* Moore, 2 V. 630 ; Knight *v.* K., 3 B. 148 ; Scott *v.* Key, 35 B. 291 ; but see Atkinson *v.* A., 62 L. T. 735.

(*i*) Meredith *v.* Heneage, 1 Si. 542 ; Hoy *v.* Master, 6 Si. 568.

(*k*) Benson *v.* Wittam, 5 Si. 22 ; Wright *v.* Atkyns, T. & R. 157, 163, 13 R. R. 199. Cp. *Re* Booth, (1894) 2 Ch. 282.

So, where it was declared in a will that a bequest of property to a legatee was "in his entire power" (*a*), or "left entirely to his good judgment" (*b*); and where a testator "recommended but did not absolutely enjoin" a distribution among daughters (*c*); or if a testator gives "property to his wife to be used by her in such ways and means as she may consider *best* for her own benefit and that of my three children" (*d*), "to be at her disposal in any way she may think *best* for the benefit of herself and family" (*e*), "well knowing her *sense of justice and love to her family*, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children" (*f*); and where a testator gave the residue of his property to legatees, "my desire being that they shall distribute such residue as they *think* will be most agreeable to my wishes" (*g*), it was held there was no trust.

A recommendation may, in many cases, amount to a direction and create a trust, yet, that being a flexible term, if such a construction be inconsistent with any positive provision in the instrument, it is to be considered as a recommendation, and nothing more. For instance, in *Shaw* v. *Lawless* (*h*), the House of Lords held that words in a will desiring that a particular person should be *continued* in the management of property, being inconsistent with the positive provisions of the will, did not create a trust in favour of such person (*i*).

The Court will not willingly construe clear words of gift to a devisee for his own benefit, free from control, as being cut down by subsequent words, which may operate as an expression of desire, without disturbing the previous devise (*k*).

In *White* v. *Briggs* (*l*) the testator gave his consumable articles,

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(*a*) Eaton *v.* Watts, 4 Eq. 151.

(*b*) M'Cormick *v.* Grogan, L. R. 4 H. L. 82.

(*c*) Young *v.* Martin, 2 Y. & C. Ch. 582.

(*d*) M'Alindur *v.* M'A., 11 Ir. R. Eq. 219; but see Comiskey *v.* Bowring-Hanbury, (1905) A. C. 84, discussed infra, p. 347.

(*e*) Lambe *v.* Eames, 10 Eq. 267, L. R. 6 Ch. 597.

(*f*) Greene *v.* G., 3 Ir. R. Eq., 90, 629.

(*g*) Stead *v.* Mellor, 5 C. D. 225.

(*h*) 5 Cl. & Fin. 129.

(*i*) See also Finden *v.* Stephens, 2 Ph. 142; Knott *v.* Cottee, 2 Ph. 192; Johnston *v.* Rowlands, 2 De G. & Sm. 356; Foster *v.* Elsley, 19 C. D. 518.

(*k*) Meredith *v.* Heneage, 10 Price, 306, 1 Si. 542; Paul *v.* Compton, 8 V. 380; Howorth *v.* Dewell, 29 B. 18; Brook *v.* B., 3 Sm. & Gif. 280; Wood *v.* Cox, 1 Keen, 317; Johnston *v.* Rowlands, 2 De G. & Sm. 356; Lambe *v.* Eames, L. R. 6 Ch. 597; *Re* Mortlock's Trust, 3 K. & J. 456; *Re* Yalden, 1 De G. M. & G. 53; Hill *v.* H., (1897) 1 Q. B. p. 489; *Re* Oldfield, (1904) 1 Ch. 549; but see Comiskey *v.* Bowring-Hanbury, (1905) A. C. 84; *Re* Burley, (1910) 1 Ch. 215.

(*l*) 15 Si. 33, 300.

linen, china, &c., *entirely to his wife's use*, and added that the same, together with all his jewels, trinkets, clocks, watches, and ornaments, *might be finally appropriated as she pleased, with the sum of 4,000l. in money, but which sum he recommended her to divide in shares*, which he specified, amongst persons whom he named. *Shadwell*, V.-C., said that in *Meredith* v. *Heneage* (*a*), the objects of the recommendation were uncertain; but here both the objects and the subjects were certain, and he therefore thought a trust was created. However, Lord *Lyndhurst* reversed the decree upon the ground that the words, "to be finally appropriated as she pleased," applied to the 4,000*l.* as well as to the jewels, &c., and therefore the case was to be governed by *Meredith* v. *Heneage*.

In *Re Hutchinson and Tenant* (*b*), testator gave all his property to his wife "*absolutely*, with full power for her to dispose of the same as she may think fit for the benefit of my family having full confidence that she will do so." The Court held, following *Lambe* v. *Eames* (*c*), that the wife took absolutely (*d*).

In *Re Adams and the Kensington Vestry* (*e*), testator gave all his property to his wife *absolutely* "in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will." The Court of Appeal held that there was no trust and that the wife took absolutely.

In *Re Diggles* (*f*), a testatrix left all her property to her daughter, her heirs and assigns, "and it is my desire that she allows to my relative and companion A. G. now residing with me, an annuity of 25*l.* during her life, and that the said A. G. shall if she desire it have the use of such portions of my household furniture, linen, &c., as may not be required by my daughter." Held by the Court of Appeal, that there was no trust or obligation on the daughter to pay the annuity.

In *Re Hamilton* (*g*), a testatrix bequeathed to her nieces legacies of 2,000*l.* each, "for their sole and separate use independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew, S. O., and niece, Mrs. P., in such mode as they shall consider right." The Court of Appeal not

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(*a*) 1 Si. 542; Sugd. Prop. 400; Wood *v.* Cox, 1 Keen, 317; Lambe *v.* Eames, 10 Eq. 267, L. R. 6 Ch. 597.

(*b*) 8 C. D. 540.

(*c*) 10 Eq. 367, L. R. 6 Ch. 597.

(*d*) See also Irvine *v.* Sullivan, 8 Eq. 673.

(*e*) 27 C. D. 394.

(*f*) 39 C. D. 253.

(*g*) (1895) 2 Ch. 370.

following *Malim* v. *Keighley* (*a*) but following *Re Adams* and *Re Diggles*, supra, held there was no precatory trust.

In *Re Williams* (*b*), a testator gave his residuary estate to his wife, her heirs, executors, administrators and assigns *absolutely* "in the fullest confidence that she will carry out my wishes in the following particulars." It was held by the Court of Appeal that the widow took the residuary estate of the testator absolutely, and unfettered by any condition or trust.

In *Re Oldfield* (*c*), testatrix gave all her property equally amongst her two daughters "as tenants in common for their own absolute use and benefit," and added, "my desire is that each of my said two daughters should during the lifetime of my son pay to him one third of the respective incomes of my said two daughters accruing from the mortgages and investments under this my will." The Court of Appeal held that no trust was created for the son.

But though the foregoing cases would seem to show that where a gift is expressed to be absolute it will not be cut down by subsequent precatory words, no such rule can be laid down, and the expression that the gift is absolute will yield to subsequent imperative words where the whole tenor of the will demands it. In *Comiskey* v. *Bowring Hanbury* (*d*), the testator gave devised and bequeathed to his wife "the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any such disposition thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall, at her death be equally divided among the surviving said nieces." *Kekewich*, J., held that the real and personal estate was given to the widow absolutely, and this decision was affirmed by the Court of Appeal (*Vaughan-Williams* and *Stirling*, L.JJ., *Cozens-Hardy*, L.J., dissenting) (*e*), but the House of Lords (*Earl of Halsbury*, L. C., and Lords *Macnaghten*, *Davey*, *James* and *Robertson*, Lord *Lindley* dissenting) held that there was an absolute gift to the testator's widow subject to an executory gift at her death to such of the testator's nieces as should survive her equally if more than one, so far as the widow should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them. With regard to

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(*a*) 2 V. 333, 529a; 2 R. R. 229.

(*b*) (1897) 2 Ch. 12; and see *Re* Atkinson, (1911) 80 L. J. Ch. 370 (C.A.).

(*c*) (1904) 1 Ch. 549.

(*d*) (1905) A. C. 84.

(*e*) *Re* Hanbury, (1904) 1 Ch. 415.

the word "absolutely," Lord *Davey* said (*a*), "I do not myself attach any great importance to the use of the word 'absolutely.' Reading it as qualifying or expressing the estate which the wife had to take, it does not seem to me to do more than give her a fee simple. It is now admitted that she had a fee simple, and the question is whether there is a good executory limitation capable of taking effect upon her death. The use of the word 'absolutely,' as defining the amount of the estate which is given to the wife, must of course be subject to any executory limitation or any other valid limitation or exception which you find engrafted on that estate in fee simple." This decision of the House of Lords has little or no bearing upon the nature of a precatory trust. The decisions in the Courts below turned upon considerations appropriate to precatory trusts. The House of Lords decided that, apart altogether from those considerations, the words of the will created an executory limitation over of the nature mentioned.

Where a legacy is given absolutely by a will, and the testator subsequently executes a codicil with regard thereto in precatory words, this may be sufficient to create a trust (*b*).

2. Certainty of Subject-matter.

"If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words" (*c*).

In *Buggins* v. *Yates* (*d*), a testator having devised real property to his wife, to be sold for payment of his debts and legacies, in aid of his personal estate, declared, that he *did not doubt but his wife would be kind to his children*, it was insisted, that this constituted a trust of the personal estate; "but the Court was of opinion, that these words gave a right to no child in particular, nor a right *to any particular part of the estate*, but that the clause was void for uncertainty" (*e*).

In *Sale* v. *Moore* (*f*), the testator bequeathed to his wife the

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(*a*) (1905) A. C. pp. 89, 90.

(*b*) *Re* Burley, (1910) 1 Ch. 215.

(*c*) Mussoorie Bank *v.* Raynor, 7 A. C., p. 331; and see *Re* Diggles, 39 C. D. 253; and judgment of Lord *Thurlow* in Wynne *v.* Hawkins, 1 Bro. Ch. 179, and see *Re* Conolly, (1910) 1 Ch. 219.

(*d*) 9 Mod. 122.

(*e*) See also *Re* Bond, 4 C. D. 238.

(*f*) 1 Si. 534.

remainder of what he died possessed of, after the payment of debts and legacies, "*not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her.*" It was held by *Hart*, V.-C., that there was no trust for the next of kin, but that the wife took the residue absolutely. His Honour, after pointing out the uncertainty, relative to the objects of the trust, and that in accordance with *Dawson* v. *Clark* (*a*), there was no ground for taking away from the widow what was absolutely vested in her, adds, "the word 'consider' is a relative term. How is she to consider them as he would have done? How is the Court to find out how he would have considered his relations?" (*b*).

So, in an absolute devise or bequest to a person, "well knowing that he will remember" certain objects (*c*), or will "do justice to" or "deal justly and properly to and by them" (*d*), or "to make ample provision for them" (*e*), will not be construed as a trust, because no particular property is pointed out as the object of it. In *Mussoorie Bank* v. *Raynor* (*f*), a testator gave his widow all his property "feeling confident that she will act justly to our children in dividing the same when no longer required by her." It was held that not only would there be a difficulty in executing the trust (see *Re Diggles* (*g*)) by reason of the uncertainty of the subject-matter of the gift, but also that the gift was absolute in the wife (*h*).

Upon the same principle it has been held that the recommendation to appoint a person as agent, receiver, and manager cannot be construed as imperative, where the subject is uncertain; thus in *Finden* v. *Stephens* (*i*), the testator expressed it as his wish and desire that a certain person should be employed as agent, receiver, and manager of his estates whenever his trustees should have occasion for the services of a person in that capacity; *Cottenham*, C., held that no trust was created which such person could enforce (*k*).

(*a*) 15 V. 409, 11 R. R. 188.

(*b*) And see Hoy *v.* Master, 6 Si. 568; Dawson *v.* Clark, 15 V. 409; Lechmere *v.* Lavie, 2 My. & K. 197.

(*c*) Bardswell *v.* B., 9 Si. 319.

(*d*) Le Maitre *v.* Bannister, Prec. Ch. by Finch, 200 (n.), 1; Pope *v.* P., 10 Si. 1.

(*e*) Winch *v.* Brutton, 14 Si. 379; Fox *v.* F., 27 B. 301.

(*f*) 7 A. C. 321.

(*g*) 39 C. D. 253.

(*h*) And see Flint *v.* Hughes, 6 B. 342; Macnab *v.* Whitbread, 17 B. 299; Reeves *v.* Baker, 18 B. 372; Greene *v.* G., 3 Ir. R. Eq. 629.

(*i*) 2 Ph. 142.

(*k*) See also Shaw *v.* Lawless, 5 Cl. & Fin. 129; Foster *v.* Elsley, 19 C. D. 518, but of course by using apt terms this may be done; cf. Williams *v.* Corbet, 8 Si. 349.

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Words of recommendation in a will, will not be construed as imperative, if an intention appear in any part of the will to give to the devisee a right or power to spend the property; for the Court, in its acuteness to extract the meaning, conceives it to be inconsistent with the intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure and by using that privilege at pleasure, leave either nothing, or more or less, to remain the subject of the trust (*a*).

Where there is an absolute gift of property to a person, and a recommendation to give to a certain object, "what shall be left" at his death, or "what he shall die seised or possessed of" (*b*); or what "he may have saved" out of an estate given for life (*c*); or "the bulk of his said residuary estate" (*d*); or a gift of all property to a wife "for her to do justice to those relations on my side such as she think worthy of consideration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to whom" she "may please" (*e*); the subject will be considered as uncertain.

In *Eade* v. *E.* (*f*), the testator bequeathed the residue of his personal property to his wife, requesting that she would at her death leave 200*l.* to each of the Miss Nortons, and leave the remainder of *her* property to his nephews George and William Eade, in such proportions as she thought proper. *Leach*, V.-C., held that the Miss Nortons were entitled to the 200*l.* each, but that no trust was created for the nephews. "If," observed his Honour, "the testator had requested his wife at her death to leave the remainder of *his* property to George and William Eade, there would have been a clear trust in their favour, because the remainder of the testator's property could have been ascertained. I cannot say, that, by the remainder of *her* property at her death, he meant the remainder of *his* property. It must be understood to mean such property as she happened to

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(*a*) Meredith *v.* Heneage, 1 Si. 556; Curtis *v.* Rippon, 5 Madd. 434; House *v.* H., 23 W. R. 22; Lefroy *v.* Flood, 4 Ir. Ch. R. 1; Eaton *v.* Watts, 4 Eq. 151.

(*b*) Wynne *v.* Hawkins, 1 Bro. Ch. 179; Sprange *v.* Barnard, 2 Bro. Ch. 585; Bland *v.* B., 2 Cox, 349; Pushman *v.* Filliter, 3 V. 7; Wilson *v.* Major, 11 V. 205; A.-G. *v.* Hall, Fitzg. 714; Lechmere *v.* Lavie, 2 My. & K. 197; Pope *v.* P., 10 Si. 1; Green *v.* Marsden, 1 Drew. 646, 651; Parnall *v.* P., 9 C. D. 96.

(*c*) Cowman *v.* Harrison, 10 Ha. 234; Bardswell *v.* B., 9 Si. 319.

(*d*) Palmer *v.* Simmonds, 2 Drew. 221.

(*e*) *Re* Bond, 4 C. D. 238.

(*f*) 5 Madd. 118.

possess at her death, from whatever source derived. This testator having, therefore, in effect, left his wife at liberty to deal with the remainder of *his* estate as she pleased, his request as to the *uncertain* property of which she might be possessed at her death, cannot create a trust."

But the Court in all these cases merely requires that the intention of the testator should be manifested with sufficient certainty to enable the Court to act judicially upon it. For instance, a recommendation in a will that a legatee shall leave in a particular way whatever he shall be possessed of under the will at the time of his death, may be controlled by other words in the will so as to render certain the extent of the property subject to the recommendation. Thus, in *Horwood* v. *West* (*a*), the testator gave to his wife all his personal estate, *relying* that if she should marry again she would secure *whatever she should possess under his will* for her separate use; and he *recommended* her to give, by her will, *what she should die possessed of* under his will to certain persons whom he named: *Leach*, V.-C., held that the wife's executor was a trustee of the whole of the property possessed by her under the will, for the persons named.

3. Certainty of Object.

Where there is a clear or admitted intention to create a trust, but the objects are not defined, the trustees will hold the property for the next of kin or heir of the donor, as the case may be (*b*). But in these cases of precatory trusts the question to be decided is, is there a trust? And where in such cases the object is left indefinite or uncertain, the Court will infer from that fact that no trust is intended (*c*)—that the object is purposely left to be selected by the donee (*d*). For a similar difficulty arises to that in which the subject matter is left indefinite, and the inference arises that the words of confidence, hope, &c., are not used imperatively, and therefore do not create a trust (*e*). So where property was left to a legatee for life with power to dispose of it "as she

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(*a*) 1 S. & S. 387.

(*b*) Stubbs *v.* Sargon, 2 Keen, 255; *Re* Boyes, 26 C. D. 531; Briggs *v.* Penny, 3 Mac. & G. 546, infra; Jarman, Wills (1910), pp. 481, 881. But see as to uncertain gifts to charities, Williams *v.* Kershaw, 5 Cl. & Fin. 111 (n.); *Re* Jarman, 8 C. D. 584; *Re* Sutton, 28 C. D. 464; *Re* Douglas, 35 C. D. 472; *Re* Best, (1904) 2 Ch. 354.

(*c*) Morice *v.* Durham, 10 V. 521; 7 R. R. 232.

(*d*) Cf. *Re* Diggles, 39 C. D. 253; Jarman, Wills (1910), p. 881.

(*e*) See Mussoorie Bank *v.* Raynor, 7 A. C., p. 331.

might judge best and wisest" (*a*), and where the testator expressed his desire that his residuary legatees should distribute the residue "as they shall think will be most agreeable to my wishes" (*b*), it was held that the legatees took absolutely (*c*).

Although words are used, such as "family," "relations," "heirs," &c., to which the Court would give a meaning in a direct gift, no trust will be implied if it is uncertain what the testator meant by them (*d*). It is difficult to say what objects are intended by the word "*family.*" Sometimes, where personal estate was the subject of the gift, it has been considered as meaning next of kin (*e*). But in *Lambe* v. *Eames* (*f*), it was said that it seems impossible to put any restriction upon the meaning of the word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. It might include sons-in-law, daughters-in-law, and many others, or an illegitimate child.

It seems to be now settled that a *power* to appoint to a person's "family" would be limited to his children, if any (*g*); that if there are none, the donee may select relations not within the degree of next of kin (*h*); and that if the power is not exercised the statutory next of kin are entitled (*i*). If it is doubtful whom the donor meant, the gift may be void for uncertainty (*k*).

In *Harland* v. *Trigg* (*l*), where a testator gave *leaseholds* to his "brother for ever, *hoping* he will continue them in the *family,*" *Thurlow*, C., held that no trust was created.

In *Wright* v. *Atkyns* (*m*), a testator devised real and leasehold estates to his mother and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family."

(*a*) Reid *v.* Atkinson, 5 Ir. R. Eq. 373.

(*b*) Stead *v.* Mellor, 5 C. D. 225; distinguishing Briggs *v.* Penny, 3 Mac. & G. 546.

(*c*) See also Creagh *v.* Murphy, 7 Ir. R. Eq. 182. *Re* Hutchinson and Tenant, 8 C. D. 540; *Re* Harbison, (1902) 1 Ir. R. 103; Sullivan *v.* S., (1903) 1 Ir. R. 193.

(*d*) See as to the meaning of these and similar words Theobald, Wills (1908), chap. 30; Farwell, Powers (1893), chap. 13; Jarman, Wills (1910), Chap. 41.

(*e*) Cruwys *v.* Colman, 9 V. 319; Grant *v.* Lynam, 4 Russ. 292.

(*f*) L. R. 6 Ch. 597, 600.

(*g*) Theobald, Wills (1908), p. 327, citing *Re* Hutchinson and Tenant, 8 C. D. 540.

(*h*) Ib. Grant *v.* Lynam, 4 Russ. 292.

(*i*) Ib. Cruwys *v.* Colman, 9 V. 319.

(*k*) Ib. Neo *v.* N., L. R. 6 P. C. 381.

(*l*) 1 Bro. Ch. 141.

(*m*) 17 V. 255, 19 V. 299.

It was held that the widow took an estate in fee in the real estate qualified in equity in reference to a trust imposed in favour of some object or class to be ascertained at her death, and that the word "family" in a precatory trust of real estate *primâ facie* denotes the heir-at-law. With reference to this case, Sir *Edward Sugden* observes, "It was treated as clear, that the words were sufficient to raise a trust if the objects were clearly ascertained. The result of the investigation seems to show that it will be difficult to maintain that the will clearly points out objects in whose favour the trust can be enforced. At all events, it cannot now be held, consistently with the opinions already expressed and acted upon by the House, that the trust was for the testator's heir-at-law at his death, and that the widow was a bare trustee, and had no power of appointment or of selection" (*a*).

In *Green* v. *Marsden* (*b*), the request to the devisee of *freeholds* was to distribute them "amongst such members of her own *family* as she should think most deserving." It was held that the description was too uncertain.

In *Griffiths* v. *Evan* (*c*), A. devised an estate to B. in tail: and for want of issue of her body, "he empowered and authorised" her to settle and dispose of the estate to such person as she thought fit, by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family." B. appointed to her husband for life, with remainders over. It was held by *Langdale*, M. R., that a trust was raised; that such appointment was void, the expression "nearest family" being equivalent to heirs; and that the co-heirs of the testator were entitled.

In *Meredith* v. *Heneage* (*d*), the testator gave *real and personal estate* to his wife, in full confidence she would distinguish *the heirs* of his late father by devising the whole of his estate, together and entire, to such of his father's *heirs* as she might think best deserved her preference. The Court thought the objects were not certain,—whether the testator had pointed out the heirs-at-law of his father as the objects to take the personal as well as the real estate, or the heirs and next of kin, or the next of kin only (*e*).

(*a*) Sugd. Prop. 388; MacLeroth *v.* Bacon, 5 V. 159; Barnes *v.* Patch, 8 V. 604; Cruwys *v.* Colman, 9 V. 319; *Re* Price, (1887) W. N. 216.

(*b*) 1 Drew. 646.

(*c*) 5 B. 241.

(*d*) 1 Si. 542.

(*e*) See also Williams *v.* W., 1 Si. (N. S.) 358; Greene *v.* G., 3 Ir. R. Eq. 90, 629.

In *Sale* v. *Moore* (*a*), a testator left a residue to his wife, not doubting that she would consider his *near relations.* The objects were held to be uncertain (*b*).

Where the power is to be exercised by the donee by will, or at his death, or, as in the principal case, "at or before his death," the objects will be those who answer a particular description at the death of the donee, and there will be no uncertainty (*c*).

A request that jewels might be left as "heirlooms" is uncertain in its object (*d*).

4. Interests taken by Donees of Precatory Trusts.

In the creation of a precatory trust the property may, as in the principal case, be given to the donee beneficially, but *subject to the trust imposed* (*e*); in which case all that is not required for the purposes of the trust belongs to the donee (*f*), and there is no resulting trust (*g*). And all the rights and incidents of property—for instance, the right of felling timber—will remain in the donee to the extent of the estate vested in him. Thus, in *Wright* v. *Atkyns* (*h*), a testator gave all his leasehold, freehold, and copyhold estates unto his mother, Charlotte Atkyns, and her heirs for ever, *in the fullest confidence that, after her decease, she would devise the property to his family;* and he charged the premises with the payment of his debts, and gave to her all his personal estate, and appointed her his executrix. It was held eventually by the House of Lords that there was a trust for the testator's heir, but that Mrs. Atkyns took an estate in fee subject thereto, and that she was entitled to cut timber in a workmanlike manner, as having a qualified estate in fee, paying the money into Court.

In *Irvine* v. *Sullivan* (*i*), the testator, after a devise of all his property to three trustees (whom he afterwards appointed executors) upon trust to sell, directed that the moneys arising therefrom, after payment of his debts, funeral and testamentary expenses, should be

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(*a*) 1 Si. 534.

(*b*) See also Macnab *v.* Whitbread, 17 B. 299.

(*c*) Pierson *v.* Garnet, 2 Bro. Ch. 38, 226; Wright *v.* Atkyns, 13 R. R. 199; Meredith *v.* Heneage, supra; Knight *v.* K., 3 B. 173; 11 Cl. & Fin. 513; cf. *Re* Price, (1887) W. N. 216.

(*d*) Hill *v.* H., (1897) 1 Q. B. 483.

(*e*) Burrough *v.* Philcox, 5 My. & C. 73, 91.

(*f*) Irvine *v.* Sullivan, 8 Eq. 673. As to order of administration of assets in such a case, see *Re* Maddock, (1902) 2 Ch. 220.

(*g*) Wood *v.* Cox, 2 My. & C. 684.

(*h*) 1 V. & B. 314; 13 R. R. 199, at p. 204.

(*i*) 8 Eq. 673.

paid by his trustees to E. D. Irvine, widow, absolutely, "*trusting* that she will carry out my wishes with regard to the same, with which she is fully acquainted." The testator had, shortly before the date of his will, expressed to E. D. Irvine, to whom he had been for some time engaged to be married, his wish that she would, out of the property he should leave her, make gifts to certain persons. E. D. Irvine, after leaving the testator, wrote down his wishes, but the paper was not submitted to or signed by him. It was held by *James*, V.-C., that E. D. Irvine took the testator's estate *beneficially*, *subject* only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at 4*l.* per cent. from the expiration of one year from the testator's death (*a*).

But if the gift is *upon trust, primâ facie* the donee takes the whole upon trust for the trust declared, or for the heir-at-law or next of kin if those purposes fail, or are not exhaustive, or are not declared (*b*).

Thus, where a testator bequeathed to his wife all his property, but without words giving her a beneficial interest, "under the firm conviction that she would dispose of and manage the same for the benefit of their children," it was held that she was merely a trustee (*c*).

In *Re Croome* (*d*), J. C., by his will, gave to his brother all his real estate "*on trust nevertheless* to pay thereout" two sums of £800 and £300 and certain annuities, and he gave all his personal estate after payment of his funeral expenses and his debts, "except the two above-mentioned sums of £800 and £300" to his said brother and to his sister as tenants in common. Two questions arose, whether the brother was entitled beneficially, subject to the trust, or whether there was a resulting trust in favour of the heir-at-law. *Stirling*, J., held there was nothing to show an intention that the brother should take beneficially, subject to the trusts, that he was therefore a trustee and there was a resulting

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(*a*) See also Shelley *v.* S., 6 Eq. 540; Baker *v.* Mosley, 12 Jur. 740. As to the effect on administration of treating such wishes as specific bequests, see *Re* Maddock, (1902) 2 Ch. 220.

(*b*) *Re* West, (1900) 1 Ch. 84; Theobald, Wills (1908), 487, 488.

(*c*) Barnes *v.* Grant, 26 L. J. Ch. 92; Greene *v.* G., 3 Ir. R. Eq. 629; Corbet *v.* C., 7 Ir. R. Eq. 456; *Re* West, (1900) 1 Ch. 84.

(*d*) (1888) W. N. pp. 37, 152; (1889) W. N. 156; 59 L. T. 582; 61 L. T. 814; and see Williams *v.* Roberts, 27 L. J. Ch. 177.

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trust for the heir-at-law. But the Court of Appeal reversed the decision, holding, there was an intention shown on the will that the brother should take as beneficial owner subject to the charges, and the decision of the Court of Appeal was upheld by the House of Lords (*a*).

If an estate is given to A. *upon condition* that he shall apply the rents for the benefit of B., that is a gift *upon trust* (*b*). But if lands are devised to an individual, with a condition annexed that he shall make certain payments, if the devise is accepted the condition must be fulfilled, but the land is the land of the devisee subject to the performance of the condition (*c*).

From *Briggs* v. *Penny* (*d*), it would seem that although vagueness in the objects may prevent a trust in their favour from being effectual, nevertheless the intention to create a trust may appear with sufficient clearness to prevent the legatee or donee, to whom the property was given with recommendatory words from taking beneficially. In that case the testatrix after giving among other legacies a sum of 3,000*l.* to Sarah Penny, and a like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said Sarah Penny, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed Sarah Penny sole executrix of her will. It was held by *Truro*, C., affirming the decision of *Knight-Bruce*, V.-C., that Sarah Penny did not take the residue for her own benefit. "There is therefore nothing," said his Lordship, "on the face of the words which necessarily implies what is vague or indefinite, as in those cases where the Court has held that the uncertainty of the object has afforded evidence that no trust was intended. . . . I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires,' and the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix's designs and desires or intentions, appears to me to amount to a declaration, that Miss Penny was to hold the property for that purpose, or in other words, to the same import, *upon trust*. It seems to me to be

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(*a*) 61 L. T. 814. See also Morrison *v.* M'Ferran, (1901) 1 Ir. R. 360.

(*b*) Per Lord *Cairns*, A.-G., &c. *v.* Wardens of Wax Chandlers Co., L. R. 6 H. L. 1, at p. 21; and see 38 C. D., p. 531.

(*c*) Ibid., p. 19.

(*d*) 3 Mac. & G. 546.

tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared; but still in such case it is clear a trust was intended, and that is sufficient to exclude the legatee from a beneficial interest. Once established that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear. In this case, however, we are not left to spell out a trust from the residuary clause alone: the fact that, besides a legacy of 3,000*l*., another legacy is expressly given to Miss Penny, 'in addition for the trouble she will have in acting as executrix,' clearly shows that she was not intended to take the residue beneficially" (*a*).

In *Stead* v. *Mellor* (*b*), a testatrix gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces, A. and B., as shall be living at my death, *my desire being that they shall distribute such residue as they think will be most agreeable to my wishes.*" A. and B. both survived the testatrix. It was held by *Jessel*, M. R., that they both took the residue for their own benefit. "Beyond general principles," said his Lordship, "I find nothing in *Briggs* v. *Penny* to guide me to a conclusion in the present case. It was a decision on the particular words of a will. It has never been followed as far as I know; at any rate I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The words were 'well knowing that she' the legatee 'will make a good use and dispose of it in a manner in accordance with my' the testatrix's 'views and wishes.' Lord *Truro* appears to have been of opinion that the words 'well knowing' were equivalent to, if not synonymous with the expression 'in the fullest confidence' (*c*), and that they were used in such a manner as to exclude all option or discretion. With all deference to his Lordship, that is a most unsatisfactory reason. Why should the words

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(*a*) See *Re* Boyes, 26 C. D. 531; *Re* Hetley, (1902) 2 Ch. 866.

(*b*) 5 C. D. 225.

(*c*) See *Re* Williams, (1897) 2 Ch.

'well knowing' bear any other than their natural meaning? No reason is given why they should. However, that is the decision. Whether the case of *Briggs* v. *Penny* was rightly or wrongly decided (and I must not forget that it affirmed the decision of a very learned judge, the Vice-Chancellor *Knight-Bruce*), it is distinguishable from the present case, *and as the words are not the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean*, and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest" (*a*).

In *Re Booth* (*b*), a testator gave the residue of his estate to his executors on trust to pay or permit his wife to receive the annual income during her life "for her use and benefit and for the maintenance and education of my children." *North*, J., held the wife took the income subject to a trust for the maintenance and education of the children, and directed an inquiry whether any and which of the children required maintenance.

Where a testatrix bequeathed a sum of money to A. "for the charitable purposes agreed upon between us" it was held that evidence was not admissible to shew that the agreement between the testatrix and A. was that only the income of the sum bequeathed during the life of A. should be devoted to charitable purposes (*c*).

Where a precatory trust has been created in favour of a class, the trustee may, in executing the trust, limit the share of a female member of the class to her separate use (*d*).

5. Trust implied from Powers of Selection and Distribution.

It is said by Lord St. Leonards to be "an immutable rule, that the non-execution of a power shall never be aided" (*e*), but he qualifies this by saying that this broad rule does not apply to powers

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12, "fullest trust and confidence," held no trust; Irvine *v.* Sullivan, "trusting," supra, p. 354; Baker *v.* Mosley, 12 Jur. 740; Barnes *v.* Grant, 26 L. J. Ch. 92; *Re* Adams, &c., 27 C. D. 394, supra, p. 346.

(*a*) See *Re* Fleetwood, 15 C. D. 594; *Re* Hetley, (1902) 2 Ch. 866; *Re* Eyre, 49 L. T. 260.

(*b*) (1894) 2 Ch. 282. The Court can administer such a trust, *Re* G., (1899) 1 Ch. 719.

(*c*) *Re* Huxtable, (1902) 2 Ch. 793.

(*d*) Willis *v.* Kymer, 7 C. D. 181.

(*e*) Sugden on Powers, 8th ed. 588, citing Arundell *v.* Philpot, 2 Vern. 69; Tomkyn *v.* Sandys, 2 P. W. 228 (n.); Wilm. 23; Bull *v.* Vardy, 1 V. 272.

in the nature of trusts. "It is perfectly clear that where there is a mere power of disposing, and that power is not executed, this Court cannot execute it." It is equally clear that "wherever *a trust* is created, and the execution of that trust fails by the death of the trustee, or by accident, the Court will execute the trust. * * * There are not only a mere trust and a mere power, but there is also known to this Court a power which the party to whom it is given is entrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place. Upon that principle, the case of *Harding* v. *Glyn* proceeded" (*a*). And the Court, moreover, may exercise the power retrospectively (*b*); and where, for instance, by the death of the trustees in the life of the testator (*c*), or by their not accepting the office (*d*), or by their inability to agree among themselves as to the manner in which the power ought to be executed (*e*), or, as in the principal case, by their deaths before having exercised their powers (*f*); or where by accident the trustees have not exercised their power (*g*), the Court itself, as far as it properly can, will take upon itself the duties of the trustees by the exercise thereof.

Two main classes of cases may be distinguished (*h*). First: cases in which the instrument creating the power imposes a duty upon the donee to exercise the power, and at the same time "gives him an interest extensive enough to enable him to discharge the

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(*a*) Per *Eldon*, C., in Brown *v.* Higgs, 8 V. 570, 5 My. & C. 92. Twice heard before Lord *Alvanley* (4 V. 708, 5 V. 495), whose judgment was affirmed by *Eldon*, C., greatly doubting, 8 V. 561, and finally by the H. L., 5 My. & Cr. 92. See *Re* Weekes' Set., (1897) 1 Ch. 289.

(*b*) Edwards *v.* Grove, 2 De G. F. & J. 210; Maberly *v.* Turton, 14 V. 499.

(*c*) A.-G. *v.* Hickman, 2 Eq. Ca. Abr. 193; A.-G. *v.* Lady Downing, Wilm. 7; Maberly *v.* Turton, 14 V. 499.

(*d*) Gude *v.* Worthington, 3 De G. & Sm. 389; Izod *v.* I., 32 B. 242; Doyley *v.* A.-G., 2 Eq. Ca. Abr. 194.

(*e*) Moseley *v.* M., Rep. t. Finch, 53; Wainwright *v.* Waterman, 1 V. 311.

(*f*) See also Flanders *v.* Clark, 1 Ves. Sen. 8; Hewett *v.* H., 2 Eden, 332; Grieveson *v.* Kirsopp, 2 Keen, 653; *Re* Hargrove's Trusts, 8 Ir. R. Eq. 256; Croft *v.* Adam, 12 Si. 639.

(*g*) Brown *v.* Higgs, supra; A.-G. *v.* Stephens, 3 My. & K. 347.

(*h*) See judgment of *Porter*, M. R., in Moore *v.* Ffolliot, 19 L. R. Ir. 499, at p. 501; the value of the distinction is doubted in Farwell on Powers, 2nd ed., p. 465, but it appears to be of use in shewing the development of the rule.

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duty" (*a*). Here a trust is created, the objects of the power are *cestui que trusts*, and if the donee fails to exercise the power, the trust will be enforced against his representatives. In this class of cases the instrument gives, in the first instance, the property to the donee absolutely, but subsequent words limit his beneficial interest to a life estate and give him a power of selection among certain persons, usually children. Cases falling under this head are closely related to those discussed under Precatory Trusts, the Court here finding in the words creating the power a trust for the class in question (*b*). Secondly: cases in which the donee of the power takes in terms only a life estate, and the power cannot in any event take effect out of any estate vested in him. Here we must distinguish between (*α*) cases in which by the words of the instrument a gift is made to the objects of the power and the donee is given only a power of selection among them, and (*β*) cases in which no direct gift is made, and the gift if any must be implied, and the power is not merely one of selection but is general in its terms. In cases falling within (*α*), the authorities shew that if the power is not executed the Court will divide the property equally between the objects of the power (*c*). The only difficulty here is as to what indications in the will are sufficient to amount to a gift. In cases falling within (*β*), the law cannot be said to be wholly free from doubt. The law as it stood before the decision in *Re Weekes' Settlement* (*d*), was stated by Mr. Jarman as follows: "Implied gifts may and often are created by powers of selection and distribution in favour of a defined class of objects; for when property is given or appointed under a general power to a person for life, and after his decease to such children, relations or other defined objects as he shall appoint, or among them in such shares as he shall appoint, and there is no express gift over in default of appointment, such a gift will be implied" (*e*). In *Re Weekes' Settlement* (supra), *Romer*, J., decided that where there is a gift to the donee of the power for life with power to appoint among a class, but no gift

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(*a*) See Brown *v.* Higgs, 8 V., at p. 574.

(*b*) See *e.g.*, Brown *v.* Higgs, supra; Forbes *v.* Ball, 3 Mer. 437.

(*c*) See *Re* Weekes' Settlement, (1897) 1 Ch. 289; Burrough *v.* Philcox, 5 My. & Cr. 73; Jones *v.* Torin, 6 Si. 255; Grieveson *v.* Kirsopp, 2 Keen 653; Winn *v.* Fenwick, 11 B. 438; Lambert *v.* Thwaites, 2 Eq. 151; Wilson *v.* Duguid, 24 C. D. 244.

(*d*) Supra, discussing and distinguishing Brown *v.* Higgs (supra); Burrough *v.* Philcox, supra; *Re* Caplin's Will, 2 Dr. & Sm. 527; *Re* White's Trusts, Johns. 656, and following Healy *v.* Donnery, 3 Ir. C. L. R. 213.

(*e*) Jarman, Wills (1893), p. 517.

to that class, the Court is not bound merely by reason of the absence of a gift over in default of appointment to imply a gift to the class in the event of the non-exercise of the power. "In order that such a gift to the objects may be implied, you must find in the will an indication that the testatrix did intend the class, or some of the class, to take—intended in fact that the power should be in the nature of a trust—only a power of selection being given, as, for example, a gift to A. for life with a gift over to such of a class as A. shall appoint" (*a*). From this decision it appears that, speaking strictly, no gift to the objects is ever *implied*, and that the defect of non-execution is only supplied by equity when in the words of the instrument itself a direct intention to benefit the objects is expressed.

A gift over in default of *objects* of the power assists the construction that the intention was that the property should not go over if there were any objects of the power (*b*).

But an express gift over in default of appointment is inconsistent with a gift to the objects (*c*) even though that gift is void (*d*), but a residuary gift is not equivalent to a gift over in default for this purpose (*e*). The terms of the instrument may make it impossible for the Court to construe it as a gift to the objects on a failure to exercise the power. Thus the donee of the power may be given an absolute discretion to dispose of capital and income as he sees fit in favour of X. or the other beneficiaries under a will (*f*), or the

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(*a*) This decision is treated as finally determining a long standing matter of doubt in Underhill and Strahan's Interpretation of Wills, etc., pp. 96 and 97, and is accepted without comment in Jarman, Wills (1910), p. 651. It has been criticised at length by Mr. J. C. Gray in the Harvard Law Review, Vol. XXV., p. 1 (Nov. 1911), and is opposed to statements of the rule by *Page Wood*, V.-C., in *Re* White's Trusts, Johns. 656; by *Kindersley*, V.-C., in *Re* Caplin's Will, 2 Dr. & Sm. 527; and see per *Davey*, L. J., in *Re* Brierley, 43 W. R. 36, 37, but is supported by the Irish decisions, Healy *v.* Donnery, 3 Ir. C. L. R. 213; Carberry *v.* M'Carthy, 7 L. R. Ir. 328; and see *Re* Hall (1899), 1 Ir. R. 308; *Re* Patterson (1899), 1 Ir. R. 324.

(*b*) Butler *v.* Gray, L. R. 5 Ch. 26.

(*c*) Richardson *v.* Harrison, 16 Q. B. D., pp. 104, 107; *Re* Jefferys, 14 Eq. 136 (V.-C. M.), not followed on this point; Pattison *v.* P., 19 B. 638; Goldring *v.* Inwood, 3 Giff. 139; *Re* Lyons and Carrol's Contract (1896), 1 Ir. R. 383; Jarman, Wills (1910), p. 652; Farwell, Powers (1893), p. 471.

(*d*) Miley *v.* Cape, (1880) W. N. 151; 43 L. T. 236.

(*e*) *Re* Brierley, 43 W. R. 36 (C. A.), and see Forbes *v.* Ball, 3 Mer. 437; 3 K. & J. 529; distinguishing Bull *v.* Vardy, 1 V. 270.

(*f*) *Re* Eddowes, 1 Dr. & Sm. 395.

donor of the power may in the instrument recite that he has already made provision for the objects (*a*).

The mode in which the Court will execute a power in the nature of a trust, depends upon the terms of the instrument by which the property is settled. If, for instance, in such instrument a rule is laid down for the guidance of the trustees which they have not acted upon, then the Court will act upon it, exercising the same judgment as the trustees might have done. Thus in *Gower* v. *Mainwaring* (*b*) Lord *Hardwicke* said, "Where trustees have power to distribute *generally, without any object pointed out or rule laid down*, the Court interposes not, unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity (*c*). But *here is a rule laid down. The trustees are to judge of the necessity and occasion of the family; the Court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees*, and when informed by evidence of the necessity can judge what is equitable and just on this necessity" (*d*).

Where, however, no rule has been laid down in the instrument creating the power as to the mode in which it is to be executed, the Court, not being able to exercise the discretion vested in the donee (*e*), and acting upon the maxim that *equality is equity*, will make an equal division among the persons who are objects of the power in the nature of a trust. Thus in *Doyley* v. *The A.-G.* (*f*), the testator gave property in trust for certain purposes, and subject thereto the trustees and the survivor of them, and the heirs and executors of such survivor, were to *dispose of it* to such of his relations on his mother's side who were most deserving, and in such manner as they should think *fit, and* for such charitable uses and purposes as they should also think most proper and convenient. The power having

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(*a*) Carberry *v*. M'Carthy, 7 L. R. Ir. 328.

(*b*) 2 Ves. Sen. 87.

(*c*) See as to charities, where the same rule applies, Salusbury *v*. Denton, 3 K. & J. 529, infra; Pocock *v*. A.-G., 3 C. D. 342; cf. Crawford *v*. Forshaw, (1891) 2 Ch. 261; *Re* Smith, (1904) 1 Ch. 139.

(*d*) And see Hewett *v*. H., 2 Eden, 332; Anon., 1 P. W. 327; Widmore *v*. Woodroffe, Amb. 636; Brunsden *v*. Woolredge, Amb. 507; A.-G. *v*. Buckland, cited 1 Ves. Sen. 231; A.-G. *v*. Price, 17 V. 371; Green *v*. Howard, 1 Bro. Ch. 33; Mahon *v*. Savage, 1 Sch. & L. 111; Maberly *v*. Turton, 14 V. 499; Liley *v*. Hey, 1 Ha. 580; *Re* Phene's Trusts, 5 Eq. 346; Butler *v*. Gray, L. R. 5 Ch. 26, 31.

(*e*) See Sugden on Powers, 8th ed., p. 601.

(*f*) 2 Eq. Ca. Abr. 194, 4 Vin. Abr. 485 (*e*), pl. 16.

devolved on the Court, *Jekyll*, M. R., directed that one-half of the property should go to the testator's relations on the mother's side, and the other half to charitable uses. He said the known rule that equality is equity was the best measure to go by.

So in *Salusbury* v. *Denton* (*a*), a testator by will gave a fund to be at the disposal of his widow by her will, "therewith to apply a part" for a charity, "the remainder to be at her disposal among my relations, in such proportions as she may be pleased to direct." The widow died without exercising the power of determining the proportions in which each were to take. It was held by *Page Wood*, V.-C., that the bequest was not void for uncertainty, but that the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator's relatives as were capable of taking within the Statute of Distributions (*b*).

Period for ascertaining class.—There is a distinction between a gift *implied* by the Court and a *direct* gift to a class coupled with a power of selection or distribution (*c*). If the instrument itself gives the property to a class but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment. Thus, in *Lambert* v. *Thwaites* (*d*), by a post-nuptial settlement, certain freehold property was conveyed to trustees *upon trust* to pay the rent to W. and his wife during their lives, and after the decease of the survivor *upon trust* to sell and *divide the proceeds amongst all and every the children* of W. in such shares and proportions *as he shall by will appoint.* There were seven children living at the date of the settlement, one of whom died before W., who died without executing the appointment. It was held by *Kindersley*, V.-C., that the property was vested in all the children, liable to be divested by the execution of the power; and the power not

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(*a*) 3 K. & J. 529.

(*b*) See also Gough *v.* Bult, 16 Si. 45, 231; Longmore *v.* Broome, 7 V. 124; Penny *v.* Turner, 2 Phill. 493; Fordyce *v.* Bridges, ibid. 497; *Re* White's Trusts, John. 656; Jones *v.* J., 5 Ha. 440; Little *v.* Neil, 10 W. R. 592; Hutchinson *v.* H., 13 Ir. R. Eq. 332; Pocock *v.* A.-G., 3 C. D. 342; Gray *v.* G., 13 Ir. Ch. R. 404; Izod *v.* I., 32 B. 242; Down *v.* Worrall, 1 My. & K. 561, distinguished by *Page Wood*, V.-C., in Salusbury *v.* Denton; Power *v.* Quealy, 4 L. R. Ir. 20.

(*c*) As to the implication of gift see *Re* Weekes' Sett., supra, at p. 360, and cases cited p. 361, note (*a*).

(*d*) 2 Eq. 151; Wilson *v.* Duguid, 24 C. D. 244.

having been executed, the representatives of the deceased child were entitled to his share (*a*). If in such a case the power had been exercised in favour of the surviving children, they only would have taken (*b*).

(2.) But if the instrument does not contain a gift of the property to any class or in default of appointment, but only a power to the donee to give it as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it (*c*). Thus, in *Walsh* v. *Wallinger* (*d*), a testator bequeathed the residue of his estate to his wife for her own use and benefit, "*trusting that she would at her decease give and bequeath* the same to the children in such manner as she should appoint." Here there was no gift in express terms to the children by the testator, nor any direction that they were to take in default of appointment; therefore it could only be inferred from the power itself who were to take in default of appointment; and inasmuch as the power was only to be exercised *by will*, and, therefore, could only be exercised in favour of those children who should be living at the wife's death, the conclusion almost necessarily was that the intention of the testator was that those only who survived the wife should take, and so it was decided (*e*).

A gift by will to A. for life, and "at" or "after" his decease to such persons as he shall appoint, gives A. a life interest with a power of appointment, either by instrument *inter vivos* or by will (*f*).

Where the power is created by a will in favour of the relations of the testator, and the power is not suspended by the existence of any preceding estate for life, those who are to take are such as answered the description of next of kin of the testator at his death (*g*), and the

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(*a*) See also Wilson *v.* Duguid, 24 C. D. 244; Davy *v.* Hooper, 2 Vern. 665; Madoc *v.* Jackson, 2 Bro. Ch. 588; Hockley *v.* Mawbey, 1 V. 143; Jones *v.* Torin, 6 Si. 255; Falkner *v.* Wynford, 9 Jur. 1006; Fenwick *v.* Greenwell, 10 B. 412; Bradley *v.* Cartwright, L. R. 2 C. P. 511.

(*b*) See Woodcock *v.* Renneck, 4 B. 190, 1 Ph. 72. See also Winn *v.* Fenwick, 11 B. 438. But see the remarks upon these cases in Lambert *v.* Thwaites, 2 Eq., pp. 158—160; Freeland *v.* Pearson, 3 Eq. 658.

(*c*) Per *Kindersley*, V.-C., in Lambert *v.* Thwaites, 2 Eq., p. 155. But see *Re* Weekes' Set., (1897) 1 Ch. 289.

(*d*) 2 Russ. & My. 78.

(*e*) See also Kennedy *v.* Kingston, 2 J. & W. 431; Freeland *v.* Pearson, 3 Eq. 658; Sinnott *v.* Walsh, 5 L. R. Ir. 27.

(*f*) *Re* Jackson's Will, 13 C. D. 189.

(*g*) Cole *v.* Wade, 16 V. 27, 10 R. R. 129, on appeal Walter *v.* Maunde, 13 same persons will take when the donee of the power having a life interest dies in the lifetime of the testator (*a*).

When, as in the principal case, the *donee* of such a power has a *life* interest in the subject of the power, which he might exercise *by will only* in favour of the members of such a class; those who compose that class at the *death of the donee* will take (*b*).

Where the donee of the power takes no interest, but an estate for life is given to some other person, it would seem that the death of the longest liver of such tenant for life and the donee of the power would be the time for ascertaining the class (*c*), but this will depend upon the terms of the particular will (*d*).

Where the power may be exercised either by *deed or will*, the authorities are conflicting as to whether the objects to take, in default of appointment by the donee, through the intervention of the Court are those members of the class, being objects of the power, who were in existence at the death of the original testator or at the date of the settlement or born afterwards as the case may be (*e*): or, as was decided in the principal case, those only who were in existence at the death of the donee (*f*). The question in each case is one of the construction of the particular instrument and the intention therein expressed.

Where a power in the nature of a trust gives the trustees liberty to distribute a fund *unequally*, they may do so, but if the Court interpose on default by the trustees it will divide the fund among the objects *equally* (*g*).

But if such power authorises only an *equal* distribution, this will be equivalent to a gift to the objects, because the trustees can only exercise the power in the same manner as the Court would do (*h*).

Relations.—Where the non-exercised power was in favour of "relations," "relatives," &c., the Court has adopted the rule that

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R. R. 230. And see Brown *v.* Higgs, 4 V. 708, 4 R. R. 323; Longmore *v.* Broome, 7 V. 124.

(*a*) Penny *v.* Turner, 2 Ph. 493; Hutchinson *v.* H., 13 Ir. R. Eq. 332.

(*b*) See Doyley *v.* A.-G., 2 Eq. Ca. Abr. 194, pl. 15; Witts *v.* Bodington, 3 Bro. Ch. 95; Cruwys *v.* Colman, 9 V. 319, 325; Birch *v.* Wade, 3 V. & B. 95; Finch *v.* Hollingsworth, 21 B. 112; *Re* Caplin's Will, 34 L. J. Ch. 578.

(*c*) Farwell, Powers (1893), p. 475.

(*d*) Cf. *Re* White's Trusts, John. 656.

(*e*) Hands *v.* H., 1 T. R. 437 (n.), cited; Grieveson *v.* Kirsopp, 2 Keen, 653; Wilson *v.* Duguid, 24 C. D. 244.

(*f*) Doyley *v.* A.-G., 2 Eq. Ca. Abr. 195; Pope *v.* Whitcombe, 3 Mer. 689; see Sugd., Powers, 8th ed., pp. 663, 693.

(*g*) Hands *v.* H., cited 1 T. R. (n.) 437; Pope *v.* Whitcombe, 3 Mer. 689; 2 Sugd., Powers, 650; and see Doyley *v.* A.-G., supra, and Salusbury *v.* Denton, 3 K. & J. 529, supra, p. 363.

(*h*) Phillips *v.* Garth, 3 Bro. Ch. 64; Rayner *v.* Mowbray, ibid., 234.

the relations who are to take in default of the exercise of the power in that case, are those who are the next of kin according to the Statute of Distributions (*a*), and they will take *per capita* (*b*), and apparently as tenants in common (*c*).

In exercising a power of *selection*, the donee may go beyond the rule adopted by the Court, and exercise it in favour of relations of the donor, who are not within the degree of next of kin (*d*), and these distinctions have not been affected by Lord Selborne's Act (*e*). The same rule has been applied with respect to personal estate, where the words "relations" or "friends" (*f*), or where the word "family" has been used in place of "relations" (*g*).

If the word "relations" or the like words, are applied thus, "to the relations of A.," and A. is illegitimate, such words will be held to include those persons who would have been the relations, &c., of A. if A. had been legitimate (*h*).

Where the donee has merely a power of *distribution*, and not a power of *selection*,—if, for instance, he has a power to appoint among relations, and not amongst such of them as he thinks fit, or words to that effect, an appointment to relations not being next of kin would be void (*i*).

The words "near relations" are of uncertain meaning, and will, therefore be confined to next of kin according to the statute. But there is no uncertainty in the words "nearest relations," it is as easy

(*a*) 22 & 23 Car. 2, c. 10.

(*b*) Tiffin *v.* Longman, 15 B. 275; Pope *v.* Whitcombe, 3 Mer. 689 (as to which see Finch *v.* Hollingsworth, 21 B. 112); Lawlor *v.* Henderson, 10 Ir. R. Eq. 151; *Re* Deakin, (1894) 3 Ch. 565; *Re* Patterson, (1899) 1 Ir. 324. Cf. Doyley *v.* A.-G., 4 Vin. Abr. 485; Thomas *v.* Hole, Cas. t. Talbot, 251.

(*c*) See Wilson *v.* Duguid, 24 C. D., at p. 251; *Re* Patterson, (1899) 1 Ir. R., p. 336. But see Eagles *v.* Le Breton, 42 L. J. Ch. 362 (also reported 15 Eq. 148, but the headnote is not in accordance with the judgment).

(*d*) Harding *v.* Glyn, supra; Wilson *v.* Duguid, 24 C. D., at p. 251; *Re* Deakin, (1894) 3 Ch. 565; and Supple *v.* Lowson, Amb. 729; Spring *v.* Biles, 1 T. R. 435, (n.); Cruwys *v.* Colman, 9 V. 324; Mahon *v.* Savage, 1 Sch. & L. 111; Forbes *v.* Ball, 3 Mer. 437; Grant *v.* Lynam, 4 Russ. 292, overruling Brunsden *v.* Woolredge, Amb. 507; Salusbury *v.* Denton, 3 K. & J. 529; Snow *v.* Teed, 9 Eq. 622.

(*e*) 37 & 38 Vict. c. 37; *Re* Deakin, (1894) 3 Ch. 567.

(*f*) *Re* Caplin's Will, 2 Dr. & Sm. 527; 34 L. J. Ch. 578.

(*g*) Cruwys *v.* Colman, 9 V. 319; Grant *v.* Lynam, 4 Russ. 297.

(*h*) *Re* Deakin, (1894) 3 Ch. 567. Cf. *Re* Wood, (1902) 2 Ch. 542.

(*i*) Pope *v.* Whitcombe, 3 Mer. 689; and see Clapton *v.* Bulmer, 10 Si. 426, 5 My. & C. 108; Finch *v.* Hollingsworth, 21 B. 112; Lawlor *v.* Henderson, 10 Ir. R. Eq. 150; Wilson *v.* Duguid, 24 C. D. 251; cf. *Re* Deakin, supra.

to ascertain who they are as next of kin under the statute, and there is therefore no need to resort to construction either to confine or extend their meaning. So under a bequest to "my nearest surviving relations," those nearest in relationship to the testator will take to the exclusion of those who under the statute would have been entitled, *e.g.*, brothers and sisters would exclude the children of deceased brothers and sisters (*a*).

And if a power of selection is confined to a particular class, the donee cannot go beyond it. Thus, a gift to the testator's "nearest relations," as A. may appoint, will only authorise an appointment to next of kin under the statute (*b*).

Where a gift is to "poor relations," then if it is to be considered as being a charitable gift, as where a fund in perpetuity is created (*c*), or the context shows a charity was intended (*d*), the Court will not confine the term relations, to those within the statute, *secus* if the gift is not to be considered charitable (*e*).

Difficulties in executing power.—Although the subject be not capable of division, or one object out of a class is to be selected by the trustee, the Court will, if possible, execute the power, on the default of the trustee (*f*).

The exercise of a power otherwise imperative as a trust, may be made dependent upon the good behaviour of the objects of the power to the donee, and in the absence of any declaration of ill-behaviour on their part made by the donee, the Court will execute the power in their favour. Thus in *Cruwys* v. *Colman* (*g*), the testatrix bequeathed to her sister B., for life, declaring that it was her *absolute desire* that she bequeathed to those of her own family what she

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(*a*) Smith *v.* Campbell, 19 V. 400, 406; 13 R. R. 224; Edge *v.* Salisbury, Amb. 70; Goodinge *v.* G., 1 Ves. Sen. 231; *Re* Nash, 71 L. T. 5 (C. A.), "nearest relatives." Cf. *Re* Gray, (1896) 2 Ch. 802, "next of kin in blood."

(*b*) 22 & 23 Car. 2, c. 10; Goodinge *v.* G., 1 Ves. Sen. 231; Edge *v.* Salisbury, Amb. 70.

(*c*) White *v.* W., 7 V. 423; A.-G. *v.* Price, 17 V. 374; Isaac *v.* De Friez, Amb. 595; 17 V. 373, (n.); Gillam *v.* Taylor, 16 Eq. 581, the dictum of *Wickens*, V.-C., being disapproved in A.-G. *v.* Northumberland, 7 C. D. 745.

(*d*) Mahon *v.* Savage, 1 Sch. & L., 111.

(*e*) Widmore *v.* Woodroffe, Amb. 636. Jarman, Wills (1910), vol. ii., pp. 16, 34; and see as to the objects of particular powers to appoint among children, grandchildren, issue, &c., Farwell, Powers (1893), chap. 13, p. 486.

(*f*) Richardson *v.* Chapman, 7 Bro. P. C. 318; Moseley *v.* M., Rep. t. Finch, 53; Brown *v.* Higgs, 5 V. 504, 4 R. R. 323.

(*g*) 9 V. 319.

Harding v. Glyn.

has power to dispose of, *provided they behaved well to her, with decency and affection.* B., by her will, declared she meant to make no disposition of her sister's property. *Grant*, M. R., held that, as all that B. said was, that she did not intend to execute the power, the trust remained unexecuted, and was consequently to be executed by the Court in favour of the next of kin of B. But, his Honour said, that a difficulty might have arisen if B. had declared her own relations had behaved ill to her, and therefore she had resolved not to give them any part of the property. The question then would have been, whether she was not constituted sole judge of the propriety of the behaviour of her family, and whether it was not an intestacy in the testatrix, the condition failing.

Discretionary powers, control of Court over.—Where absolute discretion as to the exercise of a power, as distinguished from a trust, is given to trustees the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly (*a*).

But when the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, although it will not interfere with the discretion of the trustees as to the time, mode, and other details as to its exercise when they are acting in good faith (*b*).

But the Court will control trustees if they exercise their powers in an arbitrary and unreasonable manner (*c*).

In *Re Johnston* (*d*), a testator gave to trustees all his property upon certain trusts and directed that certain sums should be invested for the benefit of his four sons on their attaining twenty-one, such sums *to be applied as the trustees in their discretion might think fit. Stirling*, J., thought that this was an attempt to fetter the enjoyment of a benefit to which a person had become absolutely entitled under the will, and as the sons alone had any beneficial interest in the sums set apart, he held they were entitled absolutely, freed from the exercise of any discretion by the trustees.

(*a*) Tempest *v.* Camoys, 21 C. D. 571 (C. A.); Wilson *v.* Turner, 22 C. D. 521; Gisborne *v.* G., 2 A. C. 300; *Re* Gadd, 23 C. D. 134; *Re* Lofthouse, 29 C. D. 921. See *Re* Brown, 29 C. D. 889; *Re* Courtier, 34 C. D. p. 141; *Re* Bryant, (1894) 1 Ch. 324; see also Tabor *v.* Brooks, 10 C. D. 273; Camden *v.* Murray, 16 C. D. 161; *Re* Kensit, (1908) W. N. 235.

(*b*) Tempest *v.* Camoys, supra; *Re* Burrage, 62 L. T. 752; *Re* Bryant, supra.

(*c*) *Re* Hodges, 7 C. D. 754; *Re* Roper, 11 C. D. 272.

(*d*) (1894) 3 Ch. 204; cf. *Re* Skinner's T., 1 J. & H. 102.

SATISFACTION.

PYE, *Ex parte.*
DUBOST, *Ex parte.*

1811. 18 V. 140; 11 R. R. 173.

Satisfaction of a Legacy by a Portion—Ademption.

As a general rule, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and, in consequence of the leaning against double portions, if the parent afterwards advance a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part; and the rule is applicable where a person puts himself *in loco parentis.*

No such presumption arises in the case of a stranger, or of a natural child, where the donor has not put himself *in loco parentis,* if the subsequent advance is not proved to be for the very purpose of satisfying the legacy; and, therefore, the legatee will be entitled to both.

William Mowbray, by his will, dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sum after-mentioned, among other legacies gave as follows:—"*I give and bequeath the sum of* 4,000*l.* *sterling* to Louisa Hortensia Garos, *daughter* of John Louis Garos, formerly of Berwick-street, Westminster; the like sum of 4,000*l.* to Emily Garos, her sister, and 4,000*l.* to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters: and in case of the death of two of them, I desire the whole 12,000*l.* may be paid to the surviving sister."

The testator also gave to John Louis Garos 600*l.*, and "to Marie Genevieve Garos, his wife, the sum of 2,500*l.* sterling, for her own use, and over which her husband is not to have any power, he having lived abroad for many years, and she in this country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic. The petitioner Pye was the committee under the commission, and upon her death took out administration to her, and administration *de bonis non* to the testator.

The Master's report stated, from the examination of the petitioner Pye, that Louisa Hortensia, Emily, and Julia Garos, were the three natural daughters of the testator by Marie Genevieve Garos, the wife of John Louis Garos; and that, since the date of the will, Louisa Hortensia Garos married Christopher Dubost; and the testator *advanced as a marriage portion for her*, which by the settlement appeared to have been received by Christopher Dubost, the sum of 3,000*l.*; and it being contended, *that the said sum of* 3,000*l. ought to be considered as an advancement and in part satisfaction of the legacy of* 4,000*l.* and the whole legacy being claimed on the part of Christopher Dubost and his wife (who were both represented to be residing abroad), the Master did not allow the claim.

As to the legacy of 2,500*l.* to Marie Genevieve Garos, the report stated, from the same examination, that since the date and execution of the will the testator caused an annuity to be purchased in France, to which country she had retired for her life, and laid out in such purchase 1,500*l.*; and, it being contended by the petitioner Pye, that the said sum of 1,500*l.* ought to be deducted from the legacy of 2,500*l.*, *as being an advancement and in part satisfaction*, and the whole legacy being claimed by the legatee, then resident abroad, the Master had not allowed such claim, but left it open to the party to prosecute, when in a situation to do so.

By a further report the Master found, as to the French annuity, that, by a letter written by the testator to Christopher Dubost in Paris, on the 25th of November, 1807, the testator authorised him to purchase in France an annuity of 100*l.*, for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for 1,500*l.* on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney authorising him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found, that by the law of France (*a*), if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done, while ignorant of such death, is valid. The Master therefore stated his opinion, that the annuity was no part of the personal estate of William Mowbray.

The first petition prayed, that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared, that the said annuity is part of his personal estate.

The other petition, by Dubost and his wife, prayed a transfer of Three per cent. Bank Annuities in satisfaction of 1,000*l.* of the legacy; and that so much of the Bank Annuities as will be sufficient to raise 3,177*l.* 3*s.* 6*d.*, the residue of the said legacy and interest, may be sold, &c.

An affidavit was offered by Dubost, that upon the treaty of marriage, the testator assured him, that, independent of the 3,000*l.*, he had already bequeathed her 4,000*l.*, and Dubost might depend upon his not altering it. A letter was also produced to the testator from Dubost, previous to the marriage, stating that he would not believe the information he had received, that the testator, being asked

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(*a*) By the Code Napoléon, Art. 2003, "Le mandat finit par la mort naturelle . . . soit du mandant, soit du mandataire." But an exception is introduced in the following article, Art. 2008: "Si le mandataire ignore la mort du mandant, ce qu'il a fait dans cette ignorance est valide." And see The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 46, 47 and 48; Hood & Challis, 7th ed., 1909, pp. 137—142; The Conveyancing Act, 1882, 45 & 46 Vict. c. 3, ss. 8, 9; Hood & Challis, 7th ed., 1909, pp. 195—198.

whether he would remember the young ladies in his will, answered, "You cannot expect that;" that he had said to Mrs. Dubost, that he did not see why there should be a difference between the sisters; and, asking if, according to the custom in France, he would give, besides the portion, 100*l*. to be laid out in jewels, &c. This letter was found after the testator's death among his papers.

Sir *Arthur Piggot*, Mr. *Richards*, Mr. *Wingfield*, Mr. *Horne*, and Mr. *Wear*, for different parties, in support of the first petition.

The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him during his life to change his purpose, and to make some other provision for this lady by funds in this country, conceiving, perhaps, that she might return here.

* * * * *

With regard to the other petition, and the objection to the letter offered as evidence, the circumstances resemble those of *Shudal* v. *Jekyll* (*a*), before Lord *Hardwicke*; *Powel* v. *Cleaver* (*b*), before Lord *Thurlow*; and *Trimmer* v. *Bayne* (*c*), before your Lordship; and the conclusion is, that the evidence is admissible.

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Sir *Samuel Romilly*, and Mr. *Bell*, in support of the second petition (referring, in opposition to the other petition, to the present law of France, declaring, that if the mandatory is unacquainted with the death of the mandant, or any other cause, which put an end to the mandate, whatever he has done while he was so unacquainted, is valid).

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In this case the legacy clearly is not given to the legatee as the child of the testator; and no evidence can be received to show that it was given to her in that character, the will containing an express statement, by way of description certainly, that she is the child of another man.

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Lord Chancellor Eldon.—These petitions call for the decision of

(*a*) 2 Atk. 516.

(*b*) 2 Bro. Ch. 499.

(*c*) 7 V. 508.

Pye, Ex parte.—Dubost, Ex parte.

points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court.

With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case ; but it is not necessary to pursue that ; as, upon the documents (*a*) before me, it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.

The other question is one of great difficulty; whether a sum of money, advanced upon the marriage of one of these young ladies, when a settlement was executed, is to be taken to be a satisfaction of a legacy, not given upon the face of the will as a portion, not given to a person stated upon the will to be an adopted child of the testator, or described merely by name, but given to an individual, a stranger, described in the will as the child of another person, who is designated as the father of that child. It not only does not appear that the testator represented himself as *in loco parentis*, but he has designated another individual as being the parent ; and, therefore, according to Lord *Thurlow's* opinion in *Grave* v. *Lord Salisbury* (*b*), the testator has expressed himself in terms anxiously calculated to conceal the fact, that he was the reputed father of that child, if he was so.

Without going through all the cases that were cited and those referred to in them, having compared the case in Atkyns (*c*) with manuscript notes of that case, and looked into some other cases, one in Ambler (*d*), and some earlier, I may state, as the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion ; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a

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(*a*) See 2 Spence Eq. Jur. 53, n. (*d*).

(*b*) 1 Bro. Ch. 425.

(*c*) Shudal *v*. Jekyll, 2 Atk. 516.

(*d*) Watson *v*. The Earl of Lincoln, Amb. 325.

portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part; and in some cases it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and though at the time of making the will, he thought he could not discharge that debt with less than 10,000*l.*, yet by a change of his circumstances, and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of 5,000*l.* (*a*).

The Court seems, in the older cases, to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child; and it has accordingly been urged in argument, but not supported by decision, except where accounted for by evidence of declarations, that the Court have said they did not mean to confine this doctrine to persons standing in that actual relation; but, perhaps, it might apply to a person placing himself *in loco parentis*, undertaking the care of an orphan. But what is to be the evidence of that, whether written evidence in the will and settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it.

In *Grave* v. *Lord Salisbury* (*b*), the first case before Lord *Thurlow*, Lord Salisbury had several natural children, to whom he had given legacies by his will, making afterwards a provision for them during his life, not *ejusdem generis;* giving the living of Hatfield to one; a farm and stock to another; upon which the question arose. It was contended that this was a satisfaction; that he intended by the legacy to make a provision, or, in other words, to discharge the obligation he owed to that child; and he had the same intention, advancing the portion, and the farm and stock. Lord *Thurlow* felt the extreme hardship, as it is evidently that, in

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(*a*) See, however, Pym *v.* Lockyer, 5 My. & C. 29, and Kirk *v.* Eddowes, 3 Ha. 509, which establish that a portion of less amount than the provision by will is a satisfaction *pro tanto* only, overruling, therefore, the cases alluded to by Lord *Eldon.*

(*b*) 1 Bro. Ch. 425.

the case of children, whose relation, as such, the law recognises, the doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to such a child; but, as the law does not recognise the relation between the putative father and illegitimate child, as imposing this debt of nature, the father in that case stands as a stranger; and no such presumption arises, in that case, where the subsequent advance is not proved to have been for the very purpose of satisfying the legacy, and therefore the legatee is entitled to both. Lord *Thurlow* directed a reference to the Master to inquire into the circumstances, who did not report the relation which the testator had to those children; and his Lordship, being pressed to send it back on that account, refused to do so; observing, that the object might have been to conceal the circumstance of that relation; and, therefore, the Court would not make the inquiry; but without deciding what would have been the case if that relation appeared, it was enough that it stood as the case of a stranger; and therefore the other provision was not a satisfaction.

In the subsequent case of *Powel* v. *Cleaver* (*a*), where the provision made was described as a portion, Lord *Thurlow* stated expressly that, if the legacy is given, not as a portion, by a stranger, who advances money on the marriage of the legatee, denominating that advance a portion, that denomination will not have the same effect in the case of a stranger, as it would in the case of parent and child; and Lord *Thurlow* asserts that there is no authority contradicting that.

If that is right, it comes to this: that, where a father gives a legacy to a child, the legacy coming from a father to his child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy (*b*); but a stranger giving a legacy, is understood as giving a bounty, not as paying a debt: he must, therefore, be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may

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(*a*) 2 Bro. Ch. 499.

(*b*) But *pro tanto* only if of less amount; Pym *v.* Lockyer, 5 My. & C. 29; Kirk *v.* Eddowes, 3 Ha. 509.

be, and it seems that it may, by evidence applying directly to the gift proposed by that will; and, recollecting how artificial the rules are, where a person has educated a child through life, considering himself as standing in the relation of putative father to that child, having a father acknowledged, describing that child as the child of a mother named, and a father named, and also making a provision for that father and mother, it would be too much upon such a will to say, this is the case of a person meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract: in other words, meaning to put himself *in loco parentis* (*a*), in the situation of the person described as the lawful father of that child.

That brings the question to this—whether this advance of a portion of 3,000*l.* is an ademption of the legacy between strangers, on the ground that this subsequent advance is treated as a portion or fortune? and whether the testator, having given that legacy of 4,000*l.*, and afterwards giving to that legatee a portion on marriage, the mere circumstance of giving that as a portion or fortune is to be taken as evidence that, when the will was made, it was meant as paying a debt of nature? or whether it was not to be understood, as in the first instance giving a bounty, and in the other making an addition to that bounty? In this case, as in *Shudal* v. *Jekyll*, more was intended to be given, but in the case of a stranger no authority says the advance of a less sum shall be an ademption of the whole. This letter, if it is to be admitted in evidence, shows how little such evidence can be trusted, as no one would have supposed, upon the correspondence, that the testator had such a will in his desk. Upon the authority of *Powel* v. *Cleaver*, unless you can show that, at the time of making the will, the testator meant to give a portion as parent, or as standing *in loco parentis*, and meant to satisfy that, in the whole or in part, by the subsequent advance, the Court is not authorised by the artificial rules of equity to hold it a satisfaction.

I am not much impressed by the objection, that he had not altered

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(*a*) This definition of a person putting himself *in loco parentis* is approved of and adopted by Lord *Cottenham*, in Powys *v.* Mansfield, 3 My. & C. 366, 367. But see both passages discussed in *Re* Ashton, (1897) 2 Ch., pp. 577—578.

his will. The answer is, that the subsequent advance operates a revocation, and therefore actual revocation was unnecessary; but it is too much to say, upon such circumstances as are before me, that this advance of 3,000*l.* is an ademption of the legacy of 4,000*l.* and the contingent interest; and though I believe I am disappointing the actual intention, and that this lady will get more than was intended, I am bound by the rule of the Court to say that this is not a satisfaction.

1811. *June 28th.*

Under this judgment the order was pronounced, dismissing the first petition, and directing a transfer and sale of the Bank Annuities according to the prayer of the other; upon which it was contended, that this should be considered as an appropriation of the stock to this legacy at the date of the Master's report; and the funds having since fallen, the legatee was entitled only to so much stock as would at that time have produced what remained due on account of the legacy.

The LORD CHANCELLOR said the broad principle of the Court is, that no attention whatever is paid to the rise or fall of the stock; and upon that ground it is considered equal, whether the appropriation is on one day or another. The party takes the rise or fall as it happens; and therefore the petitioners are entitled to have the sum reported due to them now raised.

SIR JOHN TALBOT *v.* THE DUKE OF SHREWSBURY.

1714. Pr. Ch. 394.

Satisfaction of a Debt by a Legacy.

A debtor, without taking notice of the debt, bequeaths a sum as great as, or greater than, the debt, to his creditor: this shall be a satisfaction; *secus*, if it were bequeathed on a contingency, or if it were less than the debt.

In this case it was said by Mr. *Vernon,* and agreed to by Sir *J. Trevor,* M. R., that if one being indebted to another in a sum of money, does, by his will, give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, that this shall, nevertheless, be in satisfaction of the debt, so as that he shall not have both the debt and the legacy; but if such a legacy (*a*) were given upon a contingency, which, if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not; and cited the case of one *Pollexfen* to be so adjudged by the Lord *Harcourt,* and affirmed on an appeal in the House of Lords. And as it is in the case of a will, so it will be likewise if the provision were by a deed; if the provision be absolute and certain, it shall go in satisfaction of the debt; but if it be uncertain and contingent, it can be no satisfaction, because it could not be so in its creation, and the happening of the contingency afterwards will not alter the nature of it.

(*a*) "Debt" in the text, evidently by mistake. See notes, part 7, p. 398, and Crichton *v.* C., (1895) 2 Ch. 853.

CHANCEY'S CASE (*a*).

1717. 1725. 1 P. W. 408.

Satisfaction of a Debt by a Legacy.

Although it is a general rule, that if a legacy from a debtor to his creditor be equal to or greater than the debt, it will be presumed to be a satisfaction of it, slight evidence of the intention will take the case out of the rule. Thus where one being indebted to his servant for wages in 100*l.*, had given her a bond for that sum, as due for wages, and afterwards, by will, gave her 500*l.*, for her long and faithful services, and directed that all his debts and legacies should be paid, it was held that the legacy was not a satisfaction for the debt due on the bond.

One being indebted for wages to a maidservant, who had lived with him for a considerable time, gave her a bond for 100*l.*, and in the condition of the bond, it appeared to be *for wages.* Afterwards the testator by his will, among other things, gave a legacy of 500*l.* to this maidservant; and it was mentioned in the will to be given to her *for her long and faithful services;* [and he directed that *all his debts and legacies should be paid* (*b*).]

The maidservant having, on her master's death, possessed herself of divers goods that were his, the plaintiff Chancey, who was the executor, brought his bill against her for an account, but paid to her the 100*l.* and interest secured to her by the bond.

For the defendant it was objected that she should have both the money due on the bond and also the legacy; for the legacy was a further reward for her services, and intended to be a gift *in toto:* whereas, if the bond were to be taken out of it, it would be only a gift of 400*l.*; and as to the old notion, that the testator must be just before he is bountiful, that was nothing where the testator had wherewithal to be both just and bountiful (*c*).

(*a*) Chancey *v.* Wootton, and è contra, Reg. Lib. a. fol. 449; Sel. Ch. Ca. 44; 2 Eq. Ca. Abr. 354, pl. 18.

(*b*) See the judgment of Lord *King*, post.

(*c*) Salk. 155.

Chancey's Case.

Besides, that this was not insisted upon by the bill; so that the defendant had no notice or warning to prove that the testator intended to give her the full legacy of 500*l.* over and above the bond; which proof (though by parol only) had yet been frequently admitted.

Also, for that it appeared the executor himself had paid the bond, and taken a receipt for it.

SIR J. TREVOR, M. R.—It is sufficient that it appears the creditor has a greater legacy given her, and the plaintiff, the executor, prays relief, which is as much as if he had prayed that he might not be compelled to pay both the debt and legacy.

This is stronger than the usual case; for the bond is *for service*, and the 500*l.* legacy is *also for service;* so that it is a greater reward and satisfaction for the same thing. Neither is it material that the executor has paid it, for he was bound to pay the bond at law, and his only method is to stop it out of the legacy; but clearly, such a legacy is not a satisfaction for service done to the testator (*a*) after the making of the will.

LORD CHANCELLOR KING afterwards reversed this decree, upon which occasion his Lordship said, he was not for breaking in upon any general rule (*b*), though he did not see any great reason why, if one owed 100*l.* to A. by bond, and should afterwards give him a legacy of 500*l.*, this legacy must go in satisfaction of the debt; for if so, the whole 500*l.* would not be *given*, in regard 100*l.* of it would be *paid* towards a just debt, which the testator could not help paying; and therefore the whole 500*l.* would not be *given*, against the express declaration of the testator, who says he *gives* the same; and though it seemed to have obtained as a rule *that a man should be just before he is bountiful*, yet when a man left such an estate and fund for his debts and legacies as that he might thereout be both just and bountiful, and especially when there seemed to be not only *an intention*, but also *express words* to that purpose; in such case his Lordship did not see but it would be as reasonable that the whole

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(*a*) Vide Salk. 508; 2 P. W. 343; 3 P. W. 355.

(*b*) See the rule stated in Talbot *v.* Duke of Shrewsbury, ante, p. 378.

legacy should take effect as a legacy, and that the debt should be paid besides.

And it was said at the bar, by Mr. *Talbot*, to have been a strange resolution, that if I owe a man 100*l.* and give him a 100*l.* legacy, then I give him nothing, but only pay him what I am bound to do; but if the legacy be twenty shillings less, viz., 99*l.*, here it is a good gift and legacy, exclusive of the debt.

However, the Court said they were not by this resolution overturning the general rule; but that this case was attended with particular circumstances varying it from the common case, viz., that the testator, by the express words of his will, had devised "*that all his debts and legacies should be paid;*" and this 100*l.* bond being *then a debt*, and the 500*l.* being a *legacy*, it was as strong as if he had directed that both the bond and legacy should be paid; that when the testator gave a bond for the 100*l.* arrear of wages, it was the same thing as paying it; and as if he had actually paid it, and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 100*l.* and made the defendant refund; so neither should the bond in this case be satisfied by the bequest of the legacy.

His Lordship also observed that the executor (the plaintiff, Mr. Chancey) did not himself take this 500*l.* legacy to be a satisfaction for the bond, as appeared by his having voluntarily paid the 100*l.* to the defendant, and that his Lordship was of the same opinion.

So the decree at the Rolls was reversed, and the defendant (the maidservant) had both her debt and legacy.

NOTES.

1. Generally, p. 382.
2. Ademption of a legacy by a portion, p. 383.
3. Satisfaction of a portion by a legacy, p. 388.
4. Satisfaction or ademption of a legacy—
    - (a) given by a person *in loco parentis*, p. 393.
    - (b) given by a person not in the natural or assumed relation of parent, p. 395.
5. Election in cases of satisfaction, p. 396.
6. The admission of extrinsic evidence, p. 397.
7. The satisfaction of a debt by a legacy, p. 398,

1. Generally.

Satisfaction may be defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee (*a*).

When a testator gives a legacy to a child or to any other person towards whom he has taken upon himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts) there is a presumption, *primâ facie*, that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift *inter vivos*, is either wholly or in part a substitution for or an "ademption" of the legacy (*b*).

Where the intention to satisfy is expressly declared, that intention is effectuated: thus, if a donor expressly declares that a gift is in satisfaction of a prior demand, the donee cannot claim both (*c*), and a legacy may be adeemed by a payment made in express satisfaction by the testator (*d*). Similarly, where a testator erroneously recites that a legatee owes him a particular sum or advance, and directs the legatee to bring the sum "hereinbefore recited to have been advanced" into hotchpot, or otherwise shows an intention to charge the legatee with the sum mentioned, that sum whether due or not must be brought into hotchpot (*e*). But if the testator merely directs the alleged advance "or so much thereof as shall remain unpaid" at his death or at the time of distribution to be brought into hotchpot, he *primâ facie* intends the amount actually due, and not the alleged advance less repayments to be brought into hotchpot (*f*).

In certain cases the presumption that a subsequent donation is intended to be in satisfaction of a prior claim, arises from the fact that the parties stand in some certain relation to each other. Those cases are:—1st. The satisfaction of *legacies* by *portions*, which is

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(*a*) See Lord Chichester *v.* Coventry, L. R. 2 H. L., p. 95.

(*b*) Per *Selborne*, L. C., *Re* Pollock, 28 C. D. 552, 555.

(*c*) Hardingham *v.* Thomas, 2 Drew. 353.

(*d*) Shudal *v.* Jekyll, 2 Atk. 516; Hall *v.* Hill, 1 Dr. & W., at p. 117; Kirk *v.* Eddowes, 3 Ha., at p. 518 and cases there cited; *Re* Ashton, (1898) 1 Ch. 142.

(*e*) *Re* Wood, 32 C. D. 517.

(*f*) *Re* Taylor's Estate, 22 C. D. 495; *Re* Kelsey, (1905) 2 Ch. 465, not following *Re* Aird, 12 C. D. 291.

commonly called the ademption of legacies; 2nd, the satisfaction of *portions* by *legacies;* and, 3rd, the satisfaction of *debts* by *legacies.* Since, however, the doctrine of satisfaction is not applied in the same manner to each of these classes of cases, they may more conveniently be considered separately.

2. Ademption of a Legacy by a Portion.

The rule is thus laid down by Lord *Eldon* in the principal case, "that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and, by a sort of artificial rule—upon an artificial notion, and a sort of feeling upon what is called a leaning against double portions—if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part."

The doctrine of double portions is one which would not be invented in these days (*a*), and is one which is often followed as a sacrifice made upon the altar of authority (*b*).

The rule is equally applicable to cases where a person has placed himself *in loco parentis* (*c*). But the application of the rule rests on two presumptions, viz. (1) that whatever gifts are made by a father to a child with a view to establishing him in life are portions within the rule (2) that the gift *inter vivos* was intended to be an advancement *pro tanto* of the gift under the bequest (*d*). And either of those presumptions may be rebutted by the circumstances under which the advancement was made in any particular case (*e*); or by the evidence furnished by the different nature of the gifts (*f*). The gift of a portion of less amount than a legacy, operates as an ademption of the legacy only *pro tanto* (*g*).

For the purposes of ademption, the value of the advance must be taken as at the time it was made (*h*).

(*a*) Per *Lindley*, L. J., in *Re* Lacon, (1891) 2 Ch., p. 490.

(*b*) Per *Bowen*, L. J., in Montagu *v.* Earl of Sandwich, 32 C. D. 544.

(*c*) Booker *v.* Allen, 2 Russ. & M. 270; Powys *v.* Mansfield, 3 My. & C. 359; Watson *v.* W., 33 B. 574, and see infra, p. 395.

(*d*) See per *Bowen*, L. J., *Re* Lacon, (1891) 2 Ch., pp. 497—498; *Re* Scott, (1903) 1 Ch., pp. 9—10.

(*e*) *Re* Lacon, (1891) 2 Ch. 482; *Re* Scott, (1903) 1 Ch. 1.

(*f*) See infra, p. 386.

(*g*) Pym *v.* Lockyer, 5 My. & C. 29, and see also Kirk *v.* Eddowes, 3 Ha. 509; Hopwood *v.* H., 7 H. L. Cas. 728; *Re* Pollock, 28 C. D. 552.

(*h*) Watson *v.* W., 33 B. 576; *Re* Innes, 125 L. T. Jo. 60. Cf. *Re* Beddington, (1906) 1 Ch. 771.

Ex parte Pye.

For the purpose of raising the presumption against double portions, the subsequent gift need not be strictly a portion; an advancement by paying a premium for a son or purchasing a business for him may be in the rule (*a*).

An advancement may be made to a child as a portion, at other times than that of marriage, and the presumption against double portions will then arise. For instance, a gift may be described in a writing as a portion (*b*). And if an advancement be made not evidenced by writing, evidence, as will hereafter be more fully shown, is admissible to show the nature of the transaction (*c*). But the Court will not add up small sums which a parent may give to a child, to show they were intended as a portion (*d*).

So also a legacy by a parent or a person *in loco parentis* is not satisfied by occasional small gifts in the testator's lifetime (*e*), or by annual sums paid by way of annual allowances (*f*); and a sum of money given by a father to his daughter for a wedding outfit and a wedding trip has been held not to be an ademption of a legacy (*g*).

In determining what is and what is not a portion the cases upon the construction of the term "advancement by portion" in sect. 5 of the Statute of Distributions (22 & 23 Car. 2, c. 10) are of assistance. In *Taylor* v. *Taylor* (*h*), *Jessel*, M. R., said that an advancement by way of portion is something given by a parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment. And he held that sums given for (1) payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar, (2) the price of a commission and outfit of a child entering the army, (3) the price of plant and machinery and other payments for the purpose of starting a child in business were advancements by portion, but that sums given for (1) payment of a fee to a special pleader in the case of the child intended for the Bar, (2) price of outfit and passage money of an officer in the army and his wife on going out to India with his

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(*a*) Stevenson *v.* Masson, 17 Eq. 78; Leighton *v.* L., 18 Eq. 458, 468; Kirk *v.* Eddowes, 3 Ha. 509.

(*b*) Cf. *Re* Pollock, 28 C. D. 552.

(*c*) Post, p. 397.

(*d*) See Suisse *v.* Lowther, 2 Ha. 434; Scholfield *v.* Heap, 27 B. 93; *Re* Lacon, (1891) 2 Ch. 482.

(*e*) Watson *v.* W., 33 B. 574; *Re* Peacock's Estate, 14 Eq. 236, 240; but see Ferris *v.* Goodburn, 27 L. J. Ch. 574.

(*f*) Hatfeild *v.* Minet, 8 C. D. 136, 144.

(*g*) Ravenscroft *v.* Jones, 32 B. 669; 33 L. J. Ch. 482; 4 De G. J. & S. 224.

(*h*) 20 Eq. 155.

regiment, (3) payment of debts incurred by an officer in the army (*a*), (4) assisting a clergyman in paying his housekeeping and other expenses, were not advancements by portion (*b*).

The rule against double portions is applicable to a case where a father makes an appointment by will among his children under a special power and subsequently appoints by deed to one of the appointees (*c*). But in *Re Ashton* (*d*) where a mother had a power of appointment amongst her children and appointed equally amongst them by will, and subsequently appointed to one of them by deed it was held by *Stirling*, J., that the rule had no application, the mother not being *in loco parentis* to her children. The decision was reversed by the Court of Appeal (*e*) on the ground that it appeared by the evidence that the child to whom an appointment had been made by deed had in the lifetime of the appointor accepted the sum so appointed in prepayment of the sum appointed by will. The question of law dealt with by *Stirling*, J., was not discussed.

What circumstances will repel the presumption.—So strong is the leaning or presumption against double portions, that it will not, as observed by Lord *Eldon* in the principal case, be repelled, "though there may be slight circumstances of difference between the advance and the portion." Thus, the presumption will not be repelled by the circumstance of the portion and legacy being payable at different times (*f*); nor by the circumstance that the limitations of the portion under the will are very different from the limitations in the settlement (*g*). A bequest of a sum of money absolutely is adeemed by the settlement of that or a larger amount on the marriage of the child; if a smaller amount is settled it is an ademption

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(*a*) Approved by the Court of Appeal, *Re* Scott, (1903) 1 Ch. 1, in preference to the view taken in Boyd *v.* B., 4 Eq. 305, and in *Re* Blockley, 29 C. D. 250.

(*b*) See further on this section Hatfeild *v.* Minet, 8 C. D. 136; Harte *v.* Meredith, 13 L. R. Ir. 345; *Re* Ford, (1902) 2 Ch. 605; *Re* Gist, (1906) 2 Ch. 280; *Re* Roby, (1908) 1 Ch. 71.

(*c*) Montague *v.* M., 15 B. 565; *Re* Peel's Sett., (1911) 2 Ch. 165.

(*d*) (1897) 2 Ch. 574.

(*e*) (1898) 1 Ch. 142.

(*f*) Hartopp *v.* H., 17 V. 184; Stevenson *v.* Masson, 17 Eq. 84.

(*g*) Trimmer *v.* Bayne, 7 V. 508; Monck *v.* M., 1 Ball & B. 298; Sheffield *v.* Coventry, 2 Russ. & M. 317; Platt *v.* P., 3 Si. 503; Davys *v.* Boucher, 3 Y. & C. Ex. 411; Powys *v.* Mansfield, 3 My. & C. 359, 374; Lord Durham *v.* Wharton, 3 Cl. & Fin. 146, 10 Bli. (N. S.) 526; *Re* Furness, (1901) 2 Ch. 346.

pro tanto (*a*). A promise of additional help after the presumption of satisfaction has arisen will not rebut the presumption (*b*).

The result will be the same if, after a parent has given a legacy to a daughter absolutely, he afterwards on her marriage settles a sum of money upon her and the children of the marriage (*c*). If the will contains both an absolute gift and a settled gift, a sum settled upon marriage will be taken as an ademption of the settled gift in the first instance (*d*).

A bequest to a daughter for life, with remainder to her children, will be adeemed by a gift to the daughter and her husband made subsequently to the will (*e*).

A gift of a sum of money to the husband of a daughter by her father *simpliciter*, after the marriage, and not in consequence of any promise made previous to the marriage taking place, will not be an ademption of a legacy given by the father to his daughter (*f*).

But a sum given to a daughter's husband in consideration of his making on his marriage a settlement upon her and her children (*g*), or to furnish a house for her (*h*), will operate as an ademption of a legacy to the daughter.

A substitutionary gift to issue on the death of the parent, will not be satisfied by a gift to the parent in his lifetime (*i*).

There is no presumption of law that the payment of a sum of money to a child before the date of the will (even by a father), is to go against a legacy to that child (*k*); unless there be a contract by the child that it shall do so (*l*). And a gift by the will of a father to a child for life with remainder to the issue of such child, would not be adeemed by an advance to the child made long before the will, although the testator, when he made the advance, verbally intimated that his intention was that it should have that effect (*m*).

(*a*) Lord Chichester *v.* Coventry, L. R. 2 H. L. 92; see also Montefiore *v.* Guedalla, 1 De G. F. & J. 93; Phillips *v.* P., 34 B. 19; Dawson *v.* D., 4 Eq. 504; Stevenson *v.* Masson, 17 Eq. 78; Edgeworth *v.* Johnston, 11 Ir. R. Eq. 326.

(*b*) Nevin *v.* Drysdale, 4 Eq. 517.

(*c*) Lord Chichester *v.* Coventry, L. R. 2 H. L. 92.

(*d*) *Re* Furness, (1901) 2 Ch. 346.

(*e*) Kirk *v.* Eddowes, 3 Ha. 509. See also Carver *v.* Bowles, 2 Russ. & M. 301; Delacour *v.* Freeman, 2 Ir. Ch. R. 633, 640.

(*f*) Ravenscroft *v.* Jones, 32 B. 669, 670, 4 De G. J. & S. 224; and see M'Clure *v.* Evans, 29 B. 422; but see Ferris *v.* Goodburn, 27 L. J. Ch. 574.

(*g*) Lord Durham *v.* Wharton, 3 Cl. & Fin. 146.

(*h*) Nevin *v.* Drysdale, 4 Eq. 517.

(*i*) See Rose *v.* Rogers, 39 L. J. Ch. 791; Hewitt *v.* Jardine, 14 Eq. 58.

(*k*) Taylor *v.* Cartwright, 14 Eq. 167, 176; *Re* Peacock's Estate, 14 Eq. 236.

(*l*) Upton *v.* Prince, Cas. t. Talbot, 71.

(*m*) Taylor *v.* Cartwright, 14 Eq. 167, 176.

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A legacy which has been adeemed will not be revived by a codicil republishing the will (*a*).

The presumption, of satisfaction being intended, may be repelled by the intrinsic evidence furnished by the *different nature of the gifts;* where, for instance, the testamentary portion and subsequent advancement are not *ejusdem generis*, *e.g.*, where the legacy is money and the gift stock-in-trade (*b*). But a pecuniary bequest may be adeemed by a gift of a different subject-matter, where such subject-matter is given by reference to its value or in such a way as to make it equivalent to a gift of money (*c*).

A legacy of a sum of money will not be adeemed by an allowance of an annuity (*d*). So, also, where the testamentary portion is certain, and the subsequent advancement depends upon a contingency, the presumption of satisfaction will be repelled (*e*). But where the advancement is voidable only upon a contingency so remote that all the parties concerned treated it as absolute, the presumption arises (*f*).

A portion by settlement will be a satisfaction according to the amount, either in full or *pro tanto*, of a previous bequest of a residue (*g*). Any sum of estate duty becoming payable on the portion through the death of the donor must be deducted from the portion in ascertaining the amount adeemed (*h*).

Although a legacy given to a child is limited over upon a contingency, it has been held to be adeemed by a subsequent advancement to the child alone, so as to deprive the person entitled under the limitation over of all benefit (*i*).

(*a*) Powys *v.* Mansfield, 3 My. & C. 376; Monck *v.* M., 1 Ball & B. 298; Montague *v.* M., 15 B. 565, 571.

(*b*) Holmes *v.* H., 1 Bro. Ch. 555. This rule is not touched by *Re* Lawes, 20 C. D. 81. See *Re* Jaques, (1903) 1 Ch. 267, where the observations of *North*, J., on *Re* Lawes in *Re* Vickers, 37 C. D. 525, were dissented from by the Court of Appeal.

(*c*) See *Re* Lawes, 20 C. D. 81; *Re* Vickers, 37 C. D. 525; explained *Re* Jaques, (1903) 1 Ch., pp. 272—273.

(*d*) Watson *v.* W., 33 B. 574.

(*e*) Spinks *v.* Robins, 2 Atk. 493; Crompton *v.* Sale, 2 P. W. 553.

(*f*) Powys *v.* Mansfield, 3 My. & C. 359, 374.

(*g*) Scholfield *v.* Heap, 27 B. 93; Beckton *v.* Barton, 27 B. 99; Montefiore *v.* Guedalla, 1 De G. F. & J. 93; and see Lady Thynne *v.* The Earl of Glengall, 2 H. L. Cas. 131; Meinertzagen *v.* Walters, L. R. 7 Ch. 670; Stevenson *v.* Masson, 17 Eq. 84; Keays *v.* Gilmore, 8 Ir. R. Eq. 290.

(*h*) *Re* Beddington, (1906) 1 Ch. 771; see Finance Act, 1894, sect. 2 (1) (c); Finance (1909—10), Act, 1910, sect. 59.

(*i*) Twining *v.* Powell, 2 Coll. 262; Dawson *v.* D., 4 Eq. 504; Cooper *v.* Macdonald, 16 Eq. 258.

The rule against double portions rests on the presumption that a father intends equality between his children, and accordingly the rule will only be applied between children against a child and in favour of a child—the term child including any person to whom the testator has placed himself *in loco parentis*. Accordingly a legacy or share of residue given to a child will not be adeemed in favour of a stranger entitled to the residue or a share of the residue (*a*).

3. The Satisfaction of a Portion by a Legacy.

Upon this subject, the rule is, that wherever a legacy given by a parent, or a person standing *in loco parentis*, is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, then from the strong inclination of Courts of Equity against double portions, a presumption arises that the legacy was intended by the testator as a complete satisfaction (*b*).

The second provision may be by subsequent settlement as well as by will (*c*). The presumption of satisfaction less readily arises in the instance of gifts by two deeds than in cases where the second gift is by will (*d*). If the legacy is not so great as the portion or provision, a presumption arises that it was intended as a satisfaction *pro tanto* (*e*).

The bequest, moreover, of the whole or part of a residue will, according to its amount, be presumed either a satisfaction of a portion in full, or *pro tanto* (*f*).

A provision by will may satisfy one part of a covenant without satisfying other parts of it; for instance, if a father on the marriage

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(*a*) Meinertzagen *v.* Walters, L. R. 7 Ch. 670; Fowkes *v.* Pascoe, L. R. 10 Ch. 343; *Re* Heather, (1906) 2 Ch. 230.

(*b*) Bruen *v.* B., 2 Vern. 439; Moulson *v.* M., 1 Bro. Ch. 82; Copley *v.* C., 1 P. W. 147; Ackworth *v.* A., 1 Bro. Ch. 307 (n.); Byde *v.* B., 1 Bro. Ch. 308 (n.); S. C., 2 Eden, 19, 1 Cox, 44; Duke of Somerset *v.* Duchess of Somerset, 1 Bro. Ch. 309 (n.); Finch *v.* F., 1 V. 534; Hinchcliffe *v.* H., 3 V. 516; Sparkes *v.* Cator, 3 V. 530; Pole *v.* Lord Somers, 6 V. 309; Bengough *v.* Walker, 15 V. 507; and see Lethbridge *v.* Thurlow, 15 B. 334; Ferris *v.* Goodburn, 27 L. J. Ch. 574; Bennett *v* Houldsworth, 6 C. D. 671.

(*c*) Jesson *v.* J., 2 Vern. 255; Davis *v.* Chambers, 7 De G. M. & G. 386.

(*d*) Palmer *v.* Newell, 20 B. 40, per *Romilly*, M. R.; Richman *v.* Morgan, 1 Bro. Ch. 63, 2 Bro. Ch. 394; Bengough *v.* Walker, 15 V. 507; Campbell *v.* C., 1 Eq. 383.

(*e*) Warren *v.* W., 1 Bro. Ch. 305; 1 Cox, 41.

(*f*) Lady Thynne *v.* The Earl of Glengall, 2 H. L. Cas. 131.

of his daughter, should covenant to settle 10,000*l.*, on her for life, remainder to the children of the marriage, a bequest of 10,000*l.*, to that daughter would satisfy her life interest in the 10,000*l.*, but would not satisfy or touch the interests of her children (*a*).

So a provision for a son by will may be held a satisfaction for the interest he may take under a covenant by his father on his marriage, and he will consequently be put to his election, although the provision in the will may not be held a satisfaction to the wife and children for what they take under the covenant (*b*).

So also if in such a case the bequest is to the children of the marriage, omitting the parent, that may be a satisfaction to them, but is no satisfaction of the covenant to the parent (*c*).

Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone, the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will (*d*).

And since Courts of Equity lean strongly against double portions, as in the preceding class of cases, only considerable differences between the settlement and the will are considered sufficient to repel the presumption of satisfaction; slight variations, for instance, between the settlement and the will, as to the times of the payment of the portion and legacy, or between the limitations in the settlement and the will, are not sufficient for that purpose (*e*).

Thus, in *Montagu* v. *Earl of Sandwich* (*f*), a father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of 1,000*l.* for life, and to charge the annuity on a sufficient part of the real estate he might die seised of. The father subsequently made his will by which he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement on his first and other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies, the income of which when invested would be considerably

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(*a*) Per Lord *Romilly*, M.R., in Lord Chichester *v.* Coventry, L. R. 2 H. L. 95; Bethell *v.* Abraham, 3 C. D. 590 (n.); 22 W. R. 745.

(*b*) McCarogher *v.* Whieldon, 3 Eq. 236; *Re* Blundell, (1906) 2 Ch. 223; see also Bennett *v.* Houldsworth, 6 C. D. 671; and see p. 402.

(*c*) Lord Chichester *v.* Coventry, L. R. 2 H. L. 92; see also Mayd *v.* Field, 3 C. D. 587; Campbell *v.* C., 1 Eq. 383.

(*d*) Lord Chichester *v.* Coventry, L. R. 2 H. L. 92; *Re* Blundell, (1906) 2 Ch. 222; and see infra, p. 396.

(*e*) Weall *v.* Rice, 2 R. & M., p. 268.

(*f*) 32 C. D. 525.

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more than 1,000*l.* a year. It was held by *Cotton* and *Bowen*, L.JJ. (*Fry*, L.J., *dissentiente*), reversing *Pearson*, J., that the second son was not entitled to both the annuity and the bequests under the will, as the words "subject to the charges and incumbrances thereon" were too general to rebut the presumption against double portions.

Similarly the presumption is not rebutted by the fact that the covenant in a settlement is to make a payment *on* the widow's death, and in the will the payment is to be made within *three months after* her death (*a*); or that the settlement gives a power to the husband and wife jointly, whereas the will gives it to the wife alone (*b*); that the settlement provides for children dying before their portions are payable while the will does not do so (*c*); or that the settlement is upon the children of a daughter by a particular marriage, whilst the provision by the will is for all the children (*d*); or that a covenant gives the husband a first life interest, whereas the will gives it to the wife (*e*). Nor will the fact that an absolute life interest is given to the husband under a settlement, and a life interest determinable on bankruptcy or alienation under the will (*f*); nor the fact that while the settlement gives a remainder in tail to children, the will gives them a remainder in fee; nor will the presence of a restraint upon anticipation in the latter instrument and its absence in the former be a sufficient difference to rebut the presumption of satisfaction (*g*).

It has even been held that where the settlement gave a second life interest to the husband, the omission of the life interest of the husband in the will was not sufficient to rebut the presumption (*h*).

The presumption, however, of satisfaction being intended, may, as in the former class of cases, be repelled by intrinsic evidence, showing the intention of the parent in favour of double portions (*i*), which

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(*a*) Sparkes *v.* Cator, 3 V. 530; Copley *v.* C., 1 P. W. 146; Bethell *v.* Abraham, 22 W. R. 745.

(*b*) Thynne *v.* Earl of Glengall, 2 H. L. Cas. 131; Russell *v.* St. Aubyn, 2 C. D. 398; Romaine *v.* Onslow, 24 W. R. 899.

(*c*) Hinchcliffe *v.* H., 3 V. 516.

(*d*) Thynne *v.* Earl of Glengall, 2 H. L. Cas. 131; Russell *v.* St. Aubyn, 2 C. D. 398.

(*e*) Russell *v.* St. Aubyn, 2 C. D. 398; Romaine *v.* Onslow, 24 W. R. 899.

(*f*) Russell *v.* St. Aubyn, 2 C. D. 398.

(*g*) Weall *v.* Rice, 2 Russ. & M. 251.

(*h*) Mayd *v.* Field, 3 C. D. 587. See also Sparkes *v.* Cator, 3 V. 530; Weall *v.* Rice, 2 Russ. & M. 251; Earl of Glengall *v.* Barnard, 1 Keen, 769; S. C. nom. Lady Thynne *v.* Earl of Glengall, 2 H. L. Cas. 131.

(*i*) Lethbridge *v.* Thurlow, 15 B. 334.

may also be sufficiently indicated from the different nature of the gifts. For instance, where the portion is *vested* and the legacy is *contingent*, the presumption will be repelled: for it would be hard to say, that a mere contingency should take away a portion absolutely vested (*a*); or where the husband and children of the marriage take an interest under the settlement, but nothing under the will (*b*).

The presumption against double portions will be more easily repelled in the present class of cases, where the settlement precedes the will, than in the former class of cases, where the will precedes the settlement, especially where there are substantial differences between the limitations in the two instruments (*c*).

Thus, a covenant to settle on a daughter a fund upon such trusts as she, with the consent of the trustees, should appoint, and in default in trust for the daughter for her separate use for life, remainder to her husband for life, remainder to the children of the marriage, remainder to the husband absolutely, was held not to be satisfied by a legacy to the daughter to her separate use for life without power of anticipation, and after her decease to such of her children as should attain twenty-one years, in equal shares (*d*).

A covenant in a marriage settlement for the payment in the lifetime of the settlor, or within six months after his decease, of a sum of 2,000*l.* to be held in trust for the wife for her life, and after her decease for the settlor for life, and after the decease of the survivor for the children of the marriage, and of a former marriage, as the husband and wife should jointly appoint, and in default of appointment for the children of both marriages, was held not to be satisfied by the effectuation by the settlor of two policies on his own life, each for 1,000*l.*, under the provisions of sect. 10 of the Married Women's Property Act, 1870, each policy being expressed to be "for the benefit of his wife and children" (*e*).

So, also, where the gift by the will and the portion are not *ejusdem*

(*a*) Bellasis *v.* Uthwatt, 1 Atk. 426; Hanbury *v.* H., 2 Bro. Ch. 352. And see Pierce *v.* Locke, 2 Ir. Ch. R. 205, 215.

(*b*) Lord Chichester *v.* Coventry, L. R. 2 H. L. 71.

(*c*) Lord Chichester *v.* Coventry, L. R. 2 H. L. 71; *Re* Tussaud's Estate, 9 C. D. 363; Dawson *v.* D., 4 Eq. 504; McCarogher *v.* Whieldon, 3 Eq. 236; Russell *v.* St. Aubyn, 2 C. D. 398; Paget *v.* Grenfell, 6 Eq. 7; Cooper *v.* Macdonald, 16 Eq. 258; Keays *v.* Gilmore, 8 Ir. R. Eq. 290; Weall *v.* Rice, 2 R. & M. p. 268.

(*d*) *Re* Tussaud's Estate, 9 C. D. 363; and see *Re* Vernon, 95 L. T. 48.

(*e*) Cartwright *v.* C., (1903) 2 Ch. 306.

generis, the presumption will be repelled. Thus, *land* will not be presumed to be intended as a satisfaction for *money*, nor money for land (*a*).

But a thing not *ejusdem generis* may be taken in satisfaction of a portion: where the father in his will enters into a computation of the value of the thing given, showing it to be as great or greater in value than the portion, the presumption of satisfaction arises. Thus in *Bengough* v. *Walker* (*b*), it was held by *Grant*, M. R., that a bequest by a testator to his son of a share in powder works, to be made up in value to 10,000*l.* charged with an annuity for life of another person, was a satisfaction of a portion of 2,000*l.* to which the son was entitled under the testator's marriage settlement (*c*).

Sometimes a settlement contains a declaration that an advancement by the parent, *in his lifetime*, shall be considered in part or full satisfaction of the portion, unless the contrary is expressly declared by some writing. In such cases a question may arise whether a legacy by will shall be considered as an advancement in the lifetime of the parent. It has been decided that in such case a legacy will not be held a satisfaction of the portion (*d*); *à fortiori* the share of a parent's property under his intestacy will not be considered as an advancement in his lifetime (*e*).

Where, however, the declaration in the settlement is more extensive, as where it was provided that if the father should during his lifetime, *or at the time* of his death, give portions or provisions in advancement on marriage or *otherwise* (*f*); or should bestow a portion on marriage, *or otherwise provide* for (*g*); or settle, give, or advance on marriage, *or otherwise* (*h*), a bequest may amount to an advancement within the meaning of the settlement.

Where a father, having power to appoint to a child out of a portion fund, himself advances the money, the presumption is that he does so

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(*a*) Bellasis *v.* Uthwatt, 1 Atk. 428; Goodfellow *v.* Burchett, 2 Vern. 298; Ray *v.* Stanhope, 2 Ch. R. 159; Saville *v.* S., 2 Atk. 458; Grave *v.* Earl of Salisbury, 1 Bro. Ch. 425; Pierce *v.* Locke, 2 Ir. Ch. R. 205, 215.

(*b*) 15 V. 507.

(*c*) See also *Re* Lawes, 20 C. D. 81, and see *Re* Jaques, (1903) 1 Ch. 267, where the observations of *North*, J., in *Re* Vickers, 37 C. D. 525, on *Re* Lawes were dissented from by the Court of Appeal.

(*d*) Cooper *v.* C., L. R. 8 Ch. 813; Douglas *v.* Willes, 7 Ha. 318.

(*e*) Twisden *v.* T., 9 V. 413.

(*f*) Richman *v.* Morgan, 1 Bro. Ch. 63; S. C. 2 Bro. Ch. 394, nom. Rickman *v.* Morgan.

(*g*) Leake *v.* L., 10 V. 477.

(*h*) Onslow *v.* Michell, 18 V. 490; Golding *v.* Haverfield, 13 Price, 593; Fazakerley *v.* Gillibrand, 6 Si. 591.

for the benefit of the children interested in the portion fund, and not for his own benefit or for that of the estate (*a*).

This presumption, however, may be rebutted by evidence of a different intention, as, for example, that the advance was made in substitution for an appointment out of the portion fund for the purpose of giving a sum in cash in lieu of a mere charge (*b*).

All the contemporary circumstances are admissible in evidence of such intention, but subsequent declarations are not admissible (*c*).

Although according to the law of Scotland the presumption of satisfaction of a portion by a legacy from a father to his child does not arise (*d*), it will do so, although the deed by which the portion is covenanted to be paid is Scotch, if the will by which the legacy is given is that of a domiciled Englishman (*e*).

The mere fact that a legacy given by a will is of the same amount as a *donatio mortis causa* previously made to the legatee by the testator does not raise a presumption that the legacy is a satisfaction of the donation (*f*). It appears that where the doctrine of double portions applies a legacy might be held a satisfaction of a *donatio mortis causa* (*g*).

4. Satisfaction or Ademption of a Legacy,

(a) given by a Person in Loco Parentis.

Where a person who has made two gifts to another, in such manner as, according to the rules laid down in considering the two classes of cases before discussed, would, in case he stood towards the donee in the relation of parent, raise the presumption that the latter gift was intended to be a satisfaction of the former, the question often arises, whether the donor, although not standing to the donee in that relation, has not, by his conduct, placed himself in it, or, as it is usually termed, put himself *in loco parentis;* in which case, as before observed, the presumption will arise equally as in the case of a parent (*h*).

(*a*) Ford *v.* Tynte, 2 H. & M. 324; Lee *v.* Head, 1 K. & J. 620; Noblett *v.* Litchfield, 7 Ir. Ch. R. 575.

(*b*) Ford *v.* Tynte, 2 H. & M. 324.

(*c*) Ibid.

(*d*) Johnstone *v.* Haviland, (1896) A. C. 95.

(*e*) Campbell *v.* C., 1 Eq. 383.

(*f*) Hudson *v.* Spencer, (1910) 2 Ch. 285, 290.

(*g*) Ibid. per *Warrington*, J., at p. 290.

(*h*) The word "parent" in this connection is to be understood as meaning the father, on whom the duty of making a provision for the child *primâ facie* falls. The presumption does not arise in the case of a mother. See the question discussed by *Stirling*, J., *Re* Ashton, (1897) 2 Ch., pp. 577—578.

The doctrine of ademption of legacies founded on parental or *quasi* parental relation applies also to cases where a moral obligation other than parental or *quasi* parental is recognised by the will. Thus in *Re Pollock* (*a*), a testatrix by her will bequeathed to a niece of her deceased husband, 500*l.* with these words, "according to the wish of my late beloved husband," and she afterwards, in her lifetime, paid 300*l.* to such legatee with a contemporaneous entry in her diary that such payment was a legacy from the "legatee's uncle John," and it was held by the Court of Appeal that the presumption was that such legacy was adeemed to the extent of 300*l.* (*b*).

The question, whether a person has or has not put himself *in loco parentis*, must be decided with reference to his *meaning* to put himself in that position, by assuming the office and duty of the father to make *provision* for the child, and parol evidence is admissible to prove that a person means to put himself *in loco parentis*, and upon proof of his *meaning* to do so, parol evidence of his acts and declarations is admissible also to rebut and to strengthen the presumption of satisfaction (*c*).

Any relation, or even a mere stranger in no way related to another person, may be held to have meant to put himself *in loco parentis* towards him; but mere relationship, however near, is not of itself sufficient to show that a person means to put himself *in loco parentis* towards another. A father is the only person who for the purposes of the rule against double portions is assumed to have undertaken to provide for his child. The duty may be assumed by any other person, but the burden of proving that to be the case, even as regards the mother of the child (*d*), lies on those who assert it. So neither a great uncle, uncle, grandfather, or putative father, is from his mere relationship, to be considered as *in loco parentis*, unless it can be shown that he meant to put himself *in loco parentis* with reference to the parent's office and duty of making a provision for his child (*e*).

In *Re Lawes* (*f*), *Jessel*, M. R., appeared to consider that from

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(*a*) 28 C. D. 552.

(*b*) See p. 382, supra, as to payment in satisfaction of a legacy.

(*c*) See Powys *v.* Mansfield, 3 My. & C. 359; reversing S. C., 6 Si. 528; Fowkes *v.* Pascoe, L. R. 10 Ch. 343; *Re* Pollock, supra.

(*d*) *Re* Ashton, (1897) 2 Ch. 574.

(*e*) Shudal *v.* Jekyll, 2 Atk. 516, 518; Powell *v.* Cleaver, 2 Bro. Ch. 517, 518; Roome *v.* R., 3 Atk. 183; Perry *v.* Whitehead, 6 V. 547; Grave *v.* Salisbury, 1 Bro. Ch. 425; Ellis *v.* E., 1 Sch. & L. 1; Twining *v.* Powell, 2 Coll. 262; and Lyddon *v.* Ellison, 19 B. 565, 572; Curtin *v.* Evans, 9 Ir. R. Eq. 553.

(*f*) 20 C. D. 86.

the mere fact of the testator being the putative father, he stood *in loco parentis* towards his natural son, but in that case the putative father brought himself within the rule before laid down by making a provision for his natural son.

(b) by a Person not being in the Natural or Assumed Relation of Parent towards the Legatee.

Where a person, not being in the natural or assumed relation of parent towards the legatee, gives a legacy for a *particular purpose*, and afterwards advances money for the *same purpose*, a presumption arises that it was intended as, and it will accordingly be held to be an ademption of it. "The presumptions arising out of the parental relation do not, of course, extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that, if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *primâ facie* in favour of ademption, and it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not), may be admissible in such a case. . . . To constitute a particular purpose within the meaning of that doctrine it is not . . . necessary that some special use or application of the money by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage or the like) should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist (*a*)." A legacy to A. in trust for the benefit of B., an infant, is not a legacy for a particular purpose, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose (*b*).

A gift for the endowment of a hospital is a gift for a particular

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(*a*) Per *Selborne*, L. C., *Re* Pollock, 28 C. D. 556; Monck *v.* M., 1 Ball & B. 303; see also Rosewell *v.* Bennet, 3 Atk. 77, and the observations of Lord *Cottenham*, 2 My. & C. 377; Pankhurst *v.* Howell, L. R. 6 Ch. 136.

(*b*) *Re* Smythies, (1903) 1 Ch. 259.

purpose within the rule; but a gift for the general purposes of the hospital would not be within the rule (*a*).

Where the purpose for which a legacy is given does not correspond with the purpose for which the advancement is made, the legacy, as is laid down by Lord *Eldon* in the principal case, will not be adeemed (*b*); nor will ademption take place where the legacy and advancement are given upon different contingencies (*c*).

5. Election in Cases of Satisfaction.

Where, as in the first class of cases, the first provision is by a will, it being a voluntary and revocable instrument, a subsequent advance will be an ademption, either wholly or in part, without reference to the wishes of the person advanced; if, however, as in the second class of cases, the first provision is by settlement or other contract, a subsequent legacy, considered as an advancement, will raise a case of election,—that is to say, the legatee may, at his option, take either the first or last provision (*d*).

The distinction between ademption and satisfaction lies in this: in *ademption* the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case, the law uses the word *ademption*, because the bequest or devise contained in the will is thereby *adeemed*, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the *same objects*, and he either states, or the law raises the presumption, that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will (*e*).

The doctrine of election is worked out in this manner. Where a person takes a bequest under a will, which is held to be a satisfaction

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(*a*) *Re* Corbett, (1903) 2 Ch. 326.

(*b*) Debeze *v.* Mann, 2 Bro. Ch. 165, 519; Robinson *v.* Whitley, 9 V. 577; Roome *v.* R., 3 Atk. 181.

(*c*) Spinks *v.* Robins, 2 Atk. 491.

(*d*) See 2 V. 465 (n.); Copley *v.* C., 1 P. W. 147; Finch *v.* F., 1 V. 534; Hinchcliffe *v.* H., 3 V. 516; Pole *v.* Lord Somers, 6 V. 309.

(*e*) See Lord Chichester *v.* Coventry, L. R. 2 H. L. 90.

for a sum of money payable under a settlement, he must elect between the bequest and the gift. If he elects to take under the will, inasmuch as the provision by the will is a substitution for the provision by the settlement, the covenant is superseded, and is not to be performed at all. If, on the other hand, he elects to take under the settlement, he must, to the extent of what he takes thereunder, give up what is bequeathed to him by the will, in order to compensate those who are disappointed by his election (*a*).

A covenantee is not put to his election if he takes no interest directly under the will but is only derivatively interested by reason of some disposition made by a legatee (*b*).

As to election by a married woman, see *Lady Thynne* v. *Earl of Glengall* (*c*); and as to the doctrine generally, see ante, vol. i., pp. 444 *et seq*.

6. The Admission of Extrinsic Evidence.

Although extrinsic evidence cannot be admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed, it seems to be clear that, where a transaction takes place, *not evidenced by writing*, which, if so evidenced, would raise a presumption that satisfaction of a former gift by will was intended, parol evidence is admissible to prove what the transaction really was. Thus, in *Hoskins* v. *Hoskins* (*d*), the father, after giving 750*l*. to his son by will, purchased a cornetcy for him for 650*l*. Evidence was admitted to show that this was intended as a satisfaction *pro tanto*.

Where, however, *there are two written instruments*, and from the relationship between the author of the instruments and the party claiming under them (as in the actual or assumed relation of parent and child), the law raises the presumption that a gift contained in the second instrument is intended to be in satisfaction of a gift by an instrument of earlier date, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift. And where evidence is admissible for that purpose, counter evidence is also admissible (*e*). But if on the

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(*a*) McCarogher *v.* Whieldon, 3 Eq. 236; see Lewis *v.* L., 11 Ir. R. Eq. 110.

(*b*) *Re* Blundell, (1906) 2 Ch. 222.

(*c*) 2 H. L. Cas. 118.

(*d*) Pr. Ch. 263; Kirk *v.* Eddowes, 3 Ha. 509; *Re* Pollock, 28 C. D. 556; see Twining *v.* Powell, 2 Coll. 263.

(*e*) See Debeze *v.* Mann, 2 Bro. Ch. 165, 519; Ellison *v.* Cookson, 3 Bro. Ch. 61; Trimmer *v.* Bayne, 7 V. 508, 515; Curtin *v.* Evans, 9 Ir. R. Eq. 553; *Re* Tussaud's Estate, 9 C. D. 373; *Re* Scott, (1903) 1 Ch. 1.

construction of the second instrument it is clear that the second gift was or was not a satisfaction of the first, parol evidence cannot be admitted to show the intention (*a*). So, too, if the second instrument in terms adeem the gift by the first, parol evidence is not admissible (*b*).

And the rules as to the admission of evidence are the same whether the deed or the will was executed first (*c*).

But in such cases, it is well observed by *Wigram*, V.-C., "the evidence is not admitted on either side, for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded" (*d*).

7. The Satisfaction of a Debt by a Legacy.

The general rule, as laid down in *Talbot* v. *Duke of Shrewsbury*, is "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy" (*e*).

It is a rule which has long prevailed, but which has met with the disapproval of eminent judges (*f*): it is founded on the maxim, "*Debitor non præsumitur donare.*" Even though the debt be discharged by the testator in his lifetime, it has been held that a legacy of the same amount is not payable, on the ground that the presumption of law puts the matter in the same position as if it had been stated in the will, that the legacy was to pay the debt, and that, consequently, the testator having paid the debt, his estate is relieved from payment of the legacy (*g*).

There is in this class of cases a leaning *against*, as in the two former classes of cases a leaning in *favour* of, the presumption of satisfaction, and the Court lays hold of minute circumstances to

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(*a*) Hall *v.* Hill, 1 Dr. & W. 94; *Re* Tussaud's Estate, 9 C. D. 374.

(*b*) Kirk *v.* Eddowes, 3 Ha. 509.

(*c*) *Re* Tussaud's Estate, 9 C. D. 373.

(*d*) 3 Ha. 517. See Palmer *v.* Newell, 20 B. 39.

(*e*) See also Brown *v.* Dawson, Pr. Ch. 240; Fowler *v.* F., 3 P. W. 353; Richardson *v.* Greese, 3 Atk. 68; Gaynon *v.* Wood, Dick. 331; Bensusan *v.* Nehemias, 4 De G. & Sm. 381; Shadbolt *v.* Vanderplank, 29 B. 405; Atkinson *v.* Littlewood, 18 Eq. 595.

(*f*) Fowler *v.* F., 3 P. W. 354; Lady Thynne *v.* The Earl of Glengall, 2 H. L. Cas. 153; Richardson *v.* Greese, 3 Atk. 65.

(*g*) *Re* Fletcher, 38 C. D. 373.

take a case out of the rule (*a*). Thus, where the legacy is of *less amount* than the debt, the presumption is, that it was not intended to be given in lieu of it; it will, therefore, not be considered a satisfaction, even *pro tanto*, as in the two former classes of cases of satisfaction (*b*), unless by special arrangement with the creditor (*c*).

So if the debt is a first charge and the legacy not (*d*), or, under the old law, if the debt was to the separate use, but the legacy not (*e*).

So, also, the presumption of satisfaction being intended will be repelled where the legacy, though in amount equal to or greater than the debt, is payable at *a different time*, so as not to be equally advantageous to the legatee as the payment of the debt (*f*); and perhaps even where the legacy is payable to different trustees (*g*).

An annuity payable by half-yearly payments under a covenant is not satisfied by an annuity given by will which will not become payable until a year after the testator's death (*h*).

So a legacy of 400*l.*, as to which no time of payment was fixed by the testator, was held not to be in satisfaction of a debt of 300*l.* payable to the legatee by the testator within three months of his death (*i*). But the fact that legacies are not payable till one year after the death of the testator does not take a case out of the general rule, even if the debt bears interest. A legacy held to be a satisfaction of a debt, bears interest from the testator's death, if no time is fixed for payment (*k*).

Sums held in trust for a tenant for life, are not satisfied by absolute legacies to the tenant for life of the same amounts (*l*).

The presumption will also be repelled where the legacy and debt are of a different nature, either with reference to the subjects them-

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(*a*) Mathews *v.* M., 2 Ves. Sen. 635; Clark *v.* Sewell, 3 Atk. 96; Haynes *v.* Mico, 1 Bro. Ch. 129; Jeacock *v.* Falkener, 1 Bro. Ch. 295; S. C. 1 Cox, 37; Adams *v.* Lavender, 1 M'Cl. & Y., Exch., 41; Smith *v.* S., 3 Gif. 121; Hales *v.* Darell, 3 B. 324, and cases there cited; Crichton *v.* C., (1896) 1 Ch. 870.

(*b*) Cranmer's Case, 2 Salk. 508; Atkinson *v.* Webb, 2 Vern. 478; Eastwood *v.* Vinke, 2 P. W. 614, 617; Minuel *v.* Sarazine, Mos. 295; Graham *v.* G., 1 Ves. Sen. 263; Coates *v.* C., (1898) 1 Ir. R. 258.

(*c*) Hammond *v.* Smith, 33 B. 452.

(*d*) Hales *v.* Darell, 3 B. 325.

(*e*) See, e.g., Bartlett *v.* Gillard, 3 Russ. 149. See now M. W. P. A. 1882.

(*f*) Atkinson *v.* Webb, Pr. Ch. 236; Nicholls *v.* Judson, 2 Atk. 300; Hales *v.* Darell, 3 B. 324, 332; Charlton *v.* West, 30 B. 124, 127; *Re* Roberts, 50 W. R. 469.

(*g*) Pinchin *v.* Simms, 30 B. 119, 120.

(*h*) *Re* Dowse, 50 L. J. Ch. 285.

(*i*) *Re* Horlock, (1895) 1 Ch. 516.

(*k*) *Re* Rattenberry, (1906) 1 Ch. 667, and cases there cited.

(*l*) Fairer *v.* Park, 3 C. D. 309.

selves, or with respect to the interest given: see *Eastwood* v. *Vinke* (*a*), where it was held, that as money and lands were things of a different nature, the one should not be taken in satisfaction of the other (*b*). So also, where the interest given is of a different nature or not co-extensive with the debt. Thus, a gift of a residue of real and personal estate for life was held not to be a satisfaction for a sum of money to be laid out in lands and conveyed to a person in fee (*c*).

So, also, where there is a particular motive assigned for the gift, it will not be presumed to be a satisfaction for a debt (*d*).

The presumption will not be raised where the debt of the testator was contracted *subsequently* to the making of the will; for he could have had no intention of making any satisfaction for that which was not in existence (*e*).

Where the legacy is contingent or uncertain, whether it be given upon the happening of a contingency, as in *Crompton* v. *Sale* (*f*), or is in itself of an uncertain or fluctuating nature, as a gift of the whole or a part of the testator's residuary estate, even though it should prove greater in amount than the debt, it will not be held to be a satisfaction of it (*g*).

The result will be the same, if the debt itself is contingent or uncertain, as a debt upon an open and running account (*h*), or upon a negotiable bill of exchange which may be indorsed over to another person (*i*).

But the presumption that a debt is intended to be satisfied by a legacy will not be rebutted by the circumstance that the debt is liable to decrease; where, for instance, the debt was in respect of deposits made with the testator, the creditor drawing on him from time to time in respect of such deposits (*k*).

(*a*) 2 P. W. 614.

(*b*) See also Forsight *v.* Grant, 1 V. 298; Richardson *v.* Elphinstone, 2 V. 463; Byde *v.* B., 1 Cox, 49; Bartlett *v.* Gillard, 3 Russ. 149; Fourdrin *v.* Gowdey, 3 My. & K. 409; Rowe *v.* R., 2 De G. & Sm. 294; Edmunds *v.* Low, 3 K. & J. 318; Fairer *v.* Park, 3 C. D. 309; Coates *v.* C., (1898) 1 Ir. R. 258.

(*c*) Alleyn *v.* A., 2 Ves. Sen. 37; Barret *v.* Beckford, 1 Ves. Sen. 519. See *Re* Vernon, 95 L. T. 48; Coates *v.* C., (1898) 1 Ir. R. 258.

(*d*) Mathews *v.* M., 2 Ves. Sen. 635; Charlton *v.* West, 30 B. 124, 127.

(*e*) Cranmer's Case, 2 Salk. 508; Thomas *v.* Bennet, 2 P. W. 343; Plunkett *v.* Lewis, 3 Ha. 330; and see 1 Vict. c. 26, s. 24; Crichton *v.* C., (1896) 1 Ch. 870.

(*f*) 2 P. W. 553.

(*g*) Devese *v.* Pontet, 1 Cox, 188; Barret *v.* Beckford, 1 Ves. Sen. 519; Lady Thynne *v.* The Earl of Glengall, 2 H. L. Cas. 154.

(*h*) Rawlins *v.* Powel, 1 P. W. 297.

(*i*) Carr *v.* Eastabrooke, 3 V. 561; *Re* Roberts, 50 W. R. 469.

(*k*) Edmunds *v.* Low, 3 K. & J. 318; 3 Gif. 263.

Where, as in *Chancey's Case*, selected as a leading authority upon this subject, there is an express direction in the will for payment of *debts and legacies*, the Court will infer that it was the intention of the testator that both the debt and the legacy should be paid to the creditor (*a*).

But not where the charge of debts and legacies is by will, and the debtor by codicil gives an equal or larger legacy to a creditor whose debt was contracted after the making of the will (*b*).

A direction to pay debts *alone* was held by *Wood*, V.-C., not to be sufficient to rebut the presumption of satisfaction (*c*). But the balance of authority is against this decision (*d*), and in *Re Huish* (*e*), *Kay*, J., after considering the cases, decided that a direction by a testator in a codicil that all just and lawful debts should be paid, was sufficient to exclude the presumption of satisfaction.

The appointment of the creditor as executor is not sufficient to take the case out of the general rule (*f*).

A question has been raised whether a testator in a charge ot "debts," includes his liability on a bond or covenant to pay a sum of money after his decease. In the case of *Wathen* v. *Smith* (*g*), a husband covenanted on marriage to pay his wife 1,000*l*. six months after his death. By his will he gave her 1,000*l*., payable three months after his decease, and after giving certain specific legacies, he directed his residue to be applied in payment of *all* his just *debts and legacies*. *Leach*, V.-C., held that the legacy must be considered as a performance of the covenant, and that the latter was not a debt within the sense in which the testator must be understood to use the word "debts" in his will.

In the case, however, of *Cole* v. *Willard* (*h*), the authority of *Wathen* v. *Smith* is impugned, and in *Re Huish* (*i*) it was cited but not followed. In the last mentioned case a lady gave a bond to her

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(*a*) Richardson *v.* Greese, 3 Atk. 65; Field *v.* Mostin, Dick. 543; Hales *v.* Darell, 3 B. 324, 332; Jefferies *v.* Michell, 20 B. 15; Hassell *v.* Hawkins, 4 Drew. 468. See also Lord Chichester *v.* Coventry, L. R. 2 H. L. 71.

(*b*) Gaynon *v.* Wood, 1 P. W. 409 (n.).

(*c*) Edmunds *v.* Low, 3 K. & J. 318, 321.

(*d*) Hales *v.* Darell, 3 B. 324; Jefferies *v.* Michell, 20 B. 15; Cole *v.* Willard, 25 B. 568, 573; Pinchin *v.* Simms, 30 B. 119; Charlton *v.* West, Ib. 124; Atkinson *v.* Littlewood, 18 Eq. 595. See also Lord Chichester *v.* Coventry, L. R. 2 H. L. 71, and the remarks thereon in Dawson *v.* D., 4 Eq. 504.

(*e*) 43 C. D. 260.

(*f*) *Re* Rattenberry, (1906) 1 Ch. 667.

(*g*) 4 Madd. 325.

(*h*) 25 B. 568.

(*i*) 43 C. D. 260.

nephew, to whom she was not *in loco parentis*, to secure the payment of 1,000*l*. within twelve months of her death, payable on an event which happened. She then made her will, by which she gave him different benefits, real estate, chattels, and a legacy of 3,000*l*. She made a codicil to her will, in which she said she wished all her just and lawful debts to be paid at once. *Kay*, J., held that the bond was not satisfied by the legacy, but that both were payable (*a*).

But where the liability is to pay or settle a share of the covenantor's estate after his decease, the liability is not a "debt" to be paid before the division of the residue (*b*).

Where a parent gives a legacy to a child to whom he is indebted.—It appears that a legacy given by the will of a parent to a child, is not upon any different footing from that of a legacy by any other person as a satisfaction of a *debt not being a portion*. Therefore, where a father is indebted to his child, a subsequent legacy to that child will not be considered as a satisfaction of the debt, unless it be either equal to, or greater than, the debt in amount; and the presumption of satisfaction, if raised, will be repelled by any of those slight circumstances which will take a bequest to a stranger creditor out of the general rule (*c*).

The same remarks apply to a legacy to a wife to whom the husband is indebted (*d*).

And the rule is equally applicable where the debt due is in the shape of an annuity, and an annuity is subsequently given by the will of the debtor to the annuitant (*e*).

Where a parent in his lifetime advances a child to whom he is indebted.—Where a parent is indebted to a child, and in his lifetime makes an advancement to the child upon marriage, or some other occasion, of a portion equal to or exceeding the debt, it will *primâ facie* be considered a satisfaction (*f*).

In *Plunkett* v. *Lewis* (*g*), a trust fund to which a father was

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(*a*) See also Atkinson *v.* Littlewood, 18 Eq. 595; *Re* Franklin, 52 Sol. Jo. 12.

(*b*) Bennett *v.* Houldsworth, 6 C. D. 671; distinguishing Chichester *v.* Coventry, L. R. 2 H. L. 71; *Re* Vernon, 95 L. T. 48.

(*c*) Tolson *v.* Collins, 4 V. 483; Stocken *v.* S., 4 Si. 152.

(*d*) Fowler *v.* F., 3 P. W. 353; Cole *v.* Willard, 25 B. 568; Atkinson *v.* Littlewood, 18 Eq. 595; Wathen *v.* Smith, 4 Madd. 325.

(*e*) Atkinson *v.* Littlewood, 18 Eq. 595; but see Bartlett *v.* Gillard, 3 Russ. 149, and *Re* Dowse, 50 L. J. Ch. 285. See also *Re* Rattenberry, (1906) 1 Ch., p. 672.

(*f*) Wood *v.* Briant, 2 Atk. 521; Seed *v.* Bradford, 1 Ves. Sen. 501; Chave *v.* Farrant, 18 V. 8.

(*g*) 3 Ha. 316.

entitled for life, and his son and daughter in remainder, was sold, and the proceeds, amounting to 11,445*l.*, were received by the father. Subsequently, on the marriage of the daughter, the father settled 16,000*l.* in ready money, and 20,000*l.* payable six months after his decease, besides lands. It was held by *Wigram*, V.-C., that the claim of the daughter against the father, in respect of her share of the proceeds of the trust fund, must be presumed to be satisfied by the settlement. In *Crichton* v. *C.* (*a*), a somewhat similar case to *Plunkett* v. *Lewis*, it was held in the Court of Appeal on the facts that there was no satisfaction (*b*).

The presumption of satisfaction can only arise where the person making the payment is himself the party bound to pay, or is the owner of the estate charged with the payment (*c*).

A debt due to a man will not be satisfied by a legacy to his wife (*d*).

Extrinsic evidence.—Where the presumption arises merely from the fact of a legacy to a creditor being equal to or greater than the amount of the debt, it would appear, upon principle, that evidence ought to be admitted to rebut the presumption; and if so, evidence may, on the other hand, be admitted to fortify it (*f*). However, in *Fowler* v. *F.* (*g*), Lord *Talbot* refused to admit parol evidence; and this case appears to be approved of by Sir *Edward Sugden*, in *Hall* v. *Hill* (*h*). It is, however, submitted that the evidence ought to have been admitted in that case, since, as the case is reported, it would merely have been admitted for the purpose of rebutting a presumption of law, not to contradict the intention of the testator as appearing by the will. If, indeed, Lord *Talbot* considered that the intention of the testator appeared on the face of the will, the evidence was rightly rejected.

In *Wallace* v. *Pomfret* (*i*), Mr. *Romilly* (*k*), rightly admitting that evidence might be received to rebut the presumption of the satisfaction of a debt by a legacy, where there was no expression in the will showing the intention, rightly argued also that there was no

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(*a*) (1896) 1 Ch. 870.

(*b*) See also Hardingham *v.* Thomas, 2 Drew. 353; *Re* Lawes, 20 C. D. 81; Reade *v.* R., 9 L. R. Ir. 409.

(*c*) Samuel *v.* Ward, 22 B. 347; and see Douglas *v.* Willes, 7 Ha. 328; Bannatyne *v.* Ferguson, (1896) 1 Ir. R. 149.

(*d*) Hall *v.* Hill, 1 Dr. & War. 94, 1 Cl. & Fin. 120.

(*f*) Plunkett *v.* Lewis, 3 Ha. 316.

(*g*) 3 P. W. 353.

(*h*) See 1 Dr. & W. 121, 1 Cl. & Fin. 147.

(*i*) 11 V. 542, at p. 545.

(*k*) In argument.

instance of admitting evidence where the testator has shown his intention by words; Lord *Eldon*, nevertheless, admitted evidence to beat down, not a mere presumption of law, "but," as he says, "the fair inference from the written context." This decision, however, is contrary to principle, and has been strongly disapproved of in *Hall* v. *Hill* (*a*); in which case, as the presumption of satisfaction did not arise on the face of the will, Lord Chancellor *Sugden* refused to admit parol evidence of the testator's declaration, showing that he intended the legacy as a satisfaction.

(*a*) 1 Dr. & W. 122, 1 Cl. & Fin. 147; but see Ashburner, Principles of Equity, p. 687.

LECHMERE *v.* LADY LECHMERE.

1735. Cas. t. Talbot, 26.

Implied Satisfaction of a Covenant to Purchase and Settle an Estate.

By marriage articles, Lord L. covenanted to lay out 30,000*l.* within one year after the marriage, in the purchase of freehold lands, in fee simple in possession, in the South part of Great Britain, with the consent of trustees; the lands, when purchased, to be settled upon Lord L. for life, and after his death, to pay a jointure to his intended wife, remainder to the first and other sons of the marriage in tail, remainder to trustees for 500 years, to raise portions for daughters, remainder to Lord L., his heirs and assigns for ever. The term to be void if there were no daughters, and until the 30,000*l.* should be laid out in lands, interest was to be paid for the same, after the rate of 5*l.* per cent. per annum, unto the persons entitled to the rents and profits of the lands, when purchased.

Lord L. was seised of some lands in fee at the time of his marriage. And after his marriage, he purchased some estates for lives, reversionary estates in fee, expectant on lives. Lord L. also purchased, after the marriage but not within one year, or with the consent of the trustees, several estates in fee simple in possession, which were never settled according to the covenant. Lord L. died intestate and without issue, leaving considerable real estate to descend upon his heir-at-law. Upon a bill filed by the heir-at-law against Lord L.'s widow, who took out administration :

Held, first, affirming the decision of the Court below, that the money, agreed by the articles to be laid out in land, ought to be taken as land, and go to the heir. And that there was no difference where the money thus agreed to be laid out and settled, was deposited in the hands of trustees, and where it remained in the hands of the covenantor, the agreement binding in both cases, and making it as land.

Held, also, that the purchases made before the covenant could not go in performance of the subsequent covenant, as they could not have been so intended.

Lechmere v. Lady Lechmere.

Held likewise, that the estates for lives, and reversionary estates in fee, expectant on lives, purchased after the marriage, could not go in performance of the covenant, not being estates in fee simple in possession within the meaning of the covenant.

But held, reversing the decision of the Court below, that the purchases of land in fee simple made after the marriage, though made without the consent of the trustees, and though not purchased within a year after the marriage, or settled, must be intended to have been made in part performance of the covenant to lay out 30,000*l.*

The late Lord Lechmere, upon his marriage with the Lady Elizabeth Howard, daughter to the Earl of Carlisle, and in consideration of 6,000*l.* portion, by marriage articles dated the 30th April, 1719, covenanted with the Earl of Carlisle and the Lord Morpeth, his son, to lay out, within one year after the marriage, the said sum of 6,000*l.*, and likewise the further sum of 24,000*l.* in the purchase, with the *consent of* the Earl of Carlisle and Lord Morpeth, of *freehold lands in possession*, in the south part of Great Britain, and which were to be settled upon the Lord Lechmere himself for life, without impeachment of waste, remainder to trustees and their heirs during the life of the Lord Lechmere, to preserve contingent remainders, remainder for so much as would amount to 800*l.* per annum to the Lady Lechmere, for her jointure, remainder of the whole to the first and other sons of the marriage, in tail male, remainder to the trustees for 500 years, for the raising a portion or portions for the daughter or daughters of the marriage, remainder to the *Lord Lechmere, his heirs and assigns for ever:* But if there should be no daughters, that the said term was to cease for the benefit of the Lord Lechmere, his heirs and assigns for ever. And the said Lord Lechmere further covenanted that until the said 30,000*l.* should be laid out in lands as aforesaid there should be paid interest for the same after the rate of 5*l.* per cent. unto the persons entitled to the rents and profits of the lands when purchased.

The marriage took effect, and Lord Carlisle paid 4,000*l.*, part of the portion, to Lord Lechmere, and gave his bond for the remaining 2,000*l.*, which had also been paid to the defendant, Lady Lechmere.

The Lord Lechmere was seised of some lands in fee at the *time of his* marriage of about 300*l.* per annum.

The Lord Lechmere, after his marriage, purchased several estates in fee simple in possession of about 500*l.* per annum, and contracted for the purchase of some estates in fee in possession, but none of which were ever settled according to the covenant; he also purchased several terms, estates for life, and reversionary estates in fee subject to lives. None of the purchases or contracts were made by Lord Lechmere with the consent of the trustees.

Lord Lechmere, on the 18th of June, in the year 1727, died intestate and without issue, leaving a considerable real estate (to the value of about 1,800*l.* per annum) to descend upon the plaintiff, his nephew and heir-at-law. The Lady Lechmere took out administration; and the plaintiff brought his bill (*a*) against her for an account of the Lord Lechmere's personal estate, and to have the covenant carried into execution (his remainder by the death of Lord Lechmere without issue now taking effect); as also to have some purchases completed which were left incomplete by the Lord Lechmere's death.

The Lady Lechmere insisted by her answer, that the plaintiff, being no way privy to any of the considerations within this covenant, could not compel her to lay out the 30,000*l.* in the purchase of lands for his benefit; but that if he could, the lands which Lord Lechmere had permitted to descend on him, being to the value of 1,800*l.* per annum, ought to be taken in full satisfaction for all the benefit the plaintiff could be entitled to as heir-at-law to the Lord Lechmere, who designed these several purchases to be settled according to the uses specified in the covenant.

The cause was first heard at the Rolls, before Sir *Joseph Jekyll*, M. R., and it was there decreed for the heir-at-law, Mr. Lechmere, upon both points; viz., That he was entitled to have a specific performance of this covenant; and secondly, That the several estates which descended upon him were not a satisfaction for this covenant, or any part of it; and now coming on to be heard before the Lord Chancellor.

Mr. *Pauncefort*, Mr. *Strange*, Mr. *Brown*, and others argued for the plaintiff (*b*).

(*a*) See Lechmere *v.* The Earl of Carlisle, 3 P. W. 211, from which the statement of the facts in this case has been corrected.

(*b*) This case was elaborately argued for four days; 3 Sug. V. & P. App. p. 62, 10th ed.

Lechmere v. Lady Lechmere.

Mr. Attorney-General (Sir *John Willes*), Mr. Solicitor-General (Sir *Dudley Ryder*), Mr. *Verney* (afterwards M. R.), and Mr. *Fazakerly* argued for the defendant.

Lord Talbot, L. C.—The first question is, whether the plaintiff, the heir-at-law to the Lord Lechmere, be entitled to a specific performance of this covenant? It has been considered by the plaintiff's counsel as an agreement of the Lord Lechmere, and an intent in him to lay out this whole sum of 30,000*l.* in lands at all events; on the other hand, the defendant's counsel have insisted, that the design went no farther than the providing for the Lady Lechmere, and the issue of the marriage. The intent seems to me to be, that the 30,000*l.* should, at all events, be laid out in land; the produce whereof was to be secured to the issue of the marriage, who in this case must have taken as purchasers: but as to the remainder in fee, I do not think that the looking upon the Lord Lechmere either as a purchaser of it or not, will vary the case; since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved; and I think it quite the same whether he is considered as a purchaser or as a volunteer; the dispute not being between the heir and a third person, but between the two representatives of the Lord Lechmere, the one of his real, the other of his personal estate; the heir's being but a volunteer in regard to his ancestor, will not exclude him from the aid of this Court. But, though the question is between two volunteers, the Court will determine which way the right is, and decree accordingly. We must therefore see whether the 30,000*l.* is, upon this covenant, to be looked upon as real or personal estate?

It seems to be allowed on both sides, that had the money been deposited in trustees' hands it must have been looked upon as real estate, and the heir entitled to the benefit of it. This, I say, seems to be granted; and no authority against it, but what has been collected from the case of *Chichester* v. *Bickerstaff* (*a*). It is probable that in that case the Court went upon some reason which induced it to think that Sir John Chichester looked upon the money as personal estate; for, otherwise the authority of that case is not to be maintained; being contrary to all the former resolutions, and to a

(*a*) 2 Vern. 295

large one in the House of Lords, by which I am bound, viz. that of *Edwards* v. *The Countess of Warwick* (*a*), where the money was decreed to go as land, though to a collateral heir, who was not within the considerations of the settlement; so that it is now a settled point, that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainderman ; unless there appears some variation in the parties' intent, and indeed it is very reasonable that it should be so ; for otherwise the neglect of trustees, or any other accident, might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations. But it has been objected, that this case differs from all those ; for, that the money was never deposited, but remained in the Lord Lechmere's own hands ; and that he only was the debtor. So now the question is, whether this will make any difference ? An heir can no more be looked upon as a creditor against his ancestor than he can be looked upon as a purchaser under him ; he takes with the several burdens that his ancestor lays upon him. And as, on the one hand, the Lord Lechmere bound himself, by his covenant, to lay out this sum of 30,000*l.* in land ; he, on the other, acquired a right to an estate for life, and to a remainder in fee, which by his death are now severed ; and the remainder only descends upon the heir. If a man articles for a purchase, and binds himself, his heirs, executors, and administrators, he may as well be called, in that case, both covenantor and covenantee, as in the present one ; but yet the heir is entitled to have the purchase completed, and may compel the executor to do it, because their rights are different ; as appears from the case of *Holt* v. *Holt* (*b*). And wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage which this Court will never take from him. None of the cases cited warrant this present distinction that is endeavoured at ; and in reason, I am sure, there is nothing to warrant it ; the intent and agreement of the parties being the same in both cases ; which if effectual in one case, I cannot see why it should not be so in the other. The only case, from which anything like this distinction can be collected, is that of *Lingen* v. *Sowray* (*c*), but I am no ways satisfied that that case

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(*a*) 2 P. W. 171.

(*b*) 2 Vern. 322. See now 17 & 18 Vict. c. 113 ; 30 & 31 Vict. c. 69, s. 2 ; 40 & 41 Vict. c. 34.

(*c*) 1 Eq. Ca. Abr. 175 ; Pr. Ch. 400, 1 P. W. 172.

was resolved upon that reason; for, in that case, the husband had altered the trust, and the limitations of it. Besides, in that case nobody had any interest in it but he and his wife; and the Court, as appears by the decree, laid great stress upon the change of his intent, appearing by changing the trust: but here no change appearing, the intent remains as it was at the time of the covenant entered into; and consequently a very wide difference between the two cases. In the case of *Chaplin* v. *Horner* (*a*), the husband alone was to have the benefit of the articles, and therefore not at all like the present case. I therefore think that this case falls within the common known rule, that *money articled to be laid out in land is to be looked upon as land*. The Lord Lechmere was bound at the time of his death to lay out this money in land; by which he gained a right to an estate for life, with a remainder in fee; and the estate for life being determined by the death, the right which he had to the remainder descends upon his heir; and as it comes by his death, nothing that has been done by the Lady Lechmere, either as to the waiver of her jointure, or anything else, can alter or defeat that right. Indeed to suppose it, would be absurd.

The second question is as to satisfaction (*b*), whether what descends to the heir-at-law is to be considered as satisfaction which he is entitled to under this covenant. As to questions of satisfaction, where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere, *I do not consider him as a creditor, but as standing in the place of his ancestor*, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain; for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and, if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for *here it*

(*a*) 1 P. W. 483.

(*b*) This second part of Lord *Talbot's* judgment is taken from Sug. V. & P. Append. 1117, 11th ed., where it is given more fully than in Cas. t. Talbot.

turns on what was the intention of my Lord Lechmere in the purchase made after the articles; for, as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple in possession, &c.), though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles?

The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles.

It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles.

Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under any obligation to lay out 30,000*l.* in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation.

Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a *step towards* *performance;* and that seems to me rather his intention than to enlarge his real estate. The case of *Wilcocks* v. *W.* (*a*), though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200*l.* per annum was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction; and in this particular I differ from the M. R.* There must be an account of what lands in fee simple in possession were purchased [for] after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part satisfaction of the 30,000*l.* to be laid out in land under the articles, and the residue of the 30,000*l.* must be made good out of the personal estate.

(*a*) 2 Vern. 558.

BLANDY *v.* WIDMORE.

1716. 1 P. W. 323 (*a*).

Performance of a Covenant to leave a sum of Money by allowing a Sum to devolve by Intestacy.

Covenant by a man, previous to marriage, to leave his intended wife 620*l.* The marriage takes place, and he dies intestate; the wife's share comes to above 620*l.*; this is a satisfaction.

Upon the marriage of A. with B., there were articles reciting, that, in consideration of the marriage, and of the portion, it was agreed that if B., the wife, should survive A., her intended husband, A. should *leave* B. 620*l.*; and accordingly A. covenanted with B.'s trustees, that his executors, within three months after his decease, should pay B. 620*l.* if she should survive him.

A. died intestate and without issue; upon which B. the wife, by the Statute of Distribution (*b*), became entitled to a moiety of the personal estate, which was much more than 620*l.*; and the question was, whether the distributive share belonging to B., being more than 620*l.*, should go in satisfaction of it.

Serjeant Hooper.—This 620*l.* is a debt, and debts must be first paid, after which the distribution is to be made; and if the intestate had made a will, probably he would have given to his wife something additional to this 620*l.* Now, what the statute gives is not his gift, and, being not his gift, is not to be taken as his payment; or, supposing it to be his gift, still it cannot be said to be his payment.

Lord Chancellor Cowper.—I will take this covenant *not to be broken,* for the agreement is to *leave* the widow 620*l.* Now the intestate in this case has left his widow 620*l.* and upwards, which she, as administratrix, may take presently upon her husband's death;

(*a*) S. C., 2 Vern. 709.

(*b*) 22 & 23 Car. 2, c. 10.

Blandy v. Widmore.

wherefore, let her take it, but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant; so that she shall not come in first as a creditor for the 620*l.*, and then for a moiety of the surplus.

And Mr. *Vernon* said, it had been decreed in the case of *Wilcocks* v. *W.* (*a*), Trin. 1706, that if a man covenants to settle an estate of 100*l.* per annum on his eldest son, and he leaves lands of the value of 100*l.* per annum to descend upon his son, this shall be a satisfaction of the covenant to settle; and that this last was a stronger case, it being the case of an heir, who is favoured in equity; also the case of *Phiney* v. *P.* (*b*) was cited.

Whereupon the decree (*c*) made by Sir *John Trevor*, M. R., was now affirmed by Lord Chancellor *Cowper* (*d*).

NOTES.

1. Generally.
2. Covenant to purchase and settle land, p. 414.
3. Covenant to leave a sum of money, p. 419.

1. Generally.

Lechmere v. *Lady L.* and *Blandy* v. *Widmore* were decided in accordance with the rule of equity, that, where a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention (*e*).

2. Covenant to Purchase and Settle Land.

Where a person covenants to *purchase and to settle* lands of a certain value, upon himself for life, with a jointure upon his wife and remainder to his first and other sons in tail, and afterwards purchases lands of equal, or greater value, which descend or are devised, such purchase will be deemed to have been made with the intention of performing the covenant, and the lands will be bound in equity (*f*).

(*a*) 2 Vern. 558.

(*b*) 2 Vern. 638.

(*c*) 2 Vern. 709.

(*d*) And again affirmed upon a rehearing. Reg. Lib. A. 1715, fol. 372.

(*e*) See Sowden *v.* S., 3 P. W. 228 (n.).

(*f*) Wilcocks *v.* W., 2 Vern. 558; Tooke *v.* Hastings, Ib. 97; Bridges *v.* Bere, 2 Eq. Cas. Abr. 34, and cases infra, p. 415, note (*a*).

The result will be the same where a person, having no real estate, covenants to *convey and settle*, and he afterwards purchases but does not convey or settle, real estate (*a*).

Where the lands purchased are of less value than the lands covenanted to be purchased or conveyed and settled, they will be considered as purchased in part performance of the covenant, and the residue of the sum covenanted to be laid out in lands must be made good out of the personal estate of the covenantor as being converted into land (*b*); and even if the heir be not a person interested in the performance of the covenant, the land will be bound in his hands by it (*c*).

And it is immaterial whether the estates are to be purchased within a limited time, and the purchase is not made until after such time has expired, or at different times, and in small parcels; or whether it is to be made with the consent of trustees, and such consent has not been applied for; for the intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles (*d*); nor is it material that the money to make the purchase has been deposited with trustees, or remains in the hands of the covenantor (*e*); or whether the articles say that land shall be conveyed immediately to trustees, and it is not conveyed at all; for it is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles (*f*).

The doctrine has also been applied to a case where the covenant was to pay money to trustees, to be laid out by them in a purchase of land; and the covenantor, without having paid the money, but having made a purchase of land, died intestate without having made a settlement (*g*).

(*a*) Deacon *v.* Smith, 3 Atk. 323; and see Wellesley *v.* W., 4 My. & C. 561; *Ex p.* Poole, De Gex, 581.

(*b*) Lechmere *v.* L., Cas t. Talbot, 80; Sowden *v.* S., 1 Bro. Ch. 582; 3 P. W. 228 (n.); Gardner *v.* Marquis of Townshend, G. Coop. 303; and see 4 V. 116, 117; 10 V. 9, 516.

(*c*) Garthshore *v.* Chalie, 10 V. 9.

(*d*) Lechmere *v.* Lady L., ante, p. 411.

(*e*) Ibid.

(*f*) Ibid. p. 411. See also Deacon *v.* Smith, 3 Atk. 329; Barham *v.* Earl of Clarendon, 10 Ha. 126.

(*g*) Sowden *v.* S., 3 P. W. 228; reported in a note of Mr. Cox; S. C., 1 Bro. Ch. 582, 1 Cox, 165. See also Trench *v.* Harrison, 17 Si. 111.

The expenditure, however, by a tenant for life in building on lands vested in trustees will not be taken to be in part satisfaction of a covenant by him to pay a sum of money to the trustees, which they had power to invest in the purchase of lands to be held upon the same trusts (*a*).

The principle upon which *Lechmere* v. *Lady L.* was decided, has been held to apply equally to the case where the obligation to purchase lands arose from an Act of Parliament (*b*).

Where a person upon his marriage covenanted with trustees to settle an estate upon his wife, but he failed to do so, and subsequently exchanged the estate for another, and the sum of 1,050*l.*, it was held that the estate taken in exchange, and the sum of 1,050*l.* ought to be taken in substitution for the estate covenanted to be settled, and that the 1,050*l.* was a specialty debt under the covenant (*c*).

And it is no objection to a purchase being considered as a part performance that it is optional to settle lands *or* a rent-charge, unless the intention to settle a rent-charge be shown (*d*).

If the covenantor has purchased lands and afterwards resold or mortgaged them, this will be evidence that he did not intend the purchase to be in satisfaction of the covenant (*e*) ; but where the covenantor purchased lands subject to an existing mortgage in his favour and subsequently assigned the mortgage, it was held that this was not a valid objection to the purchase being a part performance of the covenant, for as Lord *Hardwicke* observed "it was only continuing, in effect, the same mortgage upon the estate, because he wanted to take up money to complete the purchase" (*f*).

But where the covenant points to a *future* purchase of lands, it cannot be presumed that lands, of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in performance of it (*g*).

Nor can it be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as

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(*a*) Horlock *v.* Smith, 17 B. 572. And see Wills *v.* Gresham, 2 Drew. 258, 271, affirmed 3 Eq. R. 116; Robinson *v.* Sykes, 2 Jur. (N.S.) 895; Mathias *v.* M., 3 Sm. & G. 552 ; 3 Jur. (N. S.) 429.

(*b*) See Tubbs *v.* Broadwood, 2 Russ. & M. 487.

(*c*) Powdrell *v.* Jones, 2 Sm. & Gif. 335.

(*d*) Deacon *v.* Smith, 3 Atk. 323.

(*e*) Ibid. p. 327. See, however, post, p. 418.

(*f*) Ibid. p. 328.

(*g*) Cas. t. Talbot, 80 ; ante, p. 411. And see Davys *v.* Howard, 5 Bro. P. C. 552.

a performance. Thus, leaseholds for lives or terms of years, although with a covenant to purchase the fee, or estates in reversion expectant upon lives, unless, perhaps, the lives fall in during the life of the covenantor, will not be taken in performance of a covenant to purchase fee simple lands in possession (*a*).

So, where a person covenanted to purchase and settle lands of inheritance on his wife for life, without *impeachment of waste*, with remainder to the issue of the marriage, and he afterwards purchased the moiety of a house and a copyhold estate, the question arose, whether these estates, or either of them, were applicable in part satisfaction of the covenant; and Lord *Hardwicke* was clearly of opinion, that the *moiety of the house was not*, because it was not the kind of estate intended by the articles (*b*).

And under a covenant to purchase lands of inheritance, it has been held that copyhold estate was not applicable where the estates were to be settled for life, *without impeachment of waste*, because lands of that tenure could not be so settled (*c*).

And under a covenant to purchase lands of inheritance to be settled, after successive life interests, to the husband and wife with remainder to the use of the heirs of the settlor on the body of his wife, with remainder to the settlor, his heirs and assigns for ever, it was held that copyholds of the nature of Borough English could not be taken as part satisfaction to an eldest son, which by its nature went to the youngest (*d*).

Where, however, there was a covenant simply to purchase *lands*, the purchase of copyhold estate was held a part performance (*e*).

As a covenant is construed most strongly against the covenantor, a covenant by him to secure a jointure "out of estates he should thereafter acquire," will be a charge upon an estate which he had at that time already *contracted* to purchase (*f*).

A covenant to purchase lands is a mere specialty debt, and will not create a specific lien upon lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his

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(*a*) Lechmere *v.* Earl of Carlisle, 3 P. W. 227; Lechmere *v.* L., Cas. t. Talbot, 80, ante, p. 411; Deacon *v.* Smith, 3 Atk. 323; Whorwood *v.* University College, Oxford, 1 Ves. Sen. 540; Lewis *v.* Hill, 1 Ves. Sen. 274.

(*b*) Pinnell *v.* Hallett, Amb. 106.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Wilkes *v.* W., 5 Vin. Abr. 293, fol. 39; but see Whorwood *v.* University College, Oxford, 1 Ves. Sen. 540.

(*f*) Warde *v.* W., 16 B. 103.

Lechmere v. Lady Lechmere.

marriage articles, and will not affect a purchaser or mortgagee without notice; "for if the covenantor," as observed by Lord *Hardwicke*, "had sold them or mortgaged them, it would have been evidence of a different intention, and would therefore have taken off all evidence of his intention to bind them by the articles" (*a*). And other specialty creditors cannot complain that the presumption arises, that lands were purchased in performance of a covenant; for it is in the power of an owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien on it (*b*).

Notwithstanding the observation made by Lord *Hardwicke* in *Deacon* v. *Smith*, it has been held that where a person who has purchased lands in satisfaction of the covenant has mortgaged them to a mortgagee who had no notice of the covenant, the equity of redemption will be liable to the covenant. See *Ex p. Poole* (*c*), from the judgment in which case it may be inferred that the mortgagee s title depended entirely upon his being a purchaser *pro tanto* without notice.

Where the presumption arises that lands were bought with the intention of performing a covenant, in the absence of fraud, the price paid for them will be considered their value (*d*).

Where trustees, under an obligation to lay out money in land, have trust funds in their hands, any purchase by them will, more readily than in ordinary cases, be taken to have been made in fulfilment of their obligation (*e*). And where trust monies have been improperly invested by trustees, it will be followed into the land (*f*).

The same result follows where a person under an obligation to settle all his personal estate, purchases land with borrowed money, for upon his death all his personal estate which can be treated as having been employed in the purchase of the land, in paying off the borrowed money, or in lasting improvements, will be a charge upon the land in the hands of the heir for the benefit of the *cestui que trust* (*g*).

(*a*) Deacon *v.* Smith, 3 Atk. 327; see Countess of Mornington *v.* Keane, 2 De G. & J. 292; 27 L. J. Ch. 7.

(*b*) Deacon *v.* Smith, 3 Atk. 327.

(*c*) 11 Jur. 1005; De G. 581.

(*d*) See Tyrconnel *v.* Duke of Ancaster, Amb. 239, and note; Pinnell *v.* Hallett, Amb. 106; Wace *v.* Bickerton, 3 De G. & Sm. 751; Horlock *v.* Smith, 17 B. 572.

(*e*) Mathias *v.* M., 3 Sm. & Gif. 552; 3 Jur. (N. S.) 429.

(*f*) Phayre *v.* Peree, 3 Dow, 116; Sugd. Prop. 160.

(*g*) Lewis *v.* Madocks, 8 V. 150; 17 V. 48; Denton *v.* Davies, 18 V. 499.

So, where trustees of a settlement having a power to invest money with the consent of the husband and wife, the husband, being authorised by the trustees, and with the consent of his wife, purchased property not authorised by the settlement, it was held that *as between the husband and the trustees*, he must be considered to have purchased the estate for them (*a*).

Where trust money was laid out in the purchase of land, pursuant to the trusts of a settlement, and the husband advanced a further sum of 500*l.*, and the estate was conveyed to the trustees, without any notice being taken of the fact that part of the purchase-money had been advanced by the husband, it was held by Lord *Langdale*, M. R., that the husband had devoted the 500*l.* to the trusts of the settlement, as an advancement to the parties entitled under it. "In a case like this," said his Lordship, "where the father of a family makes a purchase for the purposes of his marriage settlement, I should require very strong evidence to show that he did not intend it for the benefit of all parties entitled under it" (*b*).

Where a proposal in writing to leave property by will, made to induce a marriage, is accepted, and the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property, the Court has power to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers (*c*).

3. Covenant to Leave a Sum of Money.

Upon a principle analogous to that upon which the former class of cases proceed, it has long since been settled, upon the authority of *Blandy* v. *Widmore*, that, if a person covenants to *leave*, or that his executor shall *pay*, to another, a sum of money, or part of his personal estate, if *he dies intestate*, and such person becomes entitled to a portion of his personal property, of equal or greater amount, under the statute, such distributive share will be a performance of the covenant, and he cannot claim both (*d*).

If the distributive share, as for instance, in the case of a widow, be less than the sum which the husband covenants to leave, it will

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(*a*) French *v.* Harrison, 17 Si. 111; Sealey *v.* Stawell, 2 Ir. R. Eq. 326.

(*b*) Ouseley *v.* Anstruther, 10 B. 461.

(*c*) Synge *v.* S., (1894) 1 Q. B. 466.

(*d*) Lee *v.* D'Aranda, 1 Ves. Sen. 1; see also Thacker *v.* Key, 8 Eq. 408.

be taken to be a part performance (*a*); and it does not depend upon the accident of the wife taking out administration or not (*b*); and the Court will not look upon the slight difference between *leaving* and *paying;* or whether payment is to be within three months or six months after the covenantor's death, as the year allowed to executors and administrators to retain property in their hands is for convenience merely, and does not prevent vesting; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party; notwithstanding there had not been a lapse of twelve months (*c*).

The same principle has been held applicable where the covenant of a husband is to assure or bequeath a sum to trustees for his wife, or that his executors should pay her such sum, for the distributive share of the wife will be taken in performance of the covenant (*d*).

Exceptions.—There are three classes of cases which ought to be distinguished from those last considered. (1) Where the covenantor makes a will; for, it seems that a gift *by will* on the part of the covenantor, either of a sum of money or a residue, or part of a residue, will not, *per se*, be considered a performance of a covenant to leave a widow a certain sum; for a gift by will *primâ facie* imports bounty, and admits a presumption of an intention in the testator to augment the provision under the covenant, and not to satisfy or perform it (*e*).

Where, however, although a testator makes a will it becomes inoperative, so that his widow takes a distributive share according to the Statute of Distributions, the principle of the decisions in cases of intestacy will be applicable (*f*).

(2) Where the covenant is not to pay a gross sum, but the interest of a sum of money for life, or a mere life annuity, the principle upon which *Blandy* v. *Widmore* was decided will not apply. Thus in *Couch* v. *Stratton* (*g*), a covenant by a husband to pay the interest of a sum of money to his widow, for life, was held not to be satisfied by her distributive share under his intestacy (*h*).

(*a*) Garthshore *v.* Chalie, 10 V. 14, 16, 7 R. R. 311.

(*b*) Garthshore *v.* Chalie, supra.

(*c*) Garthshore *v.* Chalie, supra; Lang *v.* L., 8 Si. 465. Cf. *Re* Rattenberry, (1906) 1 Ch. 667.

(*d*) Lee *v.* D'Aranda, 3 Atk. 419; S. C. 1 Ves. Sen. 1; Garthshore *v.* Chalie, *supra.*

(*e*) See and consider Haynes *v.* Mico, 1 Bro. Ch. 129; Devese *v.* Pontet, 1 Cox, 188, 1 R. R. 15.

(*f*) Goldsmid *v.* G., 1 Swans. 211.

(*g*) 4 V. 391, 4 R. R. 230; see Salisbury *v.* S., infra.

(*h*) See also Young *v.* Y., 5 Ir. R. Eq. 615; Salisbury *v.* S., 6 Ha. 526; Wood *v.* W., 7 B. 183.

(3) Nor will the rule laid down in *Blandy* v. *Widmore* be applicable where the husband covenants to pay a sum in his *lifetime*, and there is a breach of covenant before his death, and a *debt* is due to his wife. She will not take her distributive share either wholly or partially in performance of the covenant. In *Oliver* v. *Brickland*, or *Oliver* v. *Brighouse* (*a*), the husband covenanted to pay a sum within two years after marriage, and if he died, his executors should pay it. He lived after the two years and died intestate, leaving a larger sum than what he covenanted to pay to devolve upon his widow, as her distributive share; but *Jekyll*, M. R., held, that it was not to be taken in performance of the covenant (*b*).

And where a covenant is entire, although the provision for the wife be such, that, if part of it, standing alone, might be considered as performed by the distributive share of the husband's personalty devolving upon her on his intestacy, if another part of it could not be considered as so performed, the Court will not, since the covenant is entire, divide it by holding one part performed, and the other part not performed (*c*).

Policy of Assurance.—Where a settlor covenanted with trustees for the payment to them in his lifetime or within six months after his decease of a sum of 2,000*l.* to be held in trust for the wife for life, and after her death for the settlor for life, and after the decease of the survivor for the children of the marriage and of a former marriage as the husband and wife shall jointly appoint and in default of appointment for the children of both marriages, sons at twenty-one, and daughters at twenty-one or marriage, and the covenant remained unperformed in the settlor's lifetime, it was held not to be satisfied by the fact that the settlor took out two policies for 1,000*l.* each under the provisions of sect. 10 of the Married Women's Property Act, 1870 (*d*), expressed to be "for the benefit of his wife and children" (*e*).

because
[illegible]
[illegible]
[illegible]
[illegible]

(*a*) Cited 1 Ves. Sen. 1; 3 Atk. 420, 422.

(*b*) See Garthshore *v.* Chalie, 10 V. 12, 7 R. R. 311, where Lord *Eldon* approves of this case; but see Salisbury *v.* S., 6 Ha. p. 529; see further Lang *v.* L., 8 Si. 451; Corsbie *v.* Free, Cr. & Ph. 64.

(*c*) Couch *v.* Stratton, 4 V. 391, 4 R. R. 230.

(*d*) 33 & 34 Vict. c. 93.

(*e*) Cartwright *v.* C., (1903) 2 Ch. 306.

SPECIFIC PERFORMANCE.

CUDDEE *v.* RUTTER.

1720. 5 Vin. Abr. 538, pl. 21 (*a*).

Specific Performance of Agreements relating to Personal Property.

A bill in equity will not lie for specific performance of an agreement to transfer South-Sea Stock.

Bill for a specific performance of an agreement to transfer stock. —Case was, the defendant agreed with the plaintiff to transfer to him 1,000*l.* South-Sea Stock, upon the 20th of November then next following, at the rate of 104*l.* per cent., and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration-money; but the defendant, in drawing the note, had put in the usual words "or pay the difference," which the plaintiff struck out, and would not agree to, and then the defendant signed the note.

After the bargain was made, and before the time of delivering the stock, the South-Sea Stock rose considerably in value, and the defendant did not deliver the stock at the day, but a few days afterwards offered to pay the difference, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, &c.

Sir *Robert Raymond* and Mr. *Vernon*, for the defendant insisted (*inter alia*), that a contract for the sale of stock differs from other contracts for sale of a house, lands, &c., for in such things there may be a particular conveniency or benefit to the buyer in this individual house, &c.: but it is not so in stock, for one 1,000*l.* is as good

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(*a*) S. C. nom. Cud *v.* Rutter, 1 P. W. 570; 2 Eq. Ca. Abr. 18, pl. 8; Pr. Ch. 534, cited, nom. Scould *v.* Butter; Reg. Lib. A. 1719, fol. 35; Reg. Lib. B. 1719, fol. 411.

as another 1,000*l.* stock, and is to be purchased daily in Exchange Alley: that the plaintiff has his remedy at law for the damages; viz., the difference.

Sir JOSEPH JEKYLL, M. R., said, that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific performance of the contract, especially since it was insisted upon by the plaintiff, at the making the agreement, that he should not be obliged to take the difference, but would have the stock actually delivered to him; and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage: and decreed that the defendant do transfer the stock, and pay the dividends since 20th of November, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

ON AN APPEAL from this decree, PARKER, C. (*a*), upon opening the cause, asked if the plaintiff was at the South-Sea House upon the day appointed for transferring the stock, to demand it and tender the money, and seemed strongly against the plaintiff; and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law, for breach of the agreement, to recover damages, *id est*, the difference between the price agreed on by the parties, and the price of corn upon the market-day.

It was said (*b*), it was the common justice of this Court to compel the party to a specific performance of his agreement, if the same was just and reasonable, and fairly obtained: that this was a just, reasonable, and fair agreement in all the circumstances; it was the current price of the stock at that time, and no imposition upon the defendant; that the subsequent rise could not alter the case, for it was an equal hazard that it might fall, and the parties in such contracts executory must take their chance. They compared it to the

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(*a*) Afterwards Earl of Macclesfield.

(*b*) In argument for the plaintiff.

case of a contract for so many bales of silk, or any other merchandise, to be delivered at a future day, at a certain price: if the value of the silk, or other goods, doth rise before the day, that is no excuse for non-performance of the contract. So, in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement.

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It was said, for the defendant, that the rule laid down was too general for compelling the execution of agreements between the parties: that this Court would not compel the party to perform a hard agreement, though it was fair at the time it was made, but leave the other party to his remedy at law * * * that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time, and he had no more intention to take the stock than the other had to deliver it, and this appears by his non-attendance at the South-Sea House upon the day to accept and pay for the stock. They cited the case of *The Marquess of Normanby* v. *Lord Berkly*, temp. Lord *Somers*, C., who said, in that case, that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case, as a jury may do, but must decree the whole contract to be performed.

It was replied that the plaintiff, some days before the stock was to be delivered, told the defendant that he expected to have the stock delivered to him, but the defendant said that he had not the stock, and therefore could not deliver it; and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the South-Sea House to accept the stock; that, this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it; and upon that account the plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.

Parker, C.—There is no reason to bring this bill for a specific

Cuddee v. Rutter.

performance of this agreement, because there is no difference between this 1,000*l.* South-Sea Stock and another 1,000*l.* stock, which the plaintiff might have bought of any other person upon the very day; and the plaintiff does not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference.

These sorts of contracts are commonly understood to mean no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties; and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement. This differs very much from the case of a contract for lands, some lands being more valuable than others, at least, more convenient than others, to the purchaser; but there is no difference in stock, one man's stock is of equal benefit and conveniency as another's.

Secondly, it appears that the defendant had not the stock when the contract was made, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement. If there be a contract for the sale of malt, or any other commodity, and the seller has not the malt or other things agreed to be delivered, this Court would not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

Thirdly, in contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a Court of equity to carry into execution. The decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this kind; but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the Master inquire what the difference was at the day, and the defendant pay it to the plaintiff, with interest, but no costs.

(Decree reversed per *Parker*, C. MS. Rep. Trin. 6 Geo. 1: *Cuddee* v. *Rutter.*)

NOTES.

1. Generally.
2. Contracts relating to real property, p. 427.
3. Contracts relating to personal property, p. 428.
4. Contracts relating to personal acts, p. 439.
5. Specific performance compelled by injunction, p. 449.
6. Specific performance and damages under Lord Cairns' Act, and the Judicature Act, 1873, p. 452.

1. Generally.

This note deals with the question discussed in the principal case, viz., of what contracts, having regard to their subject-matter, the Court will decree the specific performance. This may be considered most conveniently under four general heads:—1st. When the contract relates to property, whether real or personal; 2nd. When the contract relates to personal acts; 3rd. Specific performance when compelled by injunction; and 4th. The extension of the jurisdiction of equity in matters of specific performance by the Legislature conferring powers to award damages in certain cases.

The original and sole foundation of the jurisdiction to decree specific performance of contracts is simply that an award of damages will not give a party the compensation to which he is entitled (*a*).

The remedy is discretionary, but of the circumstances calling for the exercise of this discretion the Court judges by settled and fixed rules; hence the discretion is said not to be arbitrary or capricious, but judicial (*b*). "If the defendant can show any circumstances *dehors*, independent of the writing, making it inequitable to interpose for the purpose of specific performance, a Court of equity, having satisfactory information on that subject, will not interpose" (*c*).

Thus, the Court will not specifically enforce a contract for the sale of land, when the terms are ambiguous and understood by the parties in different senses, and the price is uncertain not only in value but in nature and character (*d*).

As the remedy of specific performance is enforceable *in personam*, it cannot be invoked against a person over whom the tribunals of

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(*a*) Harnett *v.* Yielding, 2 Sch. & L. 552.

(*b*) Fry, Spec. Perf. (1903), p. 18.

(*c*) Per *Plumer*, V.-C., Clowes *v.* Higginson, 1 V. & B. 527.

(*d*) Douglas *v.* Baynes, (1908) A. C. 477; cf. Macphail *v.* Torrance, 25 T. L. R. 810.

this country have no jurisdiction, *e.g.*, against a foreign government (*a*). But the Court will make the decree against a defendant within the jurisdiction though the subject-matter with which the contract deals is not within the jurisdiction of the Court, even though the foreign law might give no such remedy (*b*).

A Court of equity will not decree specific performance of a contract, even under seal, unless it be founded upon valuable consideration (*c*), and unless, as a general rule, the contract be mutual, *i.e.*, capable of being enforced at the suit of either party.

2. Contracts relating to Real Property.

Where a contract in writing respecting *real property*, in conformity with the Statute of Frauds (*d*), is entered into between competent parties, and is, moreover, in its nature and circumstances, unobjectionable, it is as much of course to decree a specific performance as it is to give damages for the breach of such a contract (*e*).

Even when an agreement for a lease is extremely short, it will be specifically enforced (*f*), but a decree which would be inoperative will not be granted; *e.g.*, where the defendant could at once put an end to the lease he agreed to grant because of breach of covenant (*g*), or the intended term has expired before the hearing (*h*). The ordinary rescission clause in a contract of sale which enables the vendor to rescind on the purchaser making any objection or requisition which the vendor is unwilling or unable to comply with, does not enable him to rescind when he has no title at all, and consequently the Court may still decree specific performance against him (*i*).

Quasi-contracts.—A Court of equity will entertain suits for specific performance in certain cases of quasi-contracts, viz., after notice to treat has been given by railway or other companies in the exercise of their compulsory powers under the Lands Clauses Consolidation Act, 1845, and the price of the land has been fixed (*k*), no

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(*a*) Smith *v.* Weguelin, 8 Eq. 198.

(*b*) Penn *v.* Baltimore, vol. 1, p. 800; Foubert *v.* Turst, 1 Bro. P. C. 129; Toller *v.* Carteret, 2 Vern. 494; Hart *v.* Herwig, L. R. 8 Ch. 860; and cf. Duder *v.* Amsterdamsch Trustees Kantoor, (1902) 2 Ch. 132.

(*c*) Groves *v.* G., 3 Y. & J. 163; Jefferys *v.* J., Cr. & Ph. 138; Houghton *v.* Lees, 1 Jur. (N. S.) 862; Cheale *v.* Kenward, 3 De G. & J. 27; *Re* Ellenborough, (1903) 1 Ch. 697, and see note to Ellison *v.* E., post.

(*d*) 29 Car. 2, c. 3, s. 4.

(*e*) Hall *v.* Warren, 9 V. 608.

(*f*) Lever *v.* Koffler, (1901) 1 Ch. 543.

(*g*) Rankin *v.* Lay, 2 De G. F. & J. 65.

(*h*) Moore *v.* Marrable, L. R. 1 Ch. 217; Turnor *v.* Clowes, 17 W. R. 274. *cf.* Lavery *v.* Pursell, 39 C. D. 508.

(*i*) *Re* Deighton and Harris, (1898) 1 Ch. 458.

(*k*) See sects. 22 and 23.

matter in what way. In such cases a railway company is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of equity to complete the purchase (*a*).

But a mere notice to treat is not sufficient to give the Court jurisdiction to interfere by way of decreeing specific performance (*b*), nor a mere notice of intention to apply for the appointment of a surveyor after notice to treat (*c*). Then if the company refuse to proceed, the landowner's remedy is to apply for a mandamus to compel the company to put in force its powers under the Act of 1845 (*d*).

Where a railway company has given notice to treat for leaseholds, has paid the purchase-money, and has, with the consent of the lessee, been admitted into possession, it will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants (*e*).

When a railway company has given notice to treat for a *portion* of a piece of land to the owner, who, thereupon, has given notice to the company to take *the whole*, and sues for a declaration in accordance with his notice, if such declaration is made (and upon enquiry the title is found to be good), the Court has made an order compelling the company to take the necessary steps for ascertaining the value of the whole, for payment of the value so ascertained, and for the execution of a conveyance to the company (*f*).

3. Contracts relating to Personal Property.

As a general rule, specific performance of agreements relating to personalty will not be decreed: it will, however, be seen, upon examining the authorities, that whenever Courts have refused to decree specific performance in such cases, it has not been because of

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(*a*) Inge *v.* Birmingham, &c., Ry. Co., 1 Sm. & Gif. 347; Haynes *v.* H., 1 Dr. & Sm. p. 457; Harding *v.* Met. Ry., L. R. 7 Ch. p. 158; Watts *v.* W., 17 Eq. p. 221; Mercer *v.* Liverpool Ry., (1903) 1 K. B. 652; *Re* Cary Elwes' Contract, (1906) 2 Ch. 143.

(*b*) Haynes *v.* H., 1 Dr. & Sm. 426; but see Marson *v.* L. C. & D. Ry. Co., 7 Eq. 546.

(*c*) Grierson *v.* Cheshire Lines Committee, 19 Eq. 83.

(*d*) Adams *v.* London & Blackwall Ry. Co., 2 Mac. & G. 118; Lind *v.* Isle of Wight Ferry Co., 7 L. T. 416; R. *v.* Birmingham, &c., Ry. Co., 15 Q. B. 634; Tiverton & N. Devon Ry. Co. *v.* Loosemore, 9 A. C. 491.

(*e*) Ibid. See also Harding *v.* Met. Ry. Co., L. R. 7 Ch. 154.

(*f*) Marson *v.* The L. C. & D. Ry. Co., 7 Eq. 546 (the question of jurisdiction was not argued); see the remarks thereon in Grierson *v.* Cheshire Lines Committee, 19 Eq. 89.

any difference between real and personal property, but because damages at law will be an adequate compensation; and there is, therefore, no reason why the jurisdiction should be exercised. Upon this ground chiefly the Lord Chancellor, in the principal case, refused to decree specific performance, observing that it differed much from "a contract for lands, some lands being more valuable than others —at least, more convenient than others—to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and conveniency as another's" (*a*).

The question, therefore, in all cases where specific performance of an agreement relating to personalty is claimed, is, will damages be an adequate compensation for breach of the agreement? If it will not, specific performance of the agreement, as in the case of an agreement relating to realty, will be enforced (*b*).

And accordingly, it has been decided that specific performance of a contract to deliver coals, not of a specific kind, would not be decreed (*c*).

In the following cases, however, it has been held, that, as damages could not be correctly estimated, or would not furnish a complete and adequate remedy for non-performance, specific performance ought not to be decreed. In *Taylor* v. *Neville* (*d*), specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the reason given by Lord *Hardwicke* is, "that such sort of contracts differ from those that are immediately to be executed;" and they do differ in this respect, that the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed on conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract is to compel him to sell the actual profit which may arise from it at a conjectural price. This case was doubted, however, in *Pollard* v. *Clayton* (*e*).

In *Ball* v. *Coggs* (*f*), specific performance was decreed, in the House of Lords, of a contract to pay the plaintiff a certain annual

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(*a*) See Adderley *v.* Dixon, 1 S. & S. p. 610; Buxton *v.* Lister, 3 Atk. 384.

(*b*) For the Sale of Goods Act, 1893, see post, p. 461.

(*c*) Fothergill *v.* Rowland, 17 Eq. 132; but see Heathcote *v.* North Staffs. Ry. Co., 2 Mac. & G. 112; Donnell *v.* Bennett, 22 C. D. 835, and the cases there cited.

(*d*) 3 Atk. 384, cited.

(*e*) 1 K. & J. p. 474; see also Nives *v.* N., 15 C. D. 649; Dominion Coal Co. *v.* Dominion Steel & Iron Co., (1909) A. C. 293.

(*f*) 1 Bro. P. C. 140.

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sum for his life, and also a certain other sum for every hundredweight of brass wire manufactured by him during his life as manager of defendants' works.

Moreover, in *Buxton* v. *Lister* (*a*), Lord *Hardwicke* puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that, as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, specific performance would be decreed (*b*).

Again in the case of *Thorn* v. *The Commissioners of Public Works* (*c*), specific performance of a contract to purchase the arch stone, spandrill stone, and the Bramley Fall stone contained in the old Westminster Bridge was decreed.

And for the same reason, a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of virtu, will be enforced (*d*).

The jurisdiction of the Court to decree specific performance of contracts relating to chattels does not rest upon a very satisfactory foundation. The question ought not to be whether a chattel contracted to be sold is of an extraordinary character or not, but solely whether the subject-matter of the contract is a specific chattel; if it be, it is submitted, that the purchaser ought to have the right to decide whether he will have the chattel, or damages in lieu thereof. As Lord *Westbury* said, "A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of tea which are now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person" (*e*).

The Court, moreover, has enforced specific performance by a

(*a*) 3 Atk. 385.

(*b*) Per *Leach*, V.-C., 1 S. & S. 610; and see Jones *v.* Earl Tankerville, (1909) 2 Ch. 440.

(*c*) 32 B. 490.

(*d*) Per *Kindersley*, V.-C., in Falcke *v.* Gray, 4 Drew. 658. See also Pusey *v.* P., post; and Duke of Somerset *v.* Cookson, post.

(*e*) Holroyd *v.* Marshall, 10 H. L. Cas. pp. 209, 210. See and consider Hoare *v.* Dresser, 7 H. L. Cas. 317, 318. For the Sale of Goods Act, 1893, see post, p. 461.

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purchaser of a contract to purchase debts (*a*). So, likewise, the specific performance of a contract to sell or purchase an annuity will be enforced (*b*).

And the Court will, at the suit of a vendor, enforce specific performance of a contract to purchase life annuities, by compelling payment of the purchase-money, even after the death of the annuitant: at any rate, where there are arrears of the annuity due, sufficient to support a bill filed by the annuitant. The Court "entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract. And, although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him on the principle that remedies should be mutual" (*c*).

And the Court will specifically enforce a contract for the sale of a patent in a suit by a purchaser against the vendor, and will make the latter execute an assignment. The vendor also may come into equity for the purchase money (*d*).

In contracts relating to commodities, the market price of which fluctuates from day to day, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after a delay on the part of the plaintiff, when the parties may be no longer in the same position (*e*).

It has been decided that a Court of equity will neither decree specific performance of a contract to lend (*f*), nor of a contract to borrow (*g*), or to pay (*h*) money, or to leave property by will entered into by a donee of a mere testamentary power of appointment (*i*); but the Court will always decree specific performance of an agreement to execute a mortgage in consideration of money advanced at or before the time of the contract (*k*), or a parol agreement to execute a bill of sale of chattels to secure the plaintiff against

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(*a*) Adderley *v.* Dixon, 1 S. & S. 607; Wright *v.* Bell, 5 Price, 325; Dan. Ex. Rep. 95.

(*b*) Withy *v.* Cottle, 1 S. & S. 174; and see Clifford *v.* Turrell, 1 Y. & C. Ch. 138.

(*c*) Per *Leach*, V.-C., in Kenney *v.* Wexham, 6 Madd. (Madd. & G.), p. 357.

(*d*) Cogent *v.* Gibson, 33 B. 557.

(*e*) Pollard *v* Clayton, 1 K. & J. 462.

(*f*) Thorpe *v.* Hosford, 20 W. R. 922; Western Wagon Co. *v.* West, (1892) 1 Ch. 271; but see May *v.* Lane, 43 W. R. 58; Firth *v.* Slingsby, 58 L. T. 481.

(*g*) Rogers *v.* Challis, 27 B. 175.

(*h*) Crampton *v.* The Varna Ry. Co., L. R. 7 Ch. 562; and see Larios *v.* Gurety, L. R. 5 P. C. 346; Brough *v.* Oddy, 1 R. & M. 55.

(*i*) *Re* Parkin, (1892) 3 Ch. 510; and see Macphail *v.* Torrance, 25 T. L. R. 810.

(*k*) Ashton *v.* Corrigan, 13 Eq. 76; Hermann *v.* Hodges, 16 Eq. 18.

certain liabilities (*a*). Under the Companies (Consolidation) Act, 1908, however, "a contract with a company to take and pay for any debentures of the company may be enforced by an order for specific performance" (*b*).

Stocks and Shares.—The principal case shews that ordinarily specific performance of a contract for the delivery of government stock will not be decreed. In that case the Earl of *Macclesfield* refused to decree specific performance of a contract for the transfer of South-Sea Stock—his reasons being first, that one man's stock did not differ from another man's stock; secondly, that the defendant had not the stock when the contract was made; and thirdly, that stock being subject to sudden rise and fall, the day was of the essence of the contract. It will be observed that, although Lord *Macclesfield* refused specific performance, he ordered the defendant to pay the difference between the price agreed upon and the value of the stock on the day fixed upon for its delivery. Except in a somewhat doubtful case of Lord *Hardwicke*, alluded to by Lord *Eldon* (*c*), the Courts have since, as a general rule, declined to enforce specific performance of an agreement for the purchase of stock; but they did not follow Lord *Macclesfield* in ordering the payment ot the difference (*d*).

It has been held, however, that a bill would lie for the specific performance of a contract for the purchase of Neapolitan stock, where it prays, not for the transfer of stock, but for the *delivery of the certificates*, which give the legal title to the stock (*e*).

And in another case a purchaser of a life annuity payable out of dividends of stock was held entitled to specific performance (*f*), though it has been refused (partly on the ground of misrepresentation) in the case of a contract to sell a life interest in the public funds (*g*).

Contracts for the purchase of shares in companies, as distinguished from the public funds, will as a general rule be enforced. Thus in *Duncuft* v. *Albrecht* (*h*), specific performance of a parol agreement for the sale of railway shares was decreed, on the ground that such

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(*a*) Taylor *v.* Eckersley, 2 C. D. 302.

(*b*) Sect. 105, Companies (Consolidation) Act, 1908, a statutory reversal of South African, &c., Ltd. *v.* Wallington, (1898) A. C. 309.

(*c*) 10 V. p. 161.

(*d*) See Cappur *v.* Harris, Bunb. 135; Buxton *v.* Lister, 3 Atk. 384; Nutbrown *v.* Thornton, 10 V. 161, but see now the Judicature Act (1873), s. 24 (7).

(*e*) Doloret *v.* Rothschild, 1 S. & S. 590.

(*f*) Withy *v.* Cottle, 1 S. & S. 174.

(*g*) Brealey *v.* Collins, You. 317, 330.

(*h*) 12 Si. 189; affirmed on the 23rd of July, 1841, by the Lord Chancellor.

shares, being limited in number cannot always be obtained in the open market (*a*).

Specific performance of a contract to purchase shares, at the instance of the vendor, is effected by ordering the purchaser to execute and register a proper deed of transfer (*b*), and to indemnify the vendor against future calls (*c*). A company can, in a similar manner, secure specific performance of a contract by an individual to take shares allotted to him (*d*); but the company must act promptly (*e*). In one case specific performance was refused, on the ground that the company could at once put an end to the membership (*f*).

A purchaser of shares is also entitled to take all proceedings against the vendor which are necessary to procure himself to be registered as holder of those shares (*g*). Until registration of a proper transfer, the vendor holds the shares for the purchaser as an absolute *cestui que trust* (*h*).

The obligations of the parties to a contract to purchase shares vary according to whether the contract was made on the Stock Exchange or elsewhere.

(1) Stock Exchange. At law, the distinction between a jobber and a broker does not exist (*i*).

The vendor is bound, upon receiving the consideration money, to execute a proper transfer of the shares to the purchaser or his nominee, and hand the transfer and his certificate to the transferee (*k*). He thereupon, until registration, is in the position of a trustee for the transferee and is entitled to be indemnified by him from all liability in respect of the shares (*l*).

Unless he expressly contracts to do so, he does not undertake to

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(*a*) And see Jackson *v.* Cocker, 4 B. 59; Shaw *v.* Fisher, 2 De G. & Sm. 11, 5 De G. M. & G. 596; Wilson *v.* Keating, 7 W. R. 484.

(*b*) Shaw *v.* Fisher, 5 De G. M. & G. 596.

(*c*) Wynne *v.* Price, 3 De G. & Sm. 310. The right to indemnity exists at law as well as in equity, Walker *v.* Bartlett, 18 C. B. 845.

(*d*) New Brunswick, &c., Co., *v.* Muggeridge, 4 Drew. 686.

(*e*) Oriental, &c., Steam Co., *v.* Briggs, 2 John. & H. 625; Odessa Tram Co. *v.* Mendel, 8 C. D. 235.

(*f*) Sheffield Gas, &c., Co. *v.* Harrison, 17 B. 294; dissented from in New Brunswick, &c., Co. *v.* Muggeridge, supra.

(*g*) *Re* London, Hamburg, &c., Bank, Ward and Henry's Case, L. R. 2 Ch. 431.

(*h*) Loring *v.* Davis, 32 C. D. 625; cf. Hardoon *v.* Belilios, (1901) A. C. 118.

(*i*) Maxted *v.* Paine, L. R. 6 Ex. p. 170.

(*k*) Stray *v.* Russell, 1 E. & E. 888.

(*l*) Paine *v.* Hutchinson, 3 Eq. 257; Castellan *v.* Hobson, 10 Eq. 47.

procure the registration of the transferee. That duty lies on the transferee himself. Consequently, if the company, in the exercise of its powers, refuses to register the transfer the purchaser or transferee has no remedy against the vendor (*a*), who can himself obtain specific performance.

The purchaser contracts either to take the shares himself, or on a day fixed (called the name day), to give the name of one or more persons to whom the shares are to be transferred.

When the vendor executes a transfer to the nominee he recognises him as purchaser of the shares, and accordingly a new contract arises and the original purchaser is released (*b*).

The nominee must be a person who has capacity to contract (*c*), for example, not an infant or lunatic so found; who has authorised the giving of his name to the vendor (*d*); and to whom no reasonable objection can be made (*e*). He need not be a sub-purchaser, and, if no objection is taken within the proper time, he may be a mere man of straw (*f*). The Rules of the Stock Exchange determine the time during which objection can be made to any nominee (*g*).

If the nominee by his conduct induces the vendor to believe that he has adopted the contract he can be compelled to perform the contract (*h*).

There has been a certain amount of judicial controversy as to the time when the original purchaser is released. One view is that the new contract only arises when the nominee has accepted the transfer and the consideration money has been paid (*i*). The other view is that the new contract arises on the vendor notifying that he accepts the nominee (*k*). But, as in practice the only mode of notifying

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(*a*) Stray *v.* Russell, 1 E. & E. 888; Remfry *v.* Butler, E. B. & E. 887; Skinner *v.* City of London, &c., Co., 14 Q. B. D. 882; London Founders, &c., Co. *v.* Clarke, 20 Q. B. D. 576; Casey *v.* Bentley, (1902) 1 Ir. R. 376.

(*b*) Coles *v.* Bristowe, L. R. 4 Ch. 3; Grissell *v.* Bristowe, L. R. 4 C. P. 36; Merry *v.* Nickalls, L. R. 7 H. L. 530. (The vendor contracts that in certain events he will enter into a contract.)

(*c*) Merry *v.* Nickalls, L. R. 7 H. L. 530.

(*d*) Maxted *v.* Paine, L. R. 4 Ex. 81.

(*e*) Allen *v.* Graves, L. R. 5 Q. B. 478.

(*f*) Maxted *v.* Paine, L. R. 6 Ex. 132.

(*g*) See the cases cited, *passim.*

(*h*) Shepherd *v.* Gillespie, 5 Eq. 293; Shaw *v.* Fisher, 5 De G. M. & G. 596; *Re* Towns' Drainage, &c. Co., Morton's case, 16 Eq. 104. For form of decree, see 5 Eq. pp. 298—302.

(*i*) See per *Cockburn*, C. J., in Grissell *v.* Bristowe, L. R. 4 C. P. p. 51, and per *James*, L. J., in Merry *v.* Nickalls, L. R. 7 Ch. p. 751.

(*k*) Per *Kelly*, C. B., in Davis *v.* Haycock, L. R. 4 Ex. p. 384, and per *Brett*, J., in Bowring *v.* Shepherd, L. R. 6 Q. B. p. 328.

such acceptance is the delivery of the executed transfer and certificate against the money, the point is of very little importance (*a*).

Where, however, the sale of shares is with registration guaranteed, the liability of the original purchaser remains until actual registration of the transferee as holder (*b*).

(2) Not on the Stock Exchange. The respective obligations of a vendor and purchaser are governed by the general law and any special terms the parties may have agreed upon. The vendor must deliver a duly executed instrument of transfer with the certificate against the price.

It is doubtful whether he is bound to take any steps to procure registration of the transferee as holder. If the contract is made with reference to the company's articles of association, which require the vendor of shares to procure the registration of the transferee, and the company, acting under its powers, refuses such registration, then the purchaser has a good defence to an action for specific performance, and if he has paid the consideration money in ignorance of the refusal he can recover it (*c*).

Where, however, the articles do not cast on the vendor the duty of registration, the better opinion appears to be that the vendor is under no duty to procure registration, and, consequently, the refusal to register is no defence to an action by the vendor for specific performance (*d*).

The fact that the vendor is only equitably entitled to shares registered in the name of a third person is no defence to an action for specific performance (*e*), nor, it seems, is the fact that a call has been made on shares which are not fully paid (*f*).

But it would seem that where a petition for the winding up of the company has been presented before the contract for sale has been made, specific performance will not be decreed, if an order for winding up is made (*g*). But the fact that the petition was presented

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(*a*) See also Torrington *v.* Lowe, L. R. 4 C. P. 26; Castellan *v.* Hobson, 10 Eq. 47.

(*b*) Cruse *v.* Paine, L. R. 4 Ch. 441; Grissell *v.* Bristowe, L. R. 4 C. P. 36; Davis *v.* Haycock, L. R. 4 Ex. 373.

(*c*) Wilkinson *v.* Lloyd, 7 Q. B. 27; cf. Stray *v.* Russell, 1 E. & E. p. 900, but see Poole *v.* Middleton, 29 B. 646.

(*d*) See Bermingham *v.* Sheridan, 33 B. 660; Robinson *v.* Chartered Bank, 1 Eq. 32; *Re* Gresham Life, &c., Co., L. R. 8 Ch. 446; Hawkins *v.* Maltby, L. R. 3 Ch. p. 194; Skinner *v.* City of London, &c., Co., 14 Q. B. D. 882; *Re* Coalport, &c., Co., (1895) 2 Ch. 404; Casey *v.* Bentley, (1902) 1 Ir. R. 376; Sheppard *v.* Murphy, 2 Ir. R. Eq. 544.

(*e*) Paine *v.* Hutchinson, L. R. 3 Ch. 388; Loring *v.* Davis, 32 C. D. 625.

(*f*) Hawkins *v.* Maltby, L. R. 3 Ch. 188; L. R. 4 Ch. 200.

(*g*) Emmerson's case, L. R. 1 Ch. 433.

after the making of the contract does not affect the rights of the parties (*a*).

As the discretion of the directors of a company to forfeit shares for non-payment of calls is a trust to be exercised for the benefit of all the shareholders, an agreement with a shareholder to relieve him from all liability on his consenting to absolute forfeiture will not be specifically enforced, if it be shown that the discretion was not properly exercised (*b*).

All contracts, for the sale of shares in joint stock banking companies, made after 1st of July, 1867, are void, unless the distinguishing numbers of such shares are set out in the contracts (*c*); but an error as to such numbers in the transfer of such shares is immaterial, as it can be rectified afterwards (*d*).

The Court has power to rectify the register of shareholders of a company, on motion or summons, and in doing so may order the company to pay any damage which may have been sustained by the register being inaccurate (*e*). The Court may order rectification whether the question arises between the company and members or alleged members, or between persons who claim to be members.

The Court's jurisdiction is discretionary, and will not be exercised in a case of difficulty or complication; in such a case the parties will be left to bring an action for that purpose (*f*).

When the only question between persons who claim to be members is one of conflicting equities, and the company itself is not in default, it is doubtful whether the Court has jurisdiction under the section (*g*).

The Court cannot interfere when the articles of association have not been complied with (*h*); nor will the Court overrule the discretion of the directors, where the articles have given them a

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(*a*) Cruse *v.* Paine, 6 Eq. 641; Chapman *v.* Shepherd, L. R. 2 C. P. 228; Hodgkinson *v.* Kelly, 6 Eq. 496; Evans *v.* Wood, 5 Eq. 9; Holmes *v.* Symons, 13 Eq. 66.

(*b*) Harris *v.* N. Devon Ry. Co., 20 B. 384.

(*c*) 30 & 31 Vict. c. 29, s. 1.

(*d*) *Re* International Contract Co., Ind's case, L. R. 7 Ch. 485; Perry *v.* Barnett, 14 Q. B. D. 467.

(*e*) Companies (Consolidation) Act, 1908, s. 32.

(*f*) Stewart's case, L. R. 1 Ch. pp. 585, 586; *Ex p.* Watkins, 14 L. T. 696; *Re* London, Hamburg, &c., Bank, Ward and Henry's case, L. R. 2 Ch. 431, and cf. Bellerby *v.* Rowland, (1902) 2 Ch. 14.

(*g*) See, in favour, Stewart's case, supra; Musgrave and Hart's case, 5 Eq. 193; against, Ward and Henry's case, supra, and *Ex p.* Sargent, 17 Eq. p. 276.

(*h*) Musgrave's case, 5 Eq. 195; Marino's case, L. R. 2 Ch. 596; *Re* Taurine, &c., Co., 25 C. D. 118.

discretion (*a*). But if the facts establish a clear legal right in one of the parties then the Court will exercise its jurisdiction (*b*).

Ships.—All British ships and shares in them must be British owned, and the owners must be registered (*c*). The transfer, transmission, and mortgage of such ships or shares can only be effected in the manner and according to the forms prescribed by the Act (*d*). No notice of any trust is to be received or entered in the register (*e*). The title of the person registered is absolute, but the Court has power to prohibit a transfer (*f*).

Under the old Ship Registry Acts, and under the Merchant Shipping Act, 1854, it was held that the policy of the law required that the prescribed formalities must be fulfilled to confer any rights at all, and consequently no rights arising from unregistered documents could be enforced even in equity (*g*).

Even then, however, the Court had jurisdiction to enforce equitable rights over foreign ships, since they were not included in the Acts (*h*); and it had also jurisdiction when the ship was built in England in order to be sold abroad, and to be delivered at a foreign port (*i*).

There are many *dicta* that the Court would interfere in the case of fraud, but there appears to be no reported decision upon the question. But where a person, who had no title, procured himself to be registered, the Court, it seems, would, even under the then law, have compelled him to retransfer the ship to the real owner and account for the earnings (*k*).

Moreover, the policy of the old Acts did not extend to the proceeds of the sale of ships. Thus, where a ship was registered in the name of the purchaser's son, who, after the purchaser's death, acknowledged the executors' title and agreed to sell it, it was held, after he had sold, that the executors could recover the proceeds of sale (*l*).

(*a*) Walker's case, 2 Eq. 554; Marshall *v.* Glamorgan, &c., Co., 7 Eq. 129.

(*b*) *Ex p.* Shaw, 2 Q. B. D. 463.

(*c*) Merchant Shipping Act, 1894, ss. 1—23, 48—55; 1906, ss. 51—53.

(*d*) Sects. 24—30 (Transfer); 31—38 (Mortgage); 39—46 (Certificates). See Burgis *v.* Constantine, (1908) 2 K. B. 484.

(*e*) Sect. 56; but see sect. 57, infra, p. 438.

(*f*) Sect. 30; see *Re* La Blanca, 77 L. J. P. 91.

(*g*) See for old Acts, Battersby *v.* Smyth, 3 Madd. 110; Hughes *v.* Morris, 2 De G. M. & G. 349, 357; for Act of 1854, Liverpool Borough Bank *v.* Turner, 2 De G. F. & J. 502.

(*h*) Hart *v.* Herwig, L. R. 8 Ch. 860.

(*i*) Union Bank of London *v.* Lenanton, 3 C. P. D. 243.

(*k*) Holderness *v.* Lamport, 29 B. 129.

(*l*) Armstrong *v.* A., 21 B. 78.

The Merchant Shipping Act, 1862 (*a*), however, amended the law so as to enable equitable rights to be enforced. The Act is now repealed and replaced by sect. 57 of the Act of 1894, which runs as follows:

"The expression 'beneficial interest,' where used in this Part of this Act (*b*), includes interests arising under contract and other equitable interests; and the intention of this Act is, that (without prejudice to the provisions of this Act for preventing notice of trusts being entered in the register book or received by the registrar (*c*), and without prejudice to the powers of disposition, and of giving receipts conferred by this Act on registered owners and mortgagees (*d*), and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships (*e*)) interests arising under contracts and other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property" (*f*).

The earlier cases which conflict with this section have therefore ceased to be of any value.

It has been held that an owner who has executed a bill of sale absolute can show that it was intended only as a mortgage, and the Court will, for such a purpose, go behind the register and ascertain the real transaction (*g*). And an owner may show that the transferee of a mortgage had agreed to postpone the date of repayment (*h*). An agreement to transfer will accordingly be enforced (*i*).

Where the registered owner was, in fact, a trustee, and he executed a mortgage in blank for an unauthorised person, it was held that, as the mortgage was not in accordance with the statute, the title of the *cestui que trust* was not postponed (*k*).

The net result of the statutes and cases is, that if the contract is one proper for specific performance to be decreed, the mere fact that the contract relates to a ship will not disentitle the Court to make a decree. It will, of course, make a difference to the form of the decree.

(*a*) Sect. 3.

(*b*) See sects. 5, 9, 58, 71.

(*c*) Sect. 56.

(*d*) Sects. 31, 40, 56.

(*e*) Sect. 1.

(*f*) The Venture, (1908) P. 218 (C. A.), resulting trust; and see Stapleton *v.* Haymen, 2 H. & C. 918; and, for the liability of a beneficial owner, see sect. 58.

(*g*) Ward *v.* Beck, 13 C. B. (N. S.) 668; The Innisfallen, L. R. 1 Ad. & E. 72.

(*h*) The Cathcart, L. R. 1 Ad. & E. 314.

(*i*) Batthyany *v.* Bouch, 44 L. T. 177.

(*k*) Burgis *v.* Constantine, (1908) 2 K. B. 484.

As above stated (*a*), specific performance of contracts relating to chattels will be enforced in proper cases, and may be resisted upon the same grounds as the specific performance of other contracts. Thus, where the plaintiff had, without actual fraud, contracted for the purchase of two very valuable jars, the parties not being upon an equal footing, since the plaintiff well knew, and the vendor (who was an elderly lady) was ignorant of their value, and sold them at an inadequate price, specific performance was refused (*b*).

In the principal case, the Lord Chancellor lays it down as a general rule, "That the Court will not decree a specific performance of a contract when the party has not the thing to deliver." Thus, where a bill was filed against the provisional committee of a projected railway company for specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates, Lord *Cottenham*, C., allowed a demurrer (*c*), because not only was there no allegation in the bill that the defendants had in their possession any scrip to deliver, but that the bill contained statements from which the contrary might rather be inferred.

Chattels.—Now sect. 52 of the Sale of Goods Act, 1893, enacts: "In any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages." The judgment may be either unconditional or upon such terms as to the payment of damages, or the price, or otherwise, as the Court may think fit.

4. Contracts relating to Personal Acts.

Notwithstanding some early decisions to the contrary, it is now settled that, with some few exceptions, the Court will not decree specific performance of contracts to do certain works, such as to build

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(*a*) Ante, p. 428, and see post, p. 458, Pusey *v.* P.

(*b*) Falcke *v.* Gray, 4 Drew. 651.

(*c*) Columbine *v.* Chichester, 2 Ph. 27. As to cases in which plaintiff has made specific performance impossible, see Hipgrave *v.* Case, 28 C. D. 356; Nicholson *v.* Brown, (1897) W. N. 52.

or repair (*a*), to make a railway (*b*), to work quarries (*c*), coal mines (*d*), to make good a gravel pit (*e*).

The principal reason is the inconvenience and even practical impossibility of the Court taking upon itself to superintend, as between builders, contractors, railway companies and others, the erection and construction of a large number of buildings, and probably half the railways in the kingdom (*f*).

The Court, moreover, will not enforce specifically the performance of continuous duties, especially if they would spread over a long period of time, as the Court could not undertake to see to such performance (*g*).

It may be here mentioned that when an agreement is entire, the Court will not compel the defendant to fulfil his part unless the plaintiff can (*h*) and does fulfil his part also (*i*). *Secus* when the agreement is divisible (*k*).

In a case decided before the passing of Lord Cairns' Act (*l*), A., the plaintiff, agreed to grant a lease to B., the defendant, as soon as B. should have built a house with the necessary outbuildings on the land of the value of 1,400*l*. at the least, "according to a plan to be submitted to and approved by A." B. agreed to build and take the lease. No plan had been approved of. It was held that no decree could be made for specific performance (*m*); and in

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(*a*) Errington *v.* Aynesley, 2 Bro. Ch. p. 343; Lucas *v.* Comerford, 3 Bro. Ch. 166; Paxton *v.* Newton, 2 Sm. & Gif. 437; Kay *v.* Johnson, 2 Hem. & M. 118.

(*b*) South Wales Ry. Co. *v.* Wythes, 1 K. & J. 186 (on appeal), 5 De G. M. & G. 880; Greenhill *v.* Isle of Wight Ry. Co., 19 W. R. 345.

(*c*) Booth *v.* Pollard, 4 Y. & C. Ex. 61.

(*d*) Pollard *v.* Clayton, 1 K. & J. 462; Wheatley *v.* Westminster, &c., Coal Co., 9 Eq. 538; and see Lord Abinger *v.* Clayton, 17 Eq. 358, 369.

(*e*) Flint *v.* Brandon, 8 V. 159.

(*f*) The South Wales Ry. Co. *v.* Wythes, 1 K. & J. 200.

(*g*) Blackett *v.* Bates, L. R. 1 Ch. 117; Powell, &c., Coal Co. *v.* Taff Vale Ry. Co., L. R. 9 Ch. 331; Ryan *v.* Mutual Tontine, &c., Association, (1893) 1 Ch. 116; Phipps *v.* Jackson, 56 L. J. Ch. 550.

(*h*) Hipgrave *v.* Case, 28 C. D. 356; Nicholson *v.* Brown, cited infra, p. 455.

(*i*) Blackett *v.* Bates, L. R. 1 Ch. 117; Gervais *v.* Edwards, 2 Dr. & War. 80; Dietrichsen *v.* Cabburn, 2 Ph. 52; Hills *v.* Croll, 2 Ph. 60; Firth *v.* Ridley, 33 B. 516.

(*k*) Wilkinson *v.* Clements, L. R. 8 Ch. 96; Odessa Tramways Co. *v.* Mendel, 8 C. D. 235.

(*l*) 21 & 22 Vict. c. 27, repealed 46 & 47 Vict. c. 49; for the cases under this Act and the Judicature Act, 1873, see post, pp. 452—457.

(*m*) Brace *v.* Wehnert, 25 B. 348, but see post, pp. 441, 442.

another case specific performance of an agreement by a landlord to execute repairs was refused (*a*).

The Courts have not acted consistently with regard to building contracts. At first they were specifically enforced, and then not at all, but now they will be enforced if the work is so definite that the Court can enforce obedience to its orders (*b*).

Lord *Rosslyn*, C., was of opinion that if an agreement for building were in its nature defined, there would be no great difficulty in decreeing specific performance (*c*); *Story*, J., has expressed the same opinion (*d*). And it seems that in Scotland the Courts have in a very sensible manner solved the difficulty which has prevented the English Courts from compelling the specific performance of contracts to build by the appointment of a proper person to superintend the performance of the work (*e*).

Where the defendant under the contract with the plaintiff has obtained possession of land, it is clear that the Court has jurisdiction to enforce specific performance of another part of such contract by the defendant to do *defined* work *upon such land*, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages (*f*). Orders of this kind have frequently been made where railway companies have contracted to do works on lands acquired from the plaintiff (*g*).

The rule is that the Court will not enforce specific performance of a contract to build unless (1) the building work is defined by the contract in such a way that the Court can see the exact nature of the work (*h*); (2) the plaintiff has an interest in having the contract performed which cannot be adequately compensated by damages for

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(*a*) Norris *v.* Jackson, 1 John. & H. 319.

(*b*) See per *Collins*, L. J., in Wolverhampton Corporation *v.* Emmons, (1901) 1 K. B. at p. 524.

(*c*) Mosely *v.* Virgin, 3 V. 185.

(*d*) See Stor. Eq. Jur. s. 728, and Cubitt *v.* Smith, 10 Jur. (N. S.) 1123.

(*e*) Clark *v.* Glasgow Assurance Co., 1 M'Queen, H. L. Cas. 670.

(*f*) Storer *v.* G. W. Ry. Co., 2 Y. & C. Ch. 48; Franklyn *v.* Tuton, 5 Madd. 469.

(*g*) See Sanderson *v.* Cockermouth, &c., Ry., 11 B. 497; Lytton *v.* G. N. Ry. Co., 2 K. & J. 394; Darnley *v.* L. C. & D. Ry. Co., L. R. 2 H. L. 43; A.-G. *v.* Mid-Kent Ry. Co. and S. E. Ry. Co., L. R. 3 Ch. 100; Cooke *v.* Chilcott, 3 C. D. 694; Fortescue *v.* Lostwithiel, &c., Ry. Co., (1894) 3 Ch. 621; Jersey *v.* G. W. Ry. Co., (1894) 3 Ch. 625 (n.); and cf. Lane *v.* Newdigate, 10 V. 192; Hood *v.* N. E. Ry. Co., L. R. 5 Ch. 525; Wilson *v.* Northampton, &c., Ry. Co., L. R. 9 Ch. 279.

(*h*) See Rushbrooke *v.* O'Sullivan, (1908) 1 Ir. R. 232.

breach of the contract; and (3) the defendant has, by the contract, obtained possession of the land on which the work is to be done (*a*).

The ground which makes a Court of equity more anxious to decree specific performance of a contract to do certain works, as to build or to make a road in such cases is, that the plaintiff, by reason of his having parted with his land to the defendant, has no opportunity of erecting the buildings at his own cost, and so ascertaining the amount of damages sustained by reason of the non-performance of the contract (*b*); thus, in one case, a contract to erect a market-place would have been specifically enforced if the defendants had not fulfilled their contract pending the hearing (*c*); and in another case specific performance of a contract to make a railway siding was decreed (*d*).

Again, acts amounting to a part performance of the contract may so define the way in which the contract is to be fulfilled that the Court can compel specific performance, which otherwise it could not do (*e*), but acts of part performance will not of themselves supply the want of jurisdiction in their absence (*f*).

The tendency of the modern decisions where companies have contracted to perform certain works, and have got the whole benefit of the agreement, is to struggle with any amount of difficulties in order to compel specific performance (*g*); hence it has been held to be no defence to an action by a private individual against a railway company that the public would be subjected to inconvenience if the company were compelled specifically to perform their contract (*h*).

So also a railway company which had agreed to make a carriage

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(*a*) Wolverhampton Corporation *v.* Emmons, (1901) 1 K. B. 515, per *Romer*, L. J., at p. 525; Molyneux *v.* Richard, (1906) 1 Ch. 34.

(*b*) South Wales Ry. Co. *v.* Wythes, 1 K. & J. 200.

(*c*) Price *v.* Penzance Corporation, 4 Ha. 506.

(*d*) Greene *v.* West Cheshire Ry. Co., 13 Eq. 44. See also Storer *v.* G. W. Ry. Co., 2 Y. & C. Ch. 48; Soames *v.* Edge, Johns. 669; Wilson *v.* Furness Ry. Co., 9 Eq. 28.

(*e*) Price *v.* Penzance Corporation, 4 Ha. 506, 509; see also Pembroke *v.* Thorpe, 3 Swans. 437 (n.); Sanderson *v.* Cockermouth, &c., Ry. Co., 11 B. 497; Oxford *v.* Provand, L. R. 2 P. C. 135; Crook *v.* Seaford Corporation, 10 Eq. 678, and see infra, notes, p. 467.

(*f*) Kirk *v.* Bromley Union, 2 Ph. 640, 648; Crampton *v.* Varna Ry. Co., L. R. 7 Ch. 562. And see South Wales Ry. Co. *v.* Wythes, 5 De G. M. & G. 880.

(*g*) Wilson *v.* Furness Ry. Co., 9 Eq. 33; Fortescue *v.* Lostwithiel, &c., Ry. Co., (1894) 3 Ch. 621.

(*h*) Raphael *v.* Thames Valley Ry. Co., L. R. 2 Ch. 147. See also A.-G. *v.* Mid-Kent Ry. Co. and S. E. Ry. Co., L. R. 3 Ch. 100.

road between certain points, on land conveyed to them by the plaintiffs, and to make and maintain a wharf for loading and discharging vessels at a specified place, was not allowed to set up the defence that the contract was *ultra vires,* on the ground that the company was incorporated for making a railway, and not a public road (*a*), or where they had only partially fulfilled the agreement, to set up the Statute of Limitations (*b*), or, lastly, to insist that the Attorney-General was a necessary party, because it is the person with whom the agreement was made, it is he, and not the Attorney-General, on behalf of the public, who has a right to call for its performance, although the work to be done is for the benefit of the public (*c*).

Where, however, more perfect and complete justice can be done by an award of damages, the Court will not decree specific performance of such contracts. Thus, in one case, a railway company had agreed, for valuable consideration, with a landowner, to erect, construct, and fit up, a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company refused to erect a station in the specified place, and substituted one at a distance of two miles; it was held that justice could be better done by an inquiry in chambers as to damages, than by a decree for specific performance (*d*).

Contracts for Partnership.—As a general rule Courts of equity will not decree a specific performance of an agreement to enter into and carry on a partnership (*e*).

There are, however, some very limited exceptions to the rule, such for instance as the Court going the length of decreeing the execution of a formal deed recording the terms of the partnership which have been already agreed upon (*f*).

So also where there has been a *part performance* of the contract to enter into partnership for a fixed and definite term, the Court will decree specific performance thereof, and order the execution of a proper deed, and restrain, if necessary, the defendant from carrying on a partnership with another person, or from publishing notices of dissolution (*g*); but it will not do so when the amount of capital and

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(*a*) Wilson *v.* Furness Ry. Co., 9 Eq. 28, 33.

(*b*) Ibid.

(*c*) Ibid. 34.

(*d*) See Wilson *v.* Northampton, &c., Ry. Co., L. R. 9 Ch. 279.

(*e*) Scott *v.* Rayment, 7 Eq. 112; and see Sichel *v.* Mosenthal, 30 B. 371.

(*f*) Scott *v.* Rayment, 7 Eq. 115.

(*g*) Anon., 2 Ves. Sen. 630; England *v.* Curling, 8 B. 129; Hibbert *v.* H., Collyer on Partnership, p. 133.

the mode by which it is to be provided is undefined (*a*); nor will it do so when no term has been fixed for the duration of the partnership, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards (*b*).

In a case where a partner has a right to introduce a partner, and has exercised it, and the nominee has been accepted by the other partners, the Court will give the nominee all the relief usually given to a partner subject to his fulfilling the conditions contained in the partnership deed (*c*).

It is clear, moreover, that the Court will not interfere on behalf of parties claiming under contracts of partnership which are illegal as being in contravention of the laws regulating trade or otherwise (*d*), or tainted with fraud, hardship, or improper conduct (*e*).

Nor will the Court interfere where the contract of partnership has reference to the manufacture and sale of a medicine the recipe of which is secret, for in such case the Court would have no means of enforcing its own orders (*f*).

Goodwill.—The Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises where the business is carried on (*g*); but where the goodwill is altogether or principally annexed to the premises, a contract for the sale of the goodwill and premises may be enforced in equity (*h*). Goodwill is nothing more than the probability that the old customers will resort to the same place (*i*), in other words, although the vendor of goodwill may set up a rival business, he will be restrained from soliciting any former customer to deal with him or to cease to deal with the purchaser of the business (*k*).

(*a*) Downs *v.* Collins, 6 Ha. 418, 437.

(*b*) Hercy *v.* Birch, 9 V. 357; and see Sheffield Gas Consumers' Co. *v.* Harrison, 17 B. 294; New Brunswick Co. *v.* Muggeridge, 4 Drew. 698.

(*c*) Byrne *v.* Reid, (1902) 2 Ch. 735.

(*d*) Knowles *v.* Haughton, 11 V. 168; Hughes *v.* Statham, 4 B. & C. 187; *Re* Padstow, &c., Association, 20 C. D. 137; *Re* One and All, &c., Association, 25 T. L. R. 674; Thwaites *v.* Coulthwaite, (1896) 1 Ch. 496.

(*e*) Vivers *v.* Tuck, 1 Moo. P. C. 516; Maxwell *v.* Port Tennant, &c., Coal Co., 24 B. 495.

(*f*) Newbery *v.* James, 2 Mer. 446.

(*g*) Baxter *v.* Conolly, 1 J. & W. 576; Bozon *v.* Farlow, 1 Mer. 459, 474; Coslake *v.* Till, 1 Russ. 376.

(*h*) Cruttwell *v.* Lye, 17 V. 335; Shackle *v.* Baker, 14 V. 468; Chissum *v.* Dewes, 5 Russ. 29; Darbey *v.* Whitaker, 4 Drew. pp. 139, 140.

(*i*) Trego *v.* Hunt, (1896) A. C. 7; Cruttwell *v.* Lye, 17 V. 346; and see Potter *v.* Commissioners of Revenue, 10 Ex. 147; Allison *v.* Monkwearmouth, 4 Ell. & Bl. 13.

(*k*) Trego *v.* Hunt, supra; Jennings *v.* J., (1898) 1 Ch. 378; Gillingham *v.* Beddow, (1900) 2 Ch. 242; Curl *v.* Webster, (1904) 1 Ch. 685.

And although at one time it was doubtful whether a contract for the sale of the business of an attorney was legal (*a*), there is now no doubt that it is valid both at law (*b*), and in equity (*c*).

It seems to be doubtful whether there can be a decree for specific performance of a contract to sell a medical practice (*d*); but in that case there were other grounds for refusing specific performance.

Contracts of Hiring and Service.—Again, as contracts of hiring and service are of a confidential character, and cannot therefore be enforced against an unwilling party with any hope of ultimate success, the Courts refuse to decree specific performance of them (*e*), more especially as in such cases no Court can interfere so long as there is no property, the right to which is taken away from the person complaining (*f*).

The Court likewise has refused specific performance of a contract of apprenticeship against an infant, although the infant was bound by the contract (*g*).

For certain cases where the contract will be indirectly enforced by the Court granting an injunction, see post, pp. 449 *et seq.*

Contracts of Agency.—The specific performance of a *contract of agency* will not be enforced in equity, *e.g.*, to employ an auctioneer (*h*), or a shipping broker (*i*).

Husband and Wife.—A contract providing for the *future* separation of husband and wife, being against *public policy*, will not be enforced by the Court, even if it be contained in an instrument providing for an immediate separation, but looking forward to the event of the parties living together again, and to a future separation (*k*).

(*a*) See Candler *v.* C., Jac. p. 231; Bozon *v.* Farlow, 1 Mer. 459.

(*b*) Bunn *v.* Guy, 4 East, 190.

(*c*) Whittaker *v.* Howe, 3 B. 383; Aubin *v.* Holt, 2 K. & J. 66.

(*d*) May *v.* Thompson, 20 C. D. 705.

(*e*) Johnson *v.* Shrewsbury, &c., Ry. Co., 3 De G. M. & G. 914; Horne *v.* L. & N. W. Ry. Co., 10 W. R. 170; Pickering *v.* Bishop of Ely, 2 Y. & C. Ch. 249; Stocker *v.* Brocklebank, 3 Mac. & G. 250; Brett *v.* East India, &c., Shipping Co., 2 Hem. & M. 404; Frith *v.* F., (1906) A. C. 254; Mair *v.* Himalaya Tea Co., 1 Eq. 411; Bainbridge *v.* Smith, 41 C. D. 462; Sutton *v.* English, &c., Produce Co., (1902) 2 Ch. 502.

(*f*) Rigby *v.* Connol, 14 C. D. 482; Chamberlain's Wharf *v.* Smith, (1900) 2 Ch. 605. See also Gillis *v.* M'Ghee, 13 Ir. Ch. R. 48, 57; White *v.* Boby, 37 L. T. 652.

(*g*) De Francesco *v.* Barnum, 44 C. D. 430.

(*h*) Chinnock *v.* Sainsbury, 30 L. J. Ch. 409.

(*i*) Brett *v.* East India, &c., Shipping Co., 2 Hem. & M. 404.

(*k*) Westmeath *v.* Salisbury, 5 Bli. (N. S.), pp. 366, 367; Westmeath *v.* Countess of W., Jac. 142. See Vol. 1, p. 640. Cf. Harrison *v.* H., (1910) 1 K. B. 35.

The Court will, however, compel specific performance of agreements for the *present* separation between husband and wife, by decreeing the execution of proper deeds of separation, provided there be a *good consideration* to support the contract (*a*). See Vol. 1, p. 604.

Since the Married Women's Property Act, 1882 (*b*), a woman can contract, without the intervention of trustees (as was formerly necessary), to live apart from her husband, and that contract, like all other contracts, if not in other respects against public policy, is one which will be enforced (*c*).

A covenant by trustees to indemnify the husband against the wife's debts (*d*), though it be conditional on an annuity which was agreed to be paid being secured (*e*), or even a covenant by a third person to pay the husband's debts (*f*), the staying by the wife of a suit for nullity of marriage on the ground of her husband's impotency (*g*), or her acceptance of maintenance from her husband instead of proceeding against him for a divorce *a mensâ et thoro* (*h*), have all been held a good consideration for a separation agreement. So an agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, was decreed to be specifically performed (*i*). And the Court would also compel the husband by injunction, pursuant to his covenant not personally to molest his wife (*k*).

Where a couple, living in concubinage, agree to separate, the Court will give effect to a covenant by the man to pay the woman an annuity even if they come together again (*l*), and that, even if it is expressly provided that the annuity shall cease in that event (*m*).

Contracts of Indemnity.—Specific performance of an agreement or

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(*a*) Wilson *v.* W., 1 H. L. Cas. 538, Vol. 1, p. 604.

(*b*) 45 & 46 Vict. c. 75, s. 1, subs. 2.

(*c*) Besant *v.* Wood, 12 C. D. 622; McGregor *v.* M., 21 Q. B. D. 424; Sweet *v.* S., (1895) 1 Q. B. 12; Hulse *v.* H., 103 L. T. 804; and Married Women's Property Act, 1893, 56 & 57 Vict. c. 63; but see Cahill *v.* C., 8 A. C. 420; as explained in Clark *v.* C., 10 P. D. p. 195.

(*d*) Stephens *v.* Olive, 2 Bro. Ch. 90; Earl of Westmeath *v.* Countess of W., Jac. 126, 141; cf. Elworthy *v.* Bird, 2 S. & S. 372.

(*e*) Wellesley *v.* W., 10 Si. 256.

(*f*) Wilson *v.* W., 1 H. L. Cas. 538; 5 H. L. Cas. 40.

(*g*) Wilson *v.* W., 1 H. L. Cas. 538.

(*h*) Hobbs *v.* Hull, 1 Cox. (Eq.) 445.

(*i*) Gibbs *v.* Harding, L. R. 5 Ch. 336.

(*k*) Sanders *v.* Rodway, 22 L. J. Ch. 230.

(*l*) *Re* Abdy, (1895) 1 Ch. 455.

(*m*) *Ex p.* Naden, L. R. 9 Ch. 670.

covenant to indemnify will be decreed if the defendant has agreed to do some lawful act. Thus, if an assignor of a lease has paid rents and laid out monies which the assignee had covenanted to indemnify him against, the Court will direct payment to be made to the assignor on account of such breaches of covenant with costs (*a*). But the Court will not, it seems, make a general declaration of the assignor's rights to indemnity, or give liberty to apply from time to time in case of a future breach (*b*).

Arbitration.—Before the Arbitration Act, 1889, the Court would not decree the specific performance of a covenant (*c*), or execution of a bond (*d*), to refer disputes to arbitration. An inequitable refusal, however, of a plaintiff to submit to arbitration according to contract disentitled him to equitable relief, for he who seeks equity must do equity (*e*).

The Arbitration Act, 1889 (*f*), enacts,

Sect. 1: "A submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of a Court or Judge, and shall have the same effect in all respects as if made an order of Court."

Sect. 4: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings (*g*), apply to that Court to stay the proceedings, and that Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to

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(*a*) Lloyd *v.* Dimmack, 7 C. D. 398; and see Pember *v.* Mathers, 1 Bro. Ch. 53; L. & S. W. Ry. Co. *v.* Humphrey, 6 W. R. 784; Bank of England *v.* Cutler, 25 T. L. R. 509; but see Smith *v.* Clinton, 99 L. T. 840.

(*b*) Lloyd *v.* Dimmack, 7 C. D. 398; disapproving of Ranelaugh *v.* Hayes, 1 Vern. 189; and see Anglo-Australian, &c., Co. *v.* British Provident Society, 4 De G. F. & J. 341; Hughes Hallett *v.* Indian, &c., Mines, 22 C. D. 561.

(*c*) Price *v.* Williams, 1 V. 365; Street *v.* Rigby, 6 V. 815; Wilks *v.* Davis, 3 Mer. 507; Gervais *v.* Edwards, 2 Dr. & W. 80.

(*d*) South Wales Ry. Co. *v.* Wythes, 5 De G. M. & G. 880.

(*e*) Cheslyn *v.* Dalby, 2 Y. & C. Ex. 170.

(*f*) 52 & 53 Vict. c. 49; Annual Practice (1912), ii., pp. 749 *et seq.*

(*g*) Ochs *v.* O., (1909) 2 Ch. 121.

do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Sect. 12: "An award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect" (*a*).

By sect. 2, "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Sect. 4 is similar to sect. 11 of the Common Law Procedure Act, 1854, and by staying the action the plaintiff is indirectly compelled to specifically perform the contract to refer to arbitration (*b*). The Court has a discretion hereunder (*c*), and is bound to exercise it (*d*). "If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act (Common Law Procedure Act, 1854) was passed a *primâ facie* duty is cast upon the Court to act upon such agreement" (*e*). The Courts formerly showed a disposition to object to have their jurisdiction ousted by a reference to arbitration, but this no longer prevails. In *Renshaw* v. *Queen Anne Residential Mansions* (*f*), the defendants by a contract in writing agreed to employ the plaintiff for five years subject to a power to dismiss him for gross misconduct. Any dispute between the parties was to be referred to arbitration. The defendants dismissed plaintiff for, as they alleged, gross misconduct. Plaintiff brought an action for wrongful dismissal. The Court stayed the action under the section, the defendant being willing to refer all matters in dispute and to withdraw the dismissal if so ordered by the arbitration.

It is settled law that the Courts will not grant specific performance of an agreement to refer, or of a part of such an agreement, for example, the appointment of an arbitrator (*g*). In *Smith and Nelson's Arbitration* (*g*), an agreement to refer to arbitration provided for the appointment of three arbitrators, one to be appointed by each of the parties, and the third by the two so

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(*a*) See for the practice under this section, Annual Practice (1912), ii., p. 773.

(*b*) Willesford *v.* Watson, L. R. 8 Ch. 473; Plews *v.* Baker, 16 Eq. 564; Gillett *v.* Thornton, 19 Eq. 599.

(*c*) *Re* Carlisle, 44 C. D. 200; Workman *v.* Belfast Harbour Commissioners, (1899) 2 Ir. R. 234.

(*d*) Lyon *v.* Johnson, 40 C. D. 579.

(*e*) Per Lord *Selborne*, C., in Willesford *v.* Watson, L. R. 8 Ch., p. 480; and see Freeman *v.* Chester R. D. C., (1911) 1 K. B. 783. Cf. Kirchner *v.* Gruban, (1909) 1 Ch. 413.

(*f*) 45 W. R. 487.

(*g*) 25 Q. B. D. 545.

appointed. One of the parties refused to appoint an arbitrator, and the Court of Appeal held there was no power either under or apart from the Act to order him to do so. If the reference had provided for a reference to two arbitrators and an umpire, sects. 4, 5, and 6 of the Act would have met the case.

Sale at a Price to be fixed.—Where there is a contract for a sale at a price to be determined upon by *certain* persons as valuers, the Court will not ordinarily decree specific performance thereof unless the price be fixed in the manner determined upon so as to be made part of the agreement (*a*), except in those cases where the fixing of the price is a subsidiary point, and not of the essence of the contract (*b*), in which case the Court will appoint a valuer to ascertain the price.

On the same principle, where a contract provides that the price shall be fixed by named persons and they do fail for some reason to fix the price, the Court will not specifically enforce the contract or appoint valuers to fix the price (*c*); but if the contract is divisible, and the price fixed as to part, it will specifically enforce the contract as to that part (*d*). So, where the vendor refuses to allow a valuer to enter into his house for the purpose of making a valuation, the Court will compel the vendor to allow the valuation to proceed (*e*).

5. Specific Performance compelled by Injunction.

When a person has covenanted that certain things shall not be done, the only way in which he can be made to fulfil his obligation is by injunction restraining him from breaking it. In such cases the Court acts on the same principles as in specific performance. It will not grant an injunction where it will not decree specific performance (*f*)—for example, where the granting of an injunction would necessarily involve continuous employment of signalmen for an indefinite period (*g*).

(*a*) Milnes *v.* Gery, 14 V. 400; Firth *v.* M. Ry. Co., 20 Eq. 100; Vickers *v.* V., 4 Eq. 529.

(*b*) Dinham *v.* Bradford, L. R. 5 Ch. 529; Hordern *v.* H., P. C., (1910) A. C. 465; Jackson *v.* J., 1 Sm. & G. 184; Sale of Goods Act, 1893, s. 9.

(*c*) See, e.g., Milnes *v.* Gery, supra.

(*d*) Richardson *v.* Smith, L. R. 5 Ch. 648.

(*e*) Smith *v.* Peters, 20 Eq. 511, 513. See also Morse *v.* Merest, 6 Madd. (Madd. & G.) 26.

(*f*) Lumley *v.* Ravenscroft, (1895) 1 Q. B. 683; Peperno *v.* Hermiston, 31 Sol. Jo. 154; Wheatley *v.* Westminster Co., 9 Eq. 538; but see Donnell *v.* Bennett, 22 C. D. 835.

(*g*) Powell Duffryn, &c., Co. *v.* Taff Vale Ry. Co., L. R. 9 Ch. 331.

The substance of the contract is the material point, not its form. Thus, a contract negative in form but not in substance comes within the principles governing specific performance; while a covenant framed affirmatively but in substance negative will in a proper case be enforced by an injunction (*a*). Thus, a covenant that the employer will not, save in certain specified events, require his employee to leave his service is not a negative covenant (*b*). It is for the judge to determine whether the contract is negative or not (*c*).

The Court has restrained: a defendant from permitting the sale of specified goods at a particular place, in contravention of an agreement that the plaintiff should have the exclusive right of selling that class of goods there (*d*); a landowner from building in breach of a covenant not to build (*e*); a tenant from breaking a covenant not to carry on a dangerous trade (*f*); a telephone company from cutting off communication during the subsistence of a contract to maintain telephone wires and apparatus (*g*), and even, in a proper case, a company from applying to Parliament for a private Act (*h*). In a recent case, where the defendant had sold timber growing on his land to the plaintiff, and the contract gave the plaintiff rights of entry into the land, and of erecting saw mills upon the land, the Court restrained the defendant from preventing the execution of the contract (*i*).

A covenant "to act exclusively for" a company (*k*), or "to give his whole time" to the employment (*l*), is not negative. Nor is a covenant, on the assignment of a lease, to observe and perform negative covenants in the lease, for the true effect of such a covenant is

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(*a*) Catt *v.* Tourle, L. R. 4 Ch. 654; Donnell *v.* Bennett, supra.

(*b*) Davis *v.* Foreman, (1894) 3 Ch. 655; Kirchner *v.* Gruban, (1909) 1 Ch. 413; and see Wolverhampton Ry. Co. *v.* L. & N. W. Ry., 16 Eq. p. 440.

(*c*) Dowden *v.* Pook, (1904) 1 K. B. 45; cf. Maxim-Nordenfelt *v.* Maxim, (1894) A. C. 535.

(*d*) Altman *v.* Royal Aquarium Co., 3 C. D. 228; and see Donnell *v.* Bennett, 22 C. D. 835; cf. Fothergill *v.* Rowland, 17 Eq. 132.

(*e*) Rankin *v.* Huskisson, 4 Si. 13; Bowes *v.* Law, 9 Eq. 636; Lord Manners *v.* Johnson, 1 C. D. 673.

(*f*) Chapman *v.* Mason, 103 L. T. 390.

(*g*) Keith *v.* Nat. Telephone Co., (1894) 2 Ch. 147; but see Cochrane *v.* Exchange T. Co., 65 L. J. Ch. 334.

(*h*) See Ware *v.* Grand Junction Canal Co., 2 Russ. & M. p. 483; Heathcote *v.* N. Staffs. Ry. Co., 2 Mac. & G. 100; Lancaster, &c., Ry. Co. *v.* L. & N. W. Ry. Co., 2 K. & J. 293.

(*i*) Jones *v.* Tankerville (Earl of), (1909) 2 Ch. 440; see infra, p. 536. Cf. Fothergill *v.* Rowland, supra.

(*k*) Mutual Reserve, &c., Association *v.* New York Life, &c., Co., 75 L. T. 528.

(*l*) Whitwood, &c., Co. *v.* Hardman, (1891) 2 Ch. 416.

merely to give an indemnity to the assignor (*a*). In one case a covenant to give "the first refusal" of lands was enforced by injunction, but the facts were so special that the case is not a safe guide (*b*).

A plaintiff cannot restrain the defendant from breach if he has himself broken his own covenants (*c*), or has become incapable of fulfilling them (*d*).

Where a negative covenant is added to an affirmative covenant, of such a kind that the Court will not specifically enforce it, difficult questions arise. The cases are not altogether consistent, and consequently it is not easy to frame a definite principle which will embrace them.

In *Lumley* v. *Wagner* (*e*), the defendant contracted to sing at the plaintiff's theatre and not to sing elsewhere. She afterwards entered into an engagement to sing at another theatre, and the Court granted an injunction to restrain her from breaking her express negative promise. This decision has been much criticised (*f*); and, probably, if the facts were to come, for the first time, now for decision the result would be different, for the covenant was really only ancillary to the main part of the contract (*g*). It is, however, settled law, and governs all cases of a like nature, but it is an anomaly, and will not be extended (*h*). The decision will not be applied to an agreement, incapable of specific performance, which, though negative in form, is affirmative in substance (*i*).

Apart from such cases, it would seem clear that a negative covenant, joined to a positive covenant not capable of specific performance, will not be enforced by injunction if it is merely ancillary to the positive covenant and not of itself a substantial part of the

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(*a*) Harris *v.* Boots Cash Chemists, (1904) 2 Ch. 376; *Re* Poole & Clark, (1904) 2 Ch. 173.

(*b*) Manchester S. C. Co. *v.* Manchester Racecourse Co., (1901) 2 Ch. 37; but see Ryan *v.* Thomas, 55 Sol. Jo. 364.

(*c*) Telegraph Despatch, &c., Co. *v.* M'Lean, L. R. 8 Ch. 658; General Billposting Co. *v.* Atkinson, (1909) A. C. 118.

(*d*) Measures Bros. *v.* Measures, (1910) 2 Ch. 248.

(*e*) 1 De G. M. & G. 604. See also De Mattos *v.* Gibson, 4 De G. & J. 416; Grimston *v.* Cuningham, (1894) 1 Q. B. 125.

(*f*) Per Lord *Selborne*, in Wolverhampton and Walsall, &c., Co. *v.* L. & N. W. Ry. Co., 16 Eq. 433, at p. 440; Donnell *v.* Bennett, 22 C. D. 835; and see Fothergill *v.* Rowland, 17 Eq. 132.

(*g*) Merchants' Trading Co. *v.* Banner, 12 Eq. 18.

(*h*) Per *Lindley*, L. J., in Whitwood, &c., Co. *v.* Hardman, (1891) 2 Ch. pp. 426, 427; and see Fry, S. P. (1903), p. 373.

(*i*) See cases cited in note (*b*), p. 450, supra.

contract—for this reason, that if the Court did so, it would be indirectly granting specific performance to contracts which it has declared it will not specifically enforce (*a*).

6. Specific Performance and Damages under Lord Cairns' Act, and the Judicature Act, 1873.

Although the Court of Chancery had in former times given damages estimated by an issue *quantum damnificatus*, where it refused to decree specific performance (*b*), it afterwards disclaimed such jurisdiction; although it would give compensation, no doubt somewhat similar to damages (*c*), in many cases where it could decree specific performance (*d*).

The jurisdiction of the Court of Chancery with regard to damages, in addition to, *or* substitution for an injunction and specific performance, was much enlarged by the Chancery Amendment Act, 1858 (*e*). It enacted that in all cases in which the Court of Chancery had jurisdiction to entertain an application for an *injunction against a breach* of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the *specific performance* of any covenant, contract, or agreement, it should be lawful for the same Court, if it shall think fit, to *award damages* to the party injured, *either in addition to* or *in substitution* for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. (Sect. 2.) Subsequent sections provided the machinery for the assessment of damages and the trial of questions of fact either by a jury before the Court itself, or by the Court alone (sects. 3, 4, 5), or for the assessment of damages by a jury before any judge of one of the superior Courts of common law, at Nisi Prius, or before the sheriff of any county or city. (Sect. 6.)

This Act, which is not retrospective (*f*), and is discretionary (*g*), did not extend the jurisdiction of the Court to cases where there

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(*a*) See the cases above mentioned, and Phipps *v.* Jackson, 56 L. J. Ch. 550; Bucknall *v.* Tatem, 83 L. T. 121.

(*b*) City of London *v.* Nash, 3 Atk. 512; and see Cleaton *v.* Gower, Rep. t. Finch, 164.

(*c*) Phelps *v.* Prothero, 7 De G. M. & G. p. 734.

(*d*) Seton *v.* Slade, post, and note, p. 486.

(*e*) 21 & 22 Vict. c. 27 (Lord Cairns' Act).

(*f*) Wicks *v.* Hunt, Johns. 372, 380.

(*g*) Durell *v.* Pritchard, L. R. 1 Ch. 244.

was a plain common law remedy, and where the Court would not have interfered either by way of injunction or specific performance before the passing of the Act (*a*).

The Court, therefore, could not under the Act award damages save in cases where it had jurisdiction to decree specific performance and in addition to or substitution for that remedy. Hence, as a Court of Equity had no jurisdiction to compel specific performance of an agreement to borrow money, it could not award compensation or damages against a person who had refused to accept a loan for which he had contracted (*b*). And, in the same way, it could not grant damages for the breach of a contract of agency (*c*).

So where a plaintiff sued for specific performance of a contract by a company to allot shares to him, and, in the alternative if all the shares had been allotted to other persons, for damages, and it appeared that all the shares had been allotted before action commenced, it was held that as specific performance was not possible when the bill was filed, no damages could be granted (*d*). And a plaintiff will not be entitled to damages if he has done any act which would disentitle him to specific performance (*e*).

Where the Court, however, had jurisdiction to grant specific performance, it could grant specific performance of part of the contract and award damages for non-performance of part of the contract, in respect of which it could not have compelled specific performance. Thus, in *Soames* v. *Edge* (*f*), the plaintiff agreed to grant a lease to the defendant as soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and to pull down an old house, and build a new one on the site. The defendant caused the old house to be pulled down, but did not proceed to build a new house upon the old site. It was held that the plaintiff was entitled to damages for the non-building of the house and to specific performance of the contract to accept the lease (*g*).

(*a*) Durell *v.* Pritchard, L. R. 1 Ch. 244.

(*b*) Rogers *v.* Challis, 27 B. 175.

(*c*) Chinnock *v.* Sainsbury, 30 L. J. Ch. 409.

(*d*) Ferguson *v.* Wilson, L. R. 2 Ch. 77. See also Howe *v.* Hunt, 31 B. 420; Franklinski *v.* Ball, 33 B. 560; Hilton *v.* Tipper, 16 W. R. 888; Lewers *v.* The Earl of Shaftesbury, 2 Eq. 270.

(*e*) Hipgrave *v.* Case, 28 C. D. 356; Collins *v.* Stuteley, 7 W. R. 710; Scott *v.* Rayment, 7 Eq. 112; but see now Nicholson *v.* Brown, (1897) W. N. 52, cited infra, p. 455.

(*f*) Johns. 669.

(*g*) See also Mayor of London *v.* Southgate, 38 L. J. Ch. 141; Samuda *v.* Lawford, 4 Gif. 42; Norris *v.* Jackson, 1 John. & H. 319.

Cuddee v. Rutter.

In certain cases, although the Court has jurisdiction to compel specific performance, it can best do justice by awarding damages in substitution (*a*). Thus, in one case, a railway company agreed with a landowner to erect and fit up a station on certain lands which they had bought from him; the agreement contained no further description of the station, nor any stipulations as to the use of it. The company refused to erect a station in the specified place, and substituted one at the distance of two miles. Specific performance was refused and an inquiry as to damages directed.

Where the plaintiff, when he commenced his suit, was entitled to damages for delay in performance, and before the hearing the defendants performed the contract, it was held that the plaintiff was nevertheless right in bringing his suit to a hearing (*b*). Damages will be given in addition to specific performance of an agreement for a lease, in respect of the delay which was caused by the defendant's wilful refusal to perform his contract, and the consequent loss of profit to the plaintiff (*c*).

The Court, however, has no jurisdiction under Lord Cairns' Act, after a decree for specific performance of a covenant, upon motion in a cause, to add an order for assessing damages for a breach of the covenant, as such an order would be a supplemental decree upon facts which had subsequently occurred (*d*).

And it seems that after a decree for specific performance against a purchaser unable to complete, the plaintiff cannot at the same time obtain an order to rescind the agreement, and claim damages against the defendant for the breach thereof (*e*).

The Act was however applicable to cases where the damage sustained by the plaintiff was only nominal, as well as in cases where he was entitled to substantial damages (*f*).

Lord Cairns' Act has been repealed by the Schedule to the Statute Law Revision Act, 1883 (*g*), but sect. 5 of that Act enacts

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(*a*) Wilson *v.* Northampton, &c., Ry. Co., L. R. 9 Ch. 279.

(*b*) Cory *v.* Thames Ironworks, &c., Co., L. R. 3 Q. B. 181.

(*c*) Jaques *v.* Millar, 6 C. D. 153 (overruled on another point by Marshall *v.* Berridge, 19 C. D. 233); and see Wesley *v.* Walker, 26 W. R. 368; Royal Bristol, &c., Socy. *v.* Bomash, 35 C. D. 390; Jones *v.* Gardiner, (1902) 1 Ch. 191.

(*d*) Corporation of Hythe *v.* East, 1 Eq. 620.

(*e*) Henty *v.* Schroder, 12 C. D. 666 (where the form of order in Foligno *v.* Martin, 16 B. 586; Sweet *v.* Meredith, 4 Gif. 207, and Watson *v.* Cox, 15 Eq. 219, were not followed); and Jeffery *v.* Stewart, 80 L. T. 17; but see Baker *v.* Williams, 62 L. J. Ch. 315.

(*f*) Sayers *v.* Collyer, 28 C. D. 103.

(*g*) 46 & 47 Vict. c. 49.

that, "any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, or duty or liability imposed, or incurred, or compensation secured by or under any enactment repealed by the Act, shall not be affected by the repeal by this Act" (*a*).

The jurisdiction conferred by Lord Cairns' Act upon the Court of Chancery, and also the powers of granting damages formerly exerciseable by the Courts of Common Law, are by the Judicature Act, 1873 (*b*), vested in the High Court of Justice (sects. 16 and 76), and by sect. 24, "the High Court of Justice, and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." (Sub-s. 7.)

"Every remedy necessary for doing complete justice in any division of the High Court is provided by this section" (*c*).

The Chancery Division, unlike the former Court of Chancery, now has power to award damages in any case, whether the facts of the case give jurisdiction to decree specific performance or not (*d*).

"Under Lord Cairns' Act the plaintiff had first to make out that he was entitled to specific performance before he could get damages at all; now he may come into Court and say, 'If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages'" (*e*). Damages should be claimed in the alternative; if not so claimed, amendment may be allowed (*f*).

In *Nicholson* v. *Brown* (*g*), an action for specific performance of an

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(*a*) See per *Baggallay*, L. J., in Sayers *v.* Collyer, 28 C. D. 107.

(*b*) 36 & 37 Vict. c. 66.

(*c*) Per *Baggallay*, L. J., Serrao *v.* Noel, 15 Q. B. D., p. 559; and see Chapman *v.* Auckland Guardians, 23 Q. B. D. p. 299.

(*d*) See per *Kay*, J., Elmore *v.* Pirrie, 57 L. T. 333.

(*e*) Per *Kay*, J., Elmore *v.* Pirrie, 57 L. T. 333; and see Ryan *v.* Mutual Tontine, &c., Association, (1893) 1 Ch. 117; Bowman *v.* Hyland, 8 C. D. 588; cf. *Re* Deighton and Harris, (1898) 1 Ch. 458.

(*f*) Serrao *v.* Noel, 15 Q. B. D. 549.

(*g*) (1897) W. N. 52.

agreement by the defendant to take a lease, the plaintiff claimed damages in the alternative. After issue of the writ the plaintiff offered the defendant the lease, and stated that if the offer were declined he should let the premises and confine his claim to damages. The defendant did not accept the lease, and the plaintiff let the premises. At the trial the plaintiff said he should confine his claim to damages only, but he did not ask for leave to amend. At the close of plaintiff's case, defendant objected that the claim for specific performance having failed through plaintiff's own act, and no leave to amend having been asked for, the alternative claim for damages also failed (*a*). *Stirling*, J., gave leave to amend on the terms that the defendant was to be at liberty to raise any defence that he might have raised in a common law action for damages.

The result of the recent cases on this subject seems to be, that damages may be given although the plaintiff at the time of the issue of the writ had no case for specific performance (*b*); that a plaintiff may be entitled to damages although by his own act, after action commenced, he has made specific performance impossible (*c*), and that, notwithstanding the observations of the Court in many earlier cases (*d*), the Court will endeavour to do complete justice by enforcing the contract, or by giving damages for the breach, or by enforcing one part of the contract and giving damages for the remainder (*e*), as the justice of the case may seem to require.

The principles on which the Court acts in awarding damages in lieu of an injunction are very similar and have been recently restated in *Cowper* v. *Laidler* (*f*).

The Court will endeavour, where it is possible to do so, to assess the damages at the trial (*g*), or it may order an enquiry (*h*),

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(*a*) Hipgrave *v.* Case, 28 C. D. 356.

(*b*) Ryan *v.* Mutual Tontine, &c., (1893) 1 Ch. 116; Tamplin *v.* James, 15 C. D. 215.

(*c*) Nicholson *v.* Brown, (1897) W. N. 52.

(*d*) See Lavery *v.* Pursell, 39 C. D., p. 519; White *v.* Boby, 26 W. R. 133; Chapman *v.* Auckland Guardians, 23 Q. B. D., p. 299.

(*e*) Mayor, &c., London *v.* Southgate, 38 L. J. Ch. 141.

(*f*) Per *Buckley*, J., (1903) 2 Ch. 337; see also Shelfer *v.* City of London Electric, &c., Co., (1895) 1 Ch. p. 319; Dreyfus *v.* Peruvian Guana Co., 43 C. D. p. 333, 342; Martin *v.* Price, (1894) 1 Ch. 276.

(*g*) Jaques *v.* Millar, 6 C. D. 153; Wesley *v.* Walker, 26 W. R. 368; Serrao *v.* Noel, 15 Q. B. D., p. 560; Ryan *v.* Mutual Tontine, &c., (1893) 1 Ch. 116; Jones *v.* Gardiner, (1902) 1 Ch. 191.

(*h*) Seton (1901), p. 2207; Maxim-Nordenfelt, &c., Co. *v.* Nordenfelt, (1893) 3 Ch. 122.

Cuddee v. Rutter.

or refer the matter to an official referee (*a*), or may direct an issue (*b*).

In *Bayley* v. *Birch* (*c*), an action was brought for specific performance of an agreement to compromise, or for damages. An action for trespass to land had been withdrawn on the terms that plaintiff should purchase the land in question at a price to be fixed by arbitration, the defendant to give a good title, &c. Each party to pay his own costs, and the costs of the arbitration. The price was fixed, the plaintiff was ready to pay it, but the defendant could make no title. The plaintiff claimed, as the consideration for the compromise had failed, that he was entitled to be refunded the costs of the settled action (*d*). The Court limited the enquiry as to damages to the costs incurred by the plaintiff in the arbitration, and in the investigation of title.

(*a*) Arbitration Act, 1889, s. 13. Marsh *v.* Jones, 40 C. D. 563; Annual Practice (1912), i., pp. 593, 595, and Ord. XXXVI., r. 57 (n.).

(*b*) Cory *v.* Thames, &c., Co., L. R. 3 Q. B. 181; R. S. C. (1883), Ord. XXXIII., r. 1.

(*c*) (1894) 8 R. 647.

(*d*) See Bain *v.* Fothergill, L. R. 7 H. L. 158; Strutt *v.* Farlar, 16 M. & W. 249.

PUSEY *v.* PUSEY.

1684. 1 Vern. 273.

Specific Delivery up of Chattels.

Land held by the tenure of a horn. Bill brought by the heir for the horn (*a*).

BILL was, that a horn, which, time out of mind, had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz., *pecote this horn to hold huy thy land* [*sic*] (*b*).

The defendant answered as to part, and demurred as to the other part; and the demurrer was, that the plaintiff did not by his bill pretend to be entitled to this *horn* either as executor or devisee; nor had he in his bill charged it to be an *heir-loome.*

The demurrer was overruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the Lord Keeper *Guildford* was of opinion, that if the land was held by the tenure of a *horn* or *cornage*, the heir would be well entitled to the horn at law (*c*).

(*a*) Reg. Lib. 1684, B., fol. 310.

(*b*) Camden, speaking of the manor of Pusey, says, "the family of Pusey still hold it by a horn, anciently given to their ancestors by Canute, the Danish king." (Camd. Brit., Berks, p. 203, ed. 1607.) Dr. Hicks gives the inscription as follows (see Thes. Præf., p. xxv.):—

> "I Kynd Knowd geve Wyllyam Pecote
> Thys horne to hold by thy lond."

The name "Pecote," however, seems to be a mistake, and should be written "Pewse." The real inscription runs thus:—

> "Kyng Knowd geve Wyllyam Pewse
> This horne to hold by thy lond."
> "Archæologia," vol. 3, pp. 13, 14.

(*c*) Vide 1 Inst. 107 a.

DUKE OF SOMERSET *v.* COOKSON.

1735. 3 P. W. 390 (*a*).

Specific Delivery up of Chattels.

A bill lies to compel the delivery of an altar-piece, or other curiosity in specie.

The Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late Earls of Northumberland), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription, and dedication to Hercules. His Grace became entitled to it as treasure-trove within his said manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought in a bill in equity, to compel the delivery of this altar-piece *in specie, undefaced.*

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true for writings savouring of the realty a bill would lie, but not for anything merely personal (*b*) any more than it would lie for a horse or a cow. So a bill might lie for an heirloom, as in the case of *Pusey* v. *P.* (*c*). And though in trover the plaintiff could have only damages, yet in detinue, the thing itself, if it can be found, is to be recovered ; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in Chancery.

On the other side, it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law, only the intrinsic value is to be recovered, yet it would be very hard that one

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(*a*) 2 Eq. Ca. Abr. 164, pl. 28.

(*b*) Cud *v.* Rutter, 1 P. W. 570; ante, p. 422, nom. Cuddee *v.* Rutter; Colt *v.* Nettervill, 2 P. W. 304.

(*c*) 1 Vern. 273.

who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity, or ornament, *nolens volens.* Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer: that in itself, nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again *in specie;* and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly [by Lord Chancellor *Talbot*].

NOTES.

1. Generally.
2. Fiduciary relation, p. 461.
3. Deeds, p. 462.

1. Generally.

Since the decision in the cases of *Pusey* v. *P.*, and *The Duke of Somerset* v. *Cookson*, it has always been admitted as undoubtedly within the power of a Court having equitable jurisdiction to compel the delivery up of heirlooms, or chattels of *peculiar value* to the owner, although the heirlooms or chattels, if they could be found, might be recovered in an action of detinue, or their value in an action of trover. The ground of the jurisdiction is the same as that upon which the specific performance of an agreement is enforced—viz., that the specific thing is the object, and damages will not afford an adequate compensation.

"The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it" (*a*).

The reason for the interposition of the Court is still stronger when the chattel in question is an heirloom (*b*).

But the Court will not decree the specific delivery up of a chattel where adequate damages can be ascertained and awarded in an action at law. Thus, where by the terms of an agreement and the frame of the pleadings the plaintiff, an artist seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a Court of equity to interfere (*c*).

The principal cases have been followed by others of a similar character, having relation, one to a tobacco-box of a club (*d*), another to Masonic dresses and ornaments (*e*), another to a box of jewels (*f*) another to a cherrystone very finely engraved (*g*), another to an extraordinary wrought piece of plate and another to a valuable picture (*h*).

By the Sale of Goods Act, 1893, sect. 52, the Court now has jurisdiction, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically without giving the defendant the option to retain the goods on payment of damage.

2. Fiduciary Relation.

The interposition, however, of Courts of equity was not confined to those cases in which the articles sought were of some peculiar or intrinsic value, if there subsisted any fiduciary relation between the

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(*a*) Per Lord *Loughborough*, C., in Fells *v.* Read, 3 V. 71, 3 R. R. 47; and see ante, p. 430.

(*b*) Earl of Macclesfield *v.* Davis, 3 V. & B. 16.

(*c*) Dowling *v.* Betjemann, 2 John. & H. 544.

(*d*) Fells *v.* Read, supra.

(*e*) Lloyd *v.* Loaring, 6 V. 773.

(*f*) Saville *v.* Tancred, 1 Ves. Sen. 101; Belt's Supp. 70.

(*g*) Pearne *v.* Lisle, Amb. 77 (*dicta* of Lord *Hardwicke*, C.).

(*h*) Lowther *v.* Lord L., 13 V. 95; and see Nutbrown *v.* Thornton, 10 V. 163; Arundell *v.* Phipps, 10 V. 139; Buxton *v.* Lister, 3 Atk. 383; Falcke *v.* Gray, 4 Drew. 651; Claringbould *v.* Curtis, 21 L. J. Ch. 541; Holroyd *v.* Marshall, 10 H. L. Cas. p. 210.

parties. Thus, in *Wood* v. *Rowcliffe* (*a*), where a bill had been filed against an agent for the delivery up of furniture and household effects, deposited by the plaintiff with him, and to restrain him from parting with them, as he threatened to do, it was argued for the defendant, who demurred for want of equity, that household furniture and effects were not chattels of such a peculiar or valuable nature as to be within the rule. It was held by Lord *Cottenham*, C., "that where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of power" (*b*).

3. Deeds.

A Court of equity proceeding upon the same principle as in cases of chattels of peculiar value, entertains jurisdiction to decree a specific delivery up of deeds or writings to the persons legally entitled to them (*c*).

In *Jackson* v. *Butler* (*d*), where mortgaged deeds, delivered to a person for the purpose of receiving the principal and interest due on the mortgage, and pawned by him, were decreed to be delivered up by the pawnee, Lord *Hardwicke* observed, that the plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he was right in bringing a bill in equity for the recovery of his deeds.

So the Court will order the delivery up of the certificate of registry of a ship (*e*).

In such an action it was not necessary, as in trover, to prove conversion, or resistance to deliver them up when sought to be

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(*a*) 2 Ph. 382.

(*b*) And see Lingen *v.* Simpson, 1 S. & S. 600; Pooley *v.* Budd, 14 B. 34; Edwards *v.* Clay, 28 B. 145; as to contracts to purchase chattels, see ante, p. 461.

(*c*) Brown *v.* B., Dick. 62; Armitage *v.* Wadsworth, 1 Madd., p. 192; Reeves *v.* R., 9 Mod. 128; Tanner *v.* Wise, 3 P. W. 296; Ford *v.* Peering, 1 V. 72; Papillon *v.* Voice, 2 P. W., p. 478; Duncombe *v.* Mayer, 8 V. 320; Knye *v.* Moore, 1 S. & S. 61; Freeman *v.* Fairlie, 3 Mer., p. 30; Gray *v.* Cockeril, 2 Atk. 114; The Duchess of Newcastle *v.* Pelham, 3 Bro. P. C. 460; Reece *v.* Trye, 1 De G. & Sm. 273; Lady Beresford *v.* Driver, 14 B. 387, 16 B. 134; Tudor's L. C. Real Prop., 4th ed., p. 132; and cases there cited.

(*d*) 2 Atk. 306.

(*e*) Gibson *v.* Ingo, 6 Ha. 112.

recovered. But of course, if the defendant would have delivered them up without an action, the plaintiff would be liable to pay the costs unnecessarily incurred (*a*).

By the Conveyancing and Law of Property Act, 1881, sect. 9 (*b*), a person who retains deeds and gives to another person interested in them an acknowledgment of his right to have them produced and to take copies of them, and also gives an undertaking for their safe custody, may be ordered by the Court, upon application, to produce or produce and deliver the deeds; and if they are lost, destroyed or injured may be ordered to pay damages therefor upon a similar application.

The Court may enforce its order for delivery up of chattels by attachment, or it may order that execution shall issue under R. S. C. (1883), Ord. XLVIII. (*c*). But if such process is not applicable to the exigencies of the case, it may order a writ of assistance to issue. Thus, in *Wyman* v. *Knight* (*d*), the defendants, who were trustees, had been ordered to deliver up to the receiver in the action certain documents of title. One of them was out of the jurisdiction, the other had absconded. An injunction restraining the defendants from dealing with the documents was granted, and a writ of assistance ordered to issue.

(*a*) Turner *v.* Letts, 20 B., p. 191.

(*b*) 44 & 45 Vict. c. 41.

(*c*) Annual Practice (1912), i. p. 694.

(*d*) 39 C. D. 165.

LESTER [or LYSTER] *v.* FOXCROFT AND OTHERS (*a*).

1701. Colles's P. C. 108.

Part Performaace of a Parol Contract respecting Land.

Specific performance of a parol agreement to grant a lease decreed, notwithstanding the Statute of Frauds, after acts of part performance on the part of the lessee by pulling down an old house, and building new houses according to the terms of the agreement.

The appellant stated, that Isaac Foxcroft was seised in fee of a part of an ancient messuage called Wildhouse, in the parish of St. Giles's-in-the-Fields, in the county of Middlesex, and possessed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about 25th March, 1695, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was *particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that Foxcroft should, in consideration thereof, lease the said part to appellant*, from Michaelmas, 1695, for ninety-nine years, at a pepper-corn for the first year, and 150*l.* yearly rent for the last ninety-eight years.

At the time of making such agreement, *there was no memorandum or note thereof in writing; but in performance of the agreement* appellant entered into that part of the messuage, and, at his own cost, pulled down the same, and built several new houses thereon (the whole fourteen being almost finished), and therein disbursed several thousand pounds—about 2,000*l.* his own money, and several

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(*a*) S. C., cited 2 Vern. 456, nom. Foxcroft *v.* Lister; Gilb. Rep. 4, 11; Pr. Ch. 519, 526, nom. Leicester *v.* Foxcroft.

sums borrowed from Foxcroft upon his own securities, yet unsatisfied—and was all along in possession, and acted as sole proprietor and owner, and was acknowledged as such by Foxcroft, who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses were finished, appellant demised the same in his own name, received the rents, and Foxcroft never received nor claimed any part thereof.

About August, 1698, Foxcroft (being then ill of the sickness whereof he died) made his will, and his daughter, Elizabeth Foxcroft, sole executrix; and devised to his second son, Isaac Foxcroft, his heirs and executors, all his estate in the said ancient messuage called Wildhouse; and if he died under twenty-one, to his eldest son Henry Foxcroft, his daughter Elizabeth, and Benjamin Whichcott, and appointed Francis Nicholson guardian of his son Isaac, with power to let and set for such time during his minority. And immediately after making the said will, he delivered it to appellant's wife, to let the appellant see there was nothing therein inconsistent with his said agreement; and ordered her to get a lease prepared speedily according to the agreement; and delivered to her two building leases executed by him, in pursuance of like agreements with others, as precedents to have appellant's lease drawn by; and appellant accordingly caused the leases to be prepared, bearing date about the time of the said agreement, and brought two parts thereof to Foxcroft to be executed, who caused both of them to be read to him, and approved of the same; but observed that there was a mistake in one part thereof in his name, John being put for Isaac, and disliked that the sealing and delivery was not endorsed on the back thereof; and thereupon ordered appellant to get the mistake amended, and the endorsement made by the same hand that engrossed the deeds, and then to bring them again, and he would execute them; and often expressed his dissatisfaction that they were not brought back for execution as soon as he expected, and was under great uneasiness of mind lest he should die before it was done.

And appellant, a few days before the death of Foxcroft, brought the deeds, so amended, to his house, to have them so executed as he had directed, but respondent refused to let appellant see or speak with Foxcroft, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them ; and since his death, respondents refused to execute leases, according to the agreement, whereon appellant, in Hilary Term, 1698, exhibited his bill in Chancery for a specific execution of the agreement, and the cause being heard, 6th March, 1700, the Lord Keeper (*a*) declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; *which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been, at appellant's great expense, so far executed on his part, there ought to be a reciprocal performance of it on the other part;* and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them (*b*).

The respondents, in affirmance of the decree, alleged, that Isaac Foxcroft made his will, dated 30th August, 1698, of the import stated by appellant, and died 15th September following; and, in Hilary Term then next, appellant filed his bill against respondents for a specific execution of a parol agreement expended; and that respondents had answered, that they knew not that appellant was any ways concerned in pulling down and rebuilding the premises, otherwise than as agent or servant for the testator, at whose proper charge and expense they insisted the work was done; and denied that any such agreement for a lease was ever made by the testator to the appellant; and showed that the appellant was greatly indebted to the testator before any building began, and that the testator had no other way to obtain his debt but by employing him in work; and that the testator, though of perfect understanding, had not taken any notice of such supposed agreement in his will; and that the appellant had not required a performance thereof, for near three years and a half after, nor until so near an approach of the testator's death; and showed, further, that three of the appellant's witnesses were considerable legatees in the testator's will, and that their evidence tended to enlarge the personal estate for their own benefit;

(*a*) Sir Nathan Wright.

(*b*) J. Jekyll, Hen. Poley, counsel for the appellant.

and finally, insisted, that nothing of such pretended agreement being in writing, and signed by either of the parties, the Statute made for preventing frauds and perjuries (*a*) was a full bar to the appellant's pretences (*b*).

Die Lunæ, 7. *Aprilis,* 1701. Upon hearing counsel on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismission complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the respondents to whom the estate in question should come, by virtue of his father's will, should, when he or they should be of age, execute to the appellant Lyster, his executors, &c., such a lease of the premises in question, as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that the appellant and his assigns should, in the meantime, hold and enjoy the same, under the covenants and agreements in the said intended lease contained, discharged of all incumbrances done by said Isaac Foxcroft, or any claiming under him.—Lords' Journ. vol. xvi., p. 644.

NOTES.

1. Generally.
2. What acts amount to part performance, p. 469.
3. Evidence, pleading, p. 475.

1. Generally.

"The Statute of Frauds" (*c*), observes Lord *Redesdale,* "says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) of this kind was *Foxcroft* v. *Lyster* (*d*), which was decided on a principle acted upon in Courts of law, but not applicable to the particular case. It was against conscience to suffer the party who had entered

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(*a*) 29 Car. 2, c. 3.

(*b*) John Clapham, counsel for respondents.

(*c*) 29 Car. 2, c. 3.

(*d*) See note (*a*), p. 464, supra.

Lester v. Foxcroft.

and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out." And after referring to this and subsequent cases, he continues: "It appears, from these cases, that Courts of Equity have decided on equitable grounds, in contradiction to the positive enactment of the Statute of Frauds, though their proceedings are in words included in it" (*a*).

The extent of the application of the doctrine of part performance is not precisely defined. Probably it applies to all cases in which the Court would entertain a suit for specific performance, if the contract had been in writing (*b*); it is not confined to contracts for the acquisition of that which is an interest in land within sect. 4 (*c*).

In order that part performance may be made available as an answer to the statute it is necessary—

1. That the acts of part performance must be unequivocally referable to the alleged agreement; in other words, "part performance, to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement" (*d*). And, therefore, part performance of an engagement which is purely a matter of honour, and not a legal obligation, will not give the Court jurisdiction (*e*).

2. The acts must be done by the plaintiff and be such that it would amount to fraud in the defendant to take advantage of the contract not being in writing (*f*): hence the acts must be acquiesced in or done with the knowledge of the other party.

3. The parol agreement must be of such a character that the

(*a*) Bond *v.* Hopkins, 1 Sch. & L. p. 433. See also Clinan *v.* Cooke, 1 Sch. & L. p. 41; Dillwyn *v.* Llewellyn, 10 W. R. 742; Rochefoucauld *v.* Boustead, (1897) 1 Ch. p. 206.

(*b*) McManus *v.* Cooke, 35 C. D. 681 at p. 697, *Kay*, J.

(*c*) Ibid. and see Maddison *v.* Alderson, 8 A. C. 474, per *Selborne*, C. at p. 479; but see Britain *v.* Rossiter, 11 Q. B. D. 123; Prested Miners, etc. *v.* Garner, (1910) 2 K. B. 776, (1911) 1 K. B. 425.

(*d*) Per Lord *Brougham* in Lady Thynne *v.* Earl of Glengall, 2 H. L. Cas. p. 158; followed in *Re* Ryan, 3 Ir. R. Eq. 238; Frame *v.* Dawson, 14 V. 386. But see Laird *v.* Birkenhead Ry. Co., John. 500.

(*e*) See Walpole *v.* Orford, 3 V. 402.

(*f*) See Caton *v.* C., L. R. 1 Ch. p. 148 (affirmed L. R. 2 H. L. 127); Whitbread *v.* Brockhurst, 1 Bro. Ch. p. 416; Dickinson *v.* Barrow, (1904) 2 Ch. 339.

Court would be able to decree specific performance thereof if it were in writing (*a*).

4. The parol evidence must prove the agreement.

2. What Acts amount to Part Performance.

Ancillary and introductory acts.—Acts merely introductory to and done *previous* to an agreement, cannot be presumed to be done in pursuance of it, and cannot therefore be considered as acts of part performance (*b*).

Acts, moreover, which, though *subsequent*, are merely ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title (*c*), giving orders for conveyances to be drawn and engrossed (*d*), giving instructions for a lease (*e*), going to view an estate (*f*), putting a deed into a solicitor's hands to prepare a conveyance (*g*), measuring the estate (*h*), employing surveyors to value timber thereon, or fixing upon persons as appraisers to value stock (*i*), appointing a person to make a valuation of the land (*k*), altering a draft (*l*), registering deeds (*m*), obtaining the release of a right from a third party for a valuable consideration by the plaintiff in pursuance of a condition of the contract (*n*), and similar acts of an equivocal nature, are not sufficient acts of part performance to take a parol agreement out of the statute.

Payment of part (*o*), or even of *all* the purchase-money will not be

(*a*) Kirk *v.* Guardians of Bromley, 2 Ph. 640; Crampton *v.* Varna Ry. Co., L. R. 7 Ch. 562.

(*b*) Whitbread *v.* Brockhurst, 1 Bro. Ch. p. 412; Parker *v.* Smith, 1 Coll. 608, 623.

(*c*) Whaley *v.* Bagnel, 1 Bro. P. C. 345; 6 Bro. P. C. 45.

(*d*) Phillips *v.* Edwards, 33 B. 444; Clerk *v.* Wright, 1 Atk. 12; Whitchurch *v.* Bevis, 2 Bro. Ch. 559; Cooke *v.* Tombs, 2 Anst. 420.

(*e*) Phillips *v.* Edwards, 33 B. 444; Cole *v.* White, cited in 1 Bro. Ch. p. 409.

(*f*) Clerk *v.* Wright, 1 Atk. 12.

(*g*) Whitchurch *v.* Bevis, 2 Bro. Ch. 559; Redding *v.* Wilkes, 3 Bro. Ch. 400.

(*h*) Pembroke *v.* Thorpe, 3 Swans. 437 (n.)

(*i*) Whitchurch *v.* Wainewright, 1 Bro. Ch. 404.

(*k*) Cooke *v.* Jackson, 6 V. pp. 17, 41.

(*l*) Hawkins *v.* Holmes, 1 P. W. 770.

(*m*) Whitbread *v.* Brockhurst, 1 Bro. Ch. 409.

(*n*) O'Reilly *v.* Thompson, 2 Cox, 271; *Re* Cooke, 5 L. R. Ir. 99; see also Stokes *v.* Moore, 1 Cox, 219; Frame *v.* Dawson, 14 V. 386; East India Co. *v.* Nuthambadoo, 7 Moo. P. C. 482, 497; Borrett *v.* Gomeserra, Bunb. 94.

(*o*) Clinan *v.* Cooke, 1 Sch. & L. 22; Seagood *v.* Meale, Pr. Ch. 560; O'Herlihy *v.* Hedges, 1 Sch. & L. 123.

considered an act of part performance to take a parol contract out of the Statute of Frauds (*a*). Nor will payment of the auction duty (*b*).

Possession.—But an admission into possession which has unequivocal reference to the contract has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure (*c*); *à fortiori* where, as in *Lester* v. *Foxcroft*, the person seeking specific performance has laid out money in building or in improvements (*d*).

As between landlord and tenant, however, the mere continuance in possession by the tenant is not part performance of an oral contract for sale or a new lease (*e*), but if he pays an increased rent which is clearly referable to that contract it is part performance (*f*), but where other tenants of the same landlord also paid an increased rent, from the same time as the plaintiff, and the improvements were of small value and such that a prudent yearly tenant might do, the Court declined to assist the tenant (*g*).

It is essential that possession should be delivered according to the contract; if obtained otherwise it will not be treated as an act of part performance (*h*).

(*a*) Hughes *v.* Morris, 2 De G. M. & G. 356. (At one time payment was held to be a part performance. See Lacon *v.* Mertins, 3 Atk. 1.)

(*b*) Buckmaster *v.* Harrop, 7 V. 346.

(*c*) Morphett *v.* Jones, 1 Swans. 181; Earl of Aylesford's Case, 2 Stra. 783; Lacon *v.* Mertins, 3 Atk. 1; Bowers *v.* Cator, 4 V. 91; Kine *v.* Balfe, 2 Ball & B. 343; Shillibeer *v.* Jarvis, 8 De G. M. & G. 79; Wilson *v.* West Hartlepool Ry. Co., 2 De G. J. & S. 475.

(*d*) See Floyd *v.* Buckland, 2 Freem. 268; Mortimer *v.* Orchard, 2 V. 243; Toole *v.* Medlicott, 1 Ball & B. 393; Wheeler *v.* D'Esterre, 2 Dow (H. L.), 359; Norris *v.* Jackson, 10 W. R. 228; Crook *v.* Corporation of Seaford, L. R. 6 Ch. 551.

(*e*) Wills *v.* Stradling, 3 V. p. 381, but see Savage *v.* Carroll, 1 Ball & B. 265; Morphett *v.* Jones, 1 Swans. 181.

(*f*) Nunn *v.* Fabian, L. R. 1 Ch. 35; Humphreys *v.* Green, 10 Q. B. D. 148; Miller *v.* Sharp, (1899) 1 Ch. 612; and see Wills *v.* Stradling, 3 V. 378; cf. Charlewood *v.* Bedford (Duke), 1 Atk. 497; Clarke *v.* Reilly, 2 Ir. R. C. L. 422; Archbold *v.* Lord Howth, 1 Ir. R. C. L. 608; Williams *v.* Evans, 19 Eq. 547; Lyne 347; Connor *v.* Fitzgerald, 11 L. R. Ir. 106.

(*g*) Howe *v.* Hall, 4 Ir. R. Eq. 242.

(*h*) Cole *v.* White, cited 1 Bro. Ch. 409; White *v.* Whitewood, 13 T. L. R. 409.

Where possession has been taken without consent, if subsequently the owner allows a stranger to remain in possession, it may be treated as an act of part performance (*a*), and so may possession taken before, but continued after a parol contract if referable to the contract (*b*).

In *Millard* v. *Harvey* (*c*), the plaintiff's wife, without his knowledge, paid 150*l.* to the defendant with the desire of purchasing a field for the plaintiff. The defendant refused to sell, but kept the money and paid no interest. A few days afterwards he let the plaintiff into possession, telling him he might have the field to put his horse in. The plaintiff occupied it for ten years, in ignorance of what his wife had done, without paying any rent, and the defendant paid no interest. It was held that as there was a contract with the wife as agent for her husband, subsequently adopted by him, and accompanied by possession for ten years, the Court ought to decree specific performance.

Possession is considered an act of part performance of a parol contract, not only in the case of sales or leases, but also of other contracts whereby the possession may be explained (*d*); especially in the case of family arrangements (*e*).

Acquiescence moreover in possession for a long lapse of time will be a circumstance taken into consideration by the Court against allowing the Statute of Frauds to be set up (*f*).

The laying out of money.—If the laying out of money, by a stranger who enters into possession, be such as would probably take place under the alleged agreement, and is done with the privity of the other party, it will, as decided in the principal case, be an act of part performance, for example, where an intended lessee has entered and built upon the premises (*g*).

The laying out of money by the *tenant* continuing in possession, if it was part of the agreement that money should be laid out, and it

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(*a*) Pain *v.* Coombs, 1 De G. & J. 34; see also Miller *v.* Finlay, 5 L. T. 510; Gregory *v.* Mighell, 18 V. 331.

(*b*) Hodson *v.* Heuland, (1896) 2 Ch. 428.

(*c*) 34 B. 237.

(*d*) Lincoln *v.* Wright, 4 De G. & J. 16; Coles *v.* Pilkington, 19 Eq. 174.

(*e*) Stockley *v.* S., 1 V. & B. 23; Williams *v.* W., L. R. 2 Ch. 294, 304, 305; Neale *v.* N., 1 Keen, 672; Cood *v.* C., 33 B. 314.

(*f*) Blachford *v.* Kirkpatrick 6 B. 232; Crook *v.* Corporation of Seaford, L. R. 6 Ch. 551; and see Stockley *v.* S., supra.

(*g*) Ramsden *v.* Dyson, L. R. 1 H. L. 129; Sutherland *v.* Briggs, 1 Ha. 26; Reddin *v.* Jarman, 16 L. T. 449; Plimmer *v.* Mayor, &c. of Wellington, 9 A. C. 699.

is one of the considerations for granting the lease (the laying out of which must be then with the privity of the landlord), is very strong to take it out of the Statute (*a*). In *Mundy* v. *Jolliffe* (*b*), a tenant from year to year of a farm having at his own expense drained the lands upon the farm, and laid down into pasture the only piece of arable land which the farm contained, and repaired the buildings, pursuant to a parol agreement for a lease; *Cottenham*, C., upon proof of the agreement, decreed specific performance, saying, there was no doubt of the part performance. And the result is the same where the outlay in part performance of an agreement with the tenant is made by his sub-lessee with the assent and approval of the landlord (*c*).

But such laying out of money, to be an act of part performance, must not be of an equivocal character. Thus, if a tenant should set up an agreement for a purchase, and get a witness to swear to it, and then offer as evidence of part performance, his possession and cultivation of the land, that could not be deemed an act of part performance, for it would have taken place precisely in the same shape, whether there was any agreement for a purchase or not (*d*).

The surrender of a lease by the lessee to the lessor, on the faith of a parol agreement by him to grant a new lease to a third party, has been held in Ireland to be an act of part performance, and specific performance was decreed (*e*).

Upon the same principle, in *Parker* v. *Smith* (*f*), the landlord of a coal set, having four tenants in partnership together holding under a lease, several years of which were unexpired, entered into a parol agreement with all four upon the surrender of the old lease to grant a new one to two of the partners—the plaintiffs,—upon the terms that the partnership should be dissolved, and that the plaintiffs should release the two retiring partners from all liability. The dissolution and release so agreed upon took place, by which the plaintiffs took upon themselves the liability which had before been shared by the four. Specific performance was decreed. "It is part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts

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(*a*) Per Lord *Loughborough*, C., in Wills *v.* Stradling, 3 V. 382.

(*b*) 5 My. & C. 167.

(*c*) Williams *v.* Evans, 19 Eq. 547; Shillibeer *v.* Jarvis, 8 De G. M. & G. 79, 87; cf. Dickinson *v.* Barrow, (1904) 2 Ch. 339.

(*d*) Frame *v.* Dawson, 14 V. 388; and see Howe *v.* Hall, 4 Ir. R. Eq. 242.

(*e*) *Re* Cooke, 5 L. R. Ir. 99.

(*f*) 1 Coll. 608.

otherwise than as acts of part performance, taking the case out of the Statute of Frauds."

Who bound.—Companies and corporations are bound equally with individuals by acts of part performance (*a*).

Sales of land at an ordinary auction (*b*) are within the Statute of Frauds (*c*). A purchaser, therefore, at such sales is not bound, unless there is some agreement in writing.

The receipt or entry in his book by an auctioneer may be a note or a memorandum within the Statute of Frauds, but for that purpose it must, in itself, contain the agreement, or, by reference to some other document, must show what it is (*d*).

Moreover, if a purchaser of land at an auction takes possession of a lot knocked down to him, and cuts down crops, it will be held to be a part performance of the verbal contract entered into in the auction room and specific performance will be decreed, but if a person has purchased two or more lots sold separately at a sale by auction, acts of part performance with regard to one lot will not supply the want of a written contract with regard to the other lots (*e*).

As a general rule, a parol agreement to sell or grant a lease, entered into by a tenant for life with a leasing power, coupled with a part performance by the purchaser or lessee during the life of the tenant for life, will not bind the remainderman, unless he acquiesced in the part performance and was aware of the agreement (*f*), or unless, after the death of the tenant for life, the remainderman lies by and allows the purchaser or lessee to expend money in improving the estate (*g*), and the law upon this subject has been held not to be affected by the Leases and Sales of Settled Estates Act (*h*), nor by the Landed Property (Ireland) Improvement Act, 1860 (*i*).

(*a*) Wilson *v.* West Hartlepool Ry. Co., 2 De G. J. & S. 475; Steven's Hospital *v.* Dyas, 15 Ir. Ch. R. 405; and see the observations in Hunt *v.* Wimbledon, &c., 4 C. P. D. pp. 52, 60, 61, 62; Melbourne Banking Corporation *v.* Brougham, 4 A. C. 156.

(*b*) Blagden *v.* Bradbear, 12 V. 472.

(*c*) 29 Car. 2, c. 3.

(*d*) Rishton *v.* Whatmore, 8 C. D. 467; Blagden *v.* Bradbear, 12 V. p. 471; Sims *v.* Landray, (1894) 2 Ch. 318; Bell *v.* Balls, (1897) 1 Ch. 663.

(*e*) Buckmaster *v.* Harrop, 13 V. 474.

(*f*) Blore *v.* Sutton, 3 Mer. 237; Morgan *v.* Milman, 3 De G. M. & G. 24, 33; Lowe *v.* Swift, 2 Ball & B. 529; O'Fay *v.* Burke, 8 Ir. Ch. R. 225.

(*g*) Stiles *v.* Cowper, 3 Atk. 692.

(*h*) 19 & 20 Vict. c. 120.

(*i*) 23 & 24 Vict. c. 153: Hope *v.* Lord Cloncurry, 8 Ir. R. Eq. 555.

Marriage.—Although it is clear, according to more recent authorities overruling *Dundas* v. *Dutens* (*a*), that where a parol contract is made in consideration of marriage, the subsequent marriage will not be an act of part performance so as to take the case out of the Statute of Frauds, inasmuch as the statute expressly provides that a contract in consideration of marriage shall not be binding unless it be in writing (*b*), nevertheless a parol contract may be taken out of the statute by acts of part performance independently of the marriage. Thus, in *Surcome* v. *Pinniger* (*c*), a father previous to the marriage of his daughter told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The husband also expended money upon the property. It was held by the Lords Justices, that there had been sufficient part performance to take the case out of the Statute of Frauds (*d*).

In a case before the Married Women's Property Act, 1882, acts of part performance by a husband were held not sufficient to enable him to claim, against the heir of his deceased wife, specific performance of a parol agreement, entered into by his wife after marriage, to convey to him lands of which she was seised in fee, but not to her separate use; because a married woman during coverture, as well in equity as at law, was under a disability to convey her real estate; and unless the provisions of 3 & 4 Will. IV., c. 74, were complied with, a deed executed by her for the purpose (and *à fortiori* a parol contract) was void (*e*).

Although marriage is not, a return to cohabitation may be, a sufficient act of part performance. Thus, where a husband in a separation deed covenanted with a trustee to pay an annuity for life to his wife, and she shortly before his death returned to him upon the faith of a verbal agreement made to her and her trustee, that if she would do so, he would continue to pay the annuity, and would charge

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(*a*) 1 V. 196.

(*b*) Lassence *v.* Tierney, 1 Mac. & G. 551; Warden *v.* Jones, 2 De G. & J. 76; Cooper *v.* Wormald, 27 B. 266; Caton *v.* C., L. R. 1 Ch. 137 (affirmed L. R. 2 H. L. 127); *Re* Eyre, 72 L. T. 585; M'Askie *v.* M'Cay, 2 Ir. R. Eq. 447; and see Trowell *v.* Shenton, 8 C. D. 318, 326 (on Lord Tenterden's Act 9 Geo. 4, c. 14).

(*c*) 3 De G. M. & G. 571.

(*d*) See also Taylor *v.* Beech, 1 Ves. Sen. 297; Barkworth *v.* Young, 4 Drew. 1; Ungley *v.* U., 5 C. D. 887.

(*e*) Williams *v.* Walker, 9 Q. B. D. 576, 581. And see Cahill *v.* C., 8 A. C. 420.

it upon his real estate, and the husband having died without having done so, it was held that the verbal agreement, having been in part performed by the wife returning to her husband, could be enforced against his devisees (*a*).

The mere fact that an incomplete agreement has been signed will not preclude the proof of additional terms by parol in a case where there have been acts of part performance (*b*).

3. Evidence, Pleading, &c.

The plaintiff must first prove that the agreement he alleges was in fact entered into. Where the defendant admits the contract as alleged no difficulty arises, but where the defendant proves a different contract to that alleged by the plaintiff, the Court will refuse to interfere, as the burden of proof is on the plaintiff (*c*); but may give leave to bring a fresh action (*d*). But variations between the agreement alleged and that proved, if immaterial, or of the plaintiff's admission of some term against himself or omission of some term in his favour (*e*), will not prevent the Court decreeing specific performance. If the alleged contract is denied by admitting a different one, it is probable that the Court would admit parol evidence of the plaintiff to modify the contract admitted by the defendant.

A parol agreement alone, without any acts of part performance, was, under the old practice, held to be taken out of the Statute of Frauds by the admission thereof by a defendant in his answer to a bill of complaint, unless he insisted upon the statute by way of defence, for it was considered that the admission took the agreement entirely out of the mischief which the statute was designed to obviate (*f*); and in the event of his death, the admission would equally bind his representatives (*g*).

Where the defendant *admitted* a parol agreement as alleged, no

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(*a*) Webster *v.* W., 4 De G. M. & G. 437. See and consider Maddison *v.* Alderson, 8 A. C. 467; and cf. Harrison *v.* H., (1910) 1 K. B. 35.

(*b*) Sutherland *v.* Briggs, 1 Ha. 26.

(*c*) Lindsay *v.* Lynch, 2 Sch. & L. 1; Price *v.* Salusbury, 32 B. 446; Reynolds *v.* Waring, You. 346; Mortimer *v.* Orchard, 2 V. p. 243.

(*d*) Hawkins *v.* Maltby, L. R. 3 Ch. 188.

(*e*) Clifford *v.* Turrell, 9 Jur (N. S.) 633; Lanyon *v.* Martin, 13 L. R. Ir. 297; *Re* Holland, (1902) 2 Ch. p. 379.

(*f*) A.-G. *v.* Day, 1 Ves. Sen. p. 221; Lacon *v.* Mertins, 3 Atk. p. 3; Gunter *v.* Halsey, Amb. 586; Limondson *v.* Sweed, Gilb. 35, sed vide Eyre *v.* Popham, Lofft's Rep. 808, 809.

(*g*) Ibid.

Lester v. Foxcroft.

further proof thereof by the plaintiff was requisite, even if the defendant claimed the benefit of the Statute of Frauds, if there were acts of part performance, for they take the case out of the statute (*a*).

Where the defendant, under the former practice of the Court of Chancery, by answer *denied* the agreement as alleged, the evidence of one witness on the part of the plaintiff, unless it were supported by corroborating circumstances, would not be sufficient to outweigh the denial by the answer (*b*). And the rule probably would still be the same where the defendant, either in answer to interrogatories or in his evidence, positively on oath denied the alleged agreement.

Where, however, there is simply a defence, not put in on oath, the Court, acting upon the rule of law, might consider the uncorroborated evidence of a single witness in support of the alleged agreement to be sufficient.

The present system of pleading has continued this effect of an admission of the contract, and furthermore the contract is admitted unless it is actually denied, except in the case of an infant, lunatic, or person of unsound mind (*c*).

It is, perhaps, somewhat doubtful (*d*), whether an inquiry as to the terms of an agreement will be directed where it has not been established with sufficient clearness for the Court to make a decree (*e*).

In many cases, especially where possession has been taken and there have been other acts of part performance, there has been a strong inclination *quacunque viâ* to make out the agreement notwithstanding the conflict of evidence. "Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been a part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted, in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object, it has, at the hearing, and

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(*a*) Cooth *v.* Jackson, 6 V. pp. 37, 38.

(*b*) East India Co. *v.* Donald, 9 V. 275; Morphett *v.* Jones, 1 Swans. 172; Toole *v.* Medlicott, 1 Ball & B. 393.

(*c*) R. S. C., 1883, Ord. XIX., rr. 13, 15; see also Fry, S. P., (1903) p. 250.

(*d*) Per Lord *Eldon*, C., in Boardman *v.* Mostyn, 6 V. p. 470.

(*e*) See Savage *v.* Carroll, 2 Ball & B. 451; L. & Birmingham Ry. Co. *v.* Winter, Cr. & Ph. 57; Crook *v.* Corporation of Seaford, L. R. 6 Ch. 551.

when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of the agreement really were" (*a*). But if, after considering all the evidence, any material terms of the contract are doubtful, the Court can make no decree (*b*).

Where the defendant denies the agreement alleged, but admits another, and the acts of part performance are equally consistent with both agreements, parol evidence of the agreement alleged is not admissible. Thus, in *Lindsay* v. *Lynch* (*c*), the plaintiff alleged an agreement for a lease for three lives, the answer admitted an agreement for *one* life only, and the acts of part performance, viz., the building of a wall under a former covenant and the payment of rent, not being inconsistent with the agreement admitted by the defendant, evidence in support of the agreement set up by the bill was refused (*d*). It seems that if the plaintiff had amended his bill abandoning the agreement alleged, he might have had a decree for the agreement admitted (*e*), but as he had amended his bill, continuing to insist on the agreement alleged, and praying in the alternative to have specific performance of the agreement admitted by the defendant, the bill was dismissed, but without prejudice to his filing a new bill (*f*).

Pleading Statute of Frauds.—The statute must be specifically pleaded (*g*), and the point thus raised may, by consent or order, be set down for hearing before the trial (*h*). No particular section need be pleaded, but if a particular section is pleaded, the defendant may be held to it, and leave to amend may be refused (*i*).

(*a*) Per Lord *Cottenham*, C., in Mundy *v.* Jolliffe, 5 My. & C. p. 177. See also Mortimer *v.* Orchard, 2 V. 243; Laird *v.* Birkenhead Ry. Co., John. 500; Wilson *v.* West Hartlepool Ry. Co., 2 De G. J. & S. 475; Oxford *v.* Provand, L. R. 2 P. C. 135, 148; Baumann *v.* James, L. R. 3 Ch. 508; cf. Rochefoucauld *v.* Boustead, (1897) 2 Ch. p. 206.

(*b*) Clinan *v.* Cooke, 1 Sch. & L. 22; Lord Ormond *v.* Anderson, 2 Ball & B. 363; Wheeler *v.* D'Esterre, 2 Dow (H. L.), 359; Blore *v.* Sutton, 3 Mer. 237; Reynolds *v.* Waring, You. 346; Monro *v.* Taylor, 3 Mac. & G. 719; Tatham *v.* Platt, 9 Ha. 660; Stuart *v.* L. & N. W. Ry. Co., 1 De G. M. & G. 721; Taylor *v.* Portington, 7 De G. M. & G. 328.

(*c*) 2 Sch. & L. 1.

(*d*) Sed vide Sutherland *v.* Briggs, 1 Ha. 26; Tomkinson *v.* Staight, 17 C. B. 697.

(*e*) Anon., cited in 2 S. & L. 9.

(*f*) Lindsay *v.* Lynch, 2 Sch. & L. 1.

(*g*) R. S. C., 1883, Ord. XIX., r. 15, Ord. XXV., rr. 1, 2; Dawkins *v.* Penrhyn, 4 A. C. 58; Catling *v.* King, 5 C. D. 660; Brunning *v.* Odhams, 75 L. T. 602.

(*h*) R. S. C., 1883, Ord. XXV., r. 2; Stokell *v.* Niven, 61 L. T. 18.

(*i*) James *v.* Smith, (1891) 1 Ch. 384.

SETON *v.* SLADE.
HUNTER *v.* SETON.

1802. 7 V. 265; 6 R. R. 124.

Specific Performance with Compensation.

Specific performance decreed: the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit, with interest, if the title should not be made out and possession delivered by the time of payment, having been received and kept without objection: and the vendee, upon the construction and the circumstances, not being entitled to insist on the time, as the essence of the contract.

An agreement signed by one party only, good to charge him within the Statute of Frauds.

The plaintiff in the first of these causes being entitled to an estate called Kilorough, in the county of Glamorgan, under a contract entered into in 1799, by the trustees of the Marquis de Choiseul, to convey to him and his heirs, in consideration of 8,500*l.*, employed Josiah Phipps to sell the estate by auction or private contract; and the following memorandum, in writing, dated the 12th of April, 1800, was signed by the defendant Robert Slade, but not by the plaintiff, or anyone on his behalf:—"I, Robert Slade, of Doctors' Commons, in the City of London, Esquire, have this day purchased of Josiah Phipps, the estate described in the within particular, at and for the sum of 10,000*l.*, including the timber and underwood growing thereon, have paid a deposit of 1,000*l.*, do hereby undertake and agree to pay the remainder of the purchase-money, and complete my purchase, within two months from the date hereof, the proprietor making a good title thereto at his own expense, and executing a proper conveyance, to be prepared at my expense. And I do further agree to pay for the fixtures, household furniture, at a fair valuation, and for the growing crops, seeds, fallows, &c., in the same way, according to the custom of the country; and possession to be given upon the completion of the contract, to which time all outgoings are to be cleared up, and I am entitled to the rents and profits. Upon failure of my complying with the terms and conditions before mentioned, the deposit money shall be forfeited, the proprietor shall be at full liberty to re-sell the estate, and the deficiency, if any there shall be by such second sale, together with all charges attending the same, shall be made good at my expense."

The bill in the first cause prayed a specific performance of this agreement; which was resisted under the following circumstances, appearing by the answer and the evidence.

The defendant, the day after he signed the agreement (the 13th of April), wrote to Phipps from Brighthelmstone, stating objections to the title, and that, if the title should not be made out, and possession delivered to him by the 12th of June then next, he should insist upon having the deposit money returned to him with interest. Phipps' letter in answer, dated the 19th of April, stated the plaintiff's answer, as given verbally by his solicitor, thus:—"Mr. Seton desired I would inform you, that he accedes to your request respecting the interest as a matter of course." The defendant, about the beginning of May, informed Phipps he had sold out stock for the purpose of being ready with his purchase-money, and expressed his surprise that no abstract had been delivered. He afterwards pressed Phipps for the abstract, and proposed that Phipps should copy and send in his name to the plaintiff a note written by the defendant, expressing, that, finding no progress made in the delivery of the title, he called to remind Phipps, that, in the event of its not being completed at the expiration of the two months, he expects, in compliance with the promise the plaintiff made, in answer to his letter from Brighthelmstone, to have his deposit-money returned with interest, and requesting authority to fulfil the engagement on the plaintiff's part. Phipps declined writing that letter. On Saturday, the 7th of June, the abstract was left at the defendant's solicitors, with a note, stating that the plaintiff had only a title under an agreement, but all necessary parties were ready to convey, and making a proposal for that purpose. On Monday, the 9th, the plaintiff's solicitor called there to say, that he would not vouch for the authenticity of the abstract, as it was not prepared by him, but by the solicitors for the trustees of the Marquis de Choiseul. Nothing further passed till the 13th of June, on which day the defendant wrote to Phipps, demanding his deposit with interest, and stating his reasons, that the two months within which the plaintiff agreed to complete the contract were expired, and the defendant's solicitors had not received an abstract till within these few days; and so far from showing a right in the plaintiff to convey, it states merely a contract for purchase by him, without noticing a suit in Chancery against the trustees of the Marquis and Marchioness de Choiseul, previous to the contract for purchase by the plaintiff, which renders it impossible for the plaintiff to carry into effect his agreement with the defendant within the time limited.

The defendant afterwards recovered his deposit with interest, in an action. Several objections were taken to the abstract, the principal of which (mentioned in the defendant's letter of the 13th of April) were the suit instituted by the Marquis de Choiseul and his creditors to remove his trustees, and for an account of their conduct; and a prior contract with a person named Darby, who gave notice of his claim. He was made a defendant, and put in an answer, amounting, on the whole, to a disclaimer. Afterwards, being examined as a witness, by his depositions he renewed his claim. The Lord Chancellor held, that he could not get rid of the disclaimer upon the record without a strong case upon affidavit; and, therefore, he was a good witness; but the defendant, reading his depositions, must admit that he has no interest. The defendant then declined reading his evidence.

The second cause was instituted upon a bill by the trustees of the Marquis de Choiseul, praying a specific performance of their contract with Seton.

Mr. *Romilly* and Mr. *Bell*, for the plaintiff Seton.—The question is, whether the vendor was bound to make out his title by a certain day; and farther, whether, if he could make a title at a subsequent time, that would not be sufficient in this Court. In all the decisions upon this point, time has been considered a circumstance merely, not of the essence of the agreement. It is true, in modern cases parties have been discharged, where in former times they would have been bound, the late decisions having restrained the unlimited extent of the older cases. But they have never gone the length, that if the agreement is not performed at the particular day, it shall be at an end. . . . The result is that the non-performance at the day is a circumstance to show abandonment, but only a circumstance. . . .

[They cited *Gregson* v. *Riddle* (*a*).]

Mr. *Richards* and Mr. *Leach*, for the defendant Slade . . . [In the course of their argument.]

The Lord Chancellor (*b*).—There have been several very hard cases under the description of the specific performance of agreements, upon the principle of compensation; that, for instance, where a person contracted for an estate in Essex, with the object of becoming a freeholder of that county, and it turned out to be in Kent; yet he was held to it (*c*). So, in a case before Sir *T. Sewell*, upon an agreement for a leasehold house with a wharf, the object of the purchaser being to be a wharfinger, he was compelled to take the house without the wharf. So, where the object was to purchase an estate tithe-free, and he was compelled to take it subject to tithe (*d*). The value of the tithe is not a compensation. I incline much to think, notwithstanding what was said in *Gregson* v. *Riddle*, that time may be made the essence of the contract: but I do not recollect a case where an abstract was delivered for the purpose of preparing a conveyance; at the delivery no objection made that it was delivered too late; and between the delivery and the time for the execution of the conveyance, no objection stated, either to the time of the delivery or the nature of the title. The abstract certainly was delivered very late; but it is upon the party to say it was too late. If he receives the abstract without objection, does he not authorise

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(*a*) In Chancery, before the Lords Commissioners, 12th June, 1783; before Lord *Thurlow*, 12th June, 1784. Cited by Mr. *Romilly*, from his own note.

(*b*) Lord *Eldon*.

(*c*) Shirley *v.* Davis, in the Court of Exchequer, cited 6 V. 678.

(*d*) Lord Howland *v.* Norris, 1 Cox, 59.

the other to suppose he is, during the currency of the rest of the time, preparing his conveyance, and the thing is to go on ?

[Mr. *Richards* and Mr. *Leach* continuing] for the defendant.—The delivery of the abstract was a mere mockery. It could not possibly be imagined that it could be looked through in time. It was incumbent upon the vendor to have some communication with the vendee, to do away the effect of his letter. It would be a new decision, that the delivery of the abstract to the solicitor, the vendee having declared absolutely that he would not let it go beyond the time, shall amount to a new contract. No diligence could have enabled the vendor to perfect his title by the 12th of June, on account of the claim of Darby, and the suit in this Court.

Mr. *Romilly* in reply.—* * * There is no such principle, that time is essential here as well as at law, and that it is always dispensed with upon the conduct of the party. That would exclude Courts of Equity from a great part of their jurisdiction. * * * There are no words in this agreement shewing the parties meant this time strictly. It was inserted merely because it is usual to fix a time. * * *

The LORD CHANCELLOR.—If it were necessary, for the decision of this case, to express myself with great accuracy upon the principle of the Court as to suits for specific performance, as far as objections are to be founded upon what the Court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But in the view I have of this case, I incur no hazard of making a decree in its principle inconsistent with any authority that can be stated.

To say time is regarded in this Court as at law is quite impossible. The case mentioned, of a mortgage, is very strong: an express contract under hand and seal. At law, the mortgagee is under no obligation to reconvey at [*quære* after] that particular day; and yet this Court says, that, though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground, that the contract is, in this Court, considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import, at law, that once a mortgage always a mortgage. But equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord *Thurlow*, that the agreement of the parties will not alter it; for I take it to be so, in the case of a mortgage, that you shall not, by special terms, alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. * * *

But I need not address myself to the consideration of what is the precise principle, with much industry; for no authority would support me in saying, that, under the particular circumstances of this case, the defendant can resist a decree, if a good title can be made. This agreement is signed by the defendant Slade only; but that makes him within the statute (*a*) a party to be charged. I do not say whether terms might or might not be introduced, that would make time expressly of the essence of the contract (*b*). It is enough to say, that, if this agreement has that effect, there never was an agreement that would not; for, upon that point, the agreement is as loose as possible. There is no passage in it *eo intuitu;* not that sort of passage in *Gregson* v. *Riddle*. The clause as to liberty to resell, &c., is not considered of much importance in this Court; but in this instance it is a clause against the vendee, having no corresponding clause against the vendor. That clause expresses little more than would be the legal effect if that was not inserted. But it is enough to say upon that, the objection relied upon in the argument, that the plaintiff might have sold after the two months were expired, admits of this answer; that it is assuming the whole question. If you make out that he would have been at liberty to resell, that does not make out that he lets the other off; but, under the circumstances, he would not have been at liberty to resell. The evidence clearly imports that the defendant did not understand it to have bound them in that mutual respect in which he seems in his letter to think it

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(*a*) 29 Car. 2, c. 3.

(*b*) They clearly might. See Hudson *v.* Bartram, 3 Madd. 440; Boehm *v.* Wood, 1 J. & W. 410.

reasonable they should be bound. But I will construe it, for the purpose of this case, as if it had mutually bound them ; and that, if the title was not made out by the day, then the defendant should be at liberty to say he was off; for if that clause had been in this agreement he might have waived the benefit of it; and it must have been made out that his conduct did not occasion the non-fulfilling the agreement. Take it, that there was the mutual clause. The moment after the sale, the auctioneer was no longer the agent of the plaintiff. He was his agent only to sell, not to deal with the terms upon which a title was to be made. The defendant must show the auctioneer had acquired a character to bind the plaintiff in that respect. There is no evidence of that : on the contrary, the defendant applies to the auctioneer as such agent, and he refuses to act as such, and refers him to the plaintiff. But he applies again to the auctioneer, and never to the plaintiff. One clause of this letter is very important ; marking the knowledge of the title in the law-agent of the vendee, and that he was able, in the first instance, the day after, to state the material objections, viz., the proceedings in Chancery, and *Darby's* claim. That is distinct evidence that the defendant did not then understand that he had entered into an agreement, by force of which he thought he had a right to say, the time of two months was absolutely of the essence of the contract. Whether that was misunderstanding or not, that was his understanding. By the last words he seems desirous of having an agreement, which would for the first time give a mutuality as to time. But he does not choose to give up the one till he gets the other, reserving to himself the power to deal with the first agreement as he thinks fit, though he may not get the stipulation he wishes. If the plaintiff acceded to that proposition, he would be bound. But what is the evidence that he did ? There is a good deal of reasoning in support of the argument, that Phipps's letter is not merely a statement that he would pay interest, but, with regard to some circumstances, that the contract was to be off, viz., the deposit money to be returned with interest, connected with the dissolution of the agreement, which might either be within or after the expiration of the two months; but, if the former, it ought to be shown to be clearly the effect of something that passed subsequently, and was acceded to. The letter of Phipps in answer is no evidence of the facts stated in it. Does the defendant conceive the matter as resting on that letter, and consider it as an undertaking to the extent he proposed, or as completely settling that mutuality he desired, giving him a right to insist upon the time as the essence of the contract? No; for afterwards he goes again to Phipps, not an agent, to bind the plaintiff for this purpose, and, not being able to prove the date further than that it was between the 13th of April and the 5th of June. This proves that the defendant, by repeated inquiries addressed to his solicitors, who knew a good deal of the title, was informed from time to time that the abstract was not delivered. The proof is complete as to that. This is a complete waiver of any objection from the non-delivery of the abstract at the time the defendant proposed that Phipps should write that letter. Being told Phipps would not write that letter, he does not write himself, or direct his solicitors to apply; but, upon the 7th of June, by his solicitors, he receives the abstract, they knowing the history of the title and the estate, and stating the two grounds of objection the day after the contract took place. There was a note at the bottom of the abstract, stating distinctly that the plaintiff had only a title under an agreement, but that all necessary parties were ready to convey, and making a proposal for that purpose, which might or might not be completed within the time. The abstract was delivered on the 7th of June. No objection was made to receiving it. It was kept till the time expired, without objection. Ought not the objection to have been made on the 7th? The plaintiff was bound till the 12th. He could not sell to another: and if the solicitors had returned the abstract upon the objection, the plaintiff was at liberty to say he had undertaken to remove all objections, or to tender a conveyance; and he might have proceeded to prepare a conveyance, which, under the circumstances, was to be prepared by the defendant; and he might have tendered that conveyance so as to have a right to an action, or to file a bill, as upon an agreement which he had undertaken to make good within the time.

This case is not like *Lloyd* v. *Collett* (*a*), in which the defendant immediately sent the abstract back, and would not look at it. What right had this defendant to read the abstract if it came too late? He had either an intention to execute the contract, or a hope that he had

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(*a*) 4 Bro. Ch. 469; 4 V. 689 (n.).

time to get through the abstract, in order to carry it into execution; but the evidence in this respect is totally silent; and it is clear, upon the objections stated in the solicitor's depositions, that at some period or other he had gone into the abstract.

As to the other circumstances stated by the defendant, his selling out stock, &c., there is no evidence whatsoever. As to his intention of making this place his residence, there is nothing in the contract having the least reference to that; and upon an intention, not disclosed in the contract, or afterwards, as essential, this Court has never been in the habit of acting.

Under the circumstances, therefore, whether the time is or is not an objection, founded upon the authorities the Reports of this Court furnish—which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff—there is no authority that has not some reference to the conduct of the party in the mean time; and upon the conduct, this defendant has no right, under the circumstances, to say this contract was not performed within the two months.

There must, therefore, be a decree for a specific performance; and as to all the rest, a reference to the Master, to see whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very important as to the costs, but not whether he shall take the title or not. According to old cases, it was sufficient if the title was made by the time of the report (*a*).

NOTES.

1. Generally, 487.
2. Delay, p. 488.
    - (*a*) Arising from the conduct of either party, p. 488.
    - (*b*) Arising from the state of the title, p. 491.
3. Compensation for delay, p. 493.
4. Where time is of the essence of the contract, p. 497.
    - (*a*) From the nature of the property, p. 498.
    - (*b*) By agreement, p. 500.
5. Compensation where the vendor has not the interest in the estate which he has contracted to sell, or there is some deficiency in the quantity or quality thereof, p. 504.

(*a*) See Jenkins *v.* Hiles, 6 V. 646.

1. Generally.

"A Court of Equity frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case" (*a*).

Where, for instance, some of the steps towards the completion of the contract have not been taken, or, as in the principal case, the contract itself has not been completed at the time agreed upon by the parties, or where the vendor had not the same interest in the estate as that which he had contracted to sell, or there was some deficiency in the quality or quantity of it, the party not able strictly to perform the contract on his part formerly, at law, had no remedy by way of damages against the other; but, in equity, in many cases he would be able to obtain specific performance, if adequate compensation could be made for the non-literal performance of the contract.

These doctrines of equity have been extended by the Judicature Act, 1873 (*b*), to all the divisions of the High Court of Justice; for it is thereby enacted that "stipulations in contracts, *as to time, or otherwise*, which would not before the passing of this Act (*c*) have been deemed to be, or to have become, of the essence of such contracts in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

At *law*, in all cases, time was considered as of the essence of the contract. A Court of Equity, however, enforced specific performance, notwithstanding a failure to keep the dates agreed upon, either for the completion itself or for the steps towards completion, if it could do justice between the parties, and if there was nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable

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(*a*) Per Lord *Redesdale* in Davis *v.* Hone, 2 Sch. & L. 347. See also Lennon *v.* Napper, 2 Sch. & L. 684; Parkin *v.* Thorold, 2 Si. (N. S.) 6, 8.

(*b*) 36 & 37 Vict. c. 66, s. 25, sub-s. 7; see Noble *v.* Edwardes, 5 C. D. 378.

(*c*) The Act passed 5 August, 1873, and came into operation 1 November, 1875.

to interfere with and modify the legal right (*a*). This is what is meant and all that is meant, when it is said that in equity time is not of the essence of the contract (*b*). See further on this, post, p. 497.

2. Delay.

Unreasonable delay will of itself be a bar to either party obtaining a decree for specific performance; for "a party cannot call upon a Court of Equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager" (*c*). A continual claim without any active steps in support of it, will not keep alive a right which would otherwise be debarred by *laches* (*d*).

"The doctrine of *laches* in Courts of Equity is not an arbitrary or a technical doctrine. * * * In every case, if an argument against relief which would otherwise be just is founded upon mere delay, the validity of that defence must be tried upon principles substantially equitable" (*e*).

The objection as to delay in the completion of the contract may be considered, 1st, as arising from the conduct of the parties; 2nd, as arising from the state of the title.

Delay arising from the conduct of either party.—In ordinary cases, where there was nothing special in the nature of the property, or of the purposes for which it was intended, although a particular day might be fixed for the completion of the contract, the Court of Equity considered that the real object was the sale of the estate, and, the particular day named was merely formal; and that the stipulation meant, in truth, that the purchase should be completed within a reasonable time, regard being had to all the circumstances of the case, including the nature of the title to be made.

At *law*, unless the vendor had his abstract and title-deeds ready at the appointed time, his remedy was gone, and the purchaser might recover his deposit (*f*). In *equity*, however, the rule was, that it was

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(*a*) See per *Turner*, L.J., in Roberts *v.* Berry, 3 De G. M. & G. p. 291.

(*b*) Tilley *v.* Thomas, L. R. 3 Ch. 67.

(*c*) Per Lord *Alvanley*, M.R., 5 V. 720 (n.); see also Lloyd *v.* Collett, 4 Bro. Ch. 469; Harrington *v.* Wheeler, 4 V. 686; Guest *v.* Homfray, 5 V. 818; Alley *v.* Deschamps, 13 V. 225; Dorin *v.* Harvey, 15 Si. 49; Alloway *v.* Braine, 26 B. 575; Sharp *v.* Wright, 28 B. 150; Mills *v.* Haywood, 6 C. D. 196, 202; cf. M'Murray *v.* Spicer, 5 Eq. 527, 537.

(*d*) Lehmann *v.* McArthur, L. R. 3 Ch. 496.

(*e*) See New Sombrero Co. *v.* Erlanger, 3 A. C. p. 1279, cited in Rochefoucauld *v.* Boustead, (1897) 1 Ch. p. 210.

(*f*) Berry *v.* Young, 2 Esp. 640 (n.).

not alone the duty of the vendor to tender the abstract, but unless the purchaser asked for it at the appointed day (*a*), or on such other day as would leave sufficient time for the completion of the contract (*b*), the time would be considered to be waived. So, if the abstract were delivered to the purchaser *after* the day appointed, and he made no objection to the delay, he would be considered as having waived it (*c*).

If a vendor did not deliver the abstract of title within the time specified, he could not hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated that time in that respect should be of the essence of the contract (*d*). In such a case, the time within which objections would be considered as waived, would depend upon the general principles of the Court, and the conduct of the parties (*e*).

Where, however, a vendor had taken *no steps whatever* to complete the contract, and the purchaser had immediately, when the time elapsed, insisted upon the return of his deposit and refused to perform his agreement, equity would not decree specific performance of the contract, or grant an injunction to restrain the purchaser from proceeding at law to recover his deposit (*f*). But if the vendor had endeavoured to make out his title, and had not been guilty of gross *laches* or negligence, it would do so (*g*).

If, after the period at which the contract ought to have been completed, some time has elapsed before the completion of the repairs of a house described as being in good repair (*h*) ; or before the expiration of a lease of property, when it was stated that the purchaser would, several months before, be entitled to possession (*i*) ; the purchaser will still not be able to resist specific performance, unless he can show that he wanted the house for his own occupation before the time when the repairs would be completed, or the lease would expire.

Where the delay was due to the purchaser's default the vendor

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(*a*) Guest *v.* Homfray, 5 V. 818, 823 ; Compton *v.* Bagley, (1892) 1 Ch. 313.

(*b*) Jones *v.* Price, 3 Anst. 924.

(*c*) Smith *v.* Burnam, 2 Anst. 527 ; Pincke *v.* Curteis, 4 Bro. Ch. 329 ; Paine *v.* Meller, 6 V. 349.

(*d*) Upperton *v.* Nickolson, L. R. 6 Ch. 436 ; *Re* Todd and McFadden, (1908) 1 Ir. R. 213.

(*e*) Ibid., and Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196.

(*f*) Lloyd *v.* Collett, 4 Bro. Ch. 469 ; Omerod *v.* Hardman, 5 V. 737 ; Warde *v.* Jeffery, 4 Price, 294.

(*g*) Fordyce *v.* Ford, 4 Bro. Ch. 495 ; Radcliffe *v.* Warrington, 12 V. 326.

(*h*) Dyer *v.* Hargrave, 10 V. 505.

(*i*) Hall *v.* Smith, 14 V. 426 ; and see Alley *v.* Deschamps, 13 V. 225.

was held to be entitled to specific performance although he had written that he would not extend the time fixed for completion (*a*).

And although *delay* may be solely attributable to disputes between the vendor and a mortgagee, it is not a sufficient excuse for delay on the part of the purchaser, for it was his duty to insist upon fulfilment of the contract if he desired specific performance, and if necessary to commence an action for that purpose (*b*). The rule as to delay will be relaxed where a strict application of it would work injustice (*c*).

Specific performance of a contract will not be decreed when the purchaser has lain by and delayed completing it, even although he may have paid part of the purchase-money (*d*). Nor will a purchaser be aided who has taken trifling and vexatious objections to the title, and has shown a disinclination to perform the contract, especially when the value of the property has increased by the dropping of lives, or otherwise (*e*) ; or where the purchaser was in reality unable to pay the purchase-money (*f*) ; and, where either the vendor or purchaser has not completed the contract on his part at the appointed time, if the contract be inequitable, or the price unreasonable,—that is to say, inadequate in one case, or exorbitant in the other,—specific performance will not be decreed (*g*).

As to the forfeiture of his deposit by a purchaser failing to perform his contract, *Sloman* v. *Walter*, ante, p. 264.

Possession.—It seems that where the purchaser is in possession under the contract sought to be enforced, and that the vendor knows, or ought to know, that the purchaser claims possession under the contract, the purchaser will not by delay lose his right to specific performance (*h*) ; for in such a case his possession is an assertion of his right under the contract, and acquiescence in his possession is a recognition by the vendor of his right (*i*).

(*a*) Laughton *v.* Port Erin Commissioners, (1910) A. C. 565.

(*b*) Mills *v.* Haywood, 6 C. D. 196, 202; Walker *v.* Jeffreys, 1 Ha. 341 ; Colby *v.* Gadsden, 34 B. 418.

(*c*) Shepheard *v.* Walker, 20 Eq. 659.

(*d*) Harrington *v.* Wheeler, 4 V. 686; per *Erskine*, C., in Alley *v.* Deschamps, 13 V. p. 229; S. E. Ry. Co. *v.* Knott, 10 Ha. 122 ; Firth *v.* Greenwood, 1 Jur. (N. S.) 866; Alloway *v.* Braine, 26 B. 575.

(*e*) Hayes *v.* Caryll, 1 Bro. P. C. 126; Spurrier *v.* Hancock, 4 V. 667; Main *v.* Melbourn, 4 V. 720; Pope *v.* Simpson, 5 V. 145; Burke *v.* Smyth, 3 Jo. & Lat. 193.

(*f*) Gee *v.* Pearse, 2 De G. & Sm. 325 ; Aberaman Iron Works *v.* Wickens, 5 Eq. pp. 507, 508; Howe *v.* Smith, 27 C. D. 89 ; Fleming *v.* Loe, (1901) 2 Ch. 594.

(*g*) Whorwood *v.* Simpson, 2 Vern. 186; Lewis *v.* Lord Lechmere, 10 Mod. 503 ; but see City of London *v.* Richmond, 2 Vern. p. 423.

(*h*) Clarke *v.* Moore, 1 Jo. & Lat. 727.

(*i*) See per *Cotton*, L.J., in Mills *v.* Haywood, 6 C. D. 202.

But where a tenant in possession contracts for the purchase of his landlord's interest, the case is different. His right under the contract is to be no longer tenant, and his possession is not an assertion of right under the contract of purchase; for it is not clearly referable to the contract of purchase, and consequently does not necessarily amount to a claim under the contract. Thus, the fact that the purchaser, after the purchase-money becomes due, continues to pay rent, instead of insisting on his right to be treated as liable only for the purchase-money and interest, is strong evidence to show that the plaintiff was in possession as tenant only (*a*); and the mere fact of the expenditure of considerable sums of money on the property, will not, in the absence of any recognition on the part of the vendor to that effect, be sufficient to show that he was in possession as purchaser (*b*).

In a case where the contract provided that the purchase-money was to be paid by instalments, and the purchaser, who had been let into possession, paid all the instalments but one and then fell into arrears and deserted the property, and, afterwards, the vendor, failing to find him, had let the land with an option to purchase to a tenant who built upon it, it was held that the purchaser's conduct did not amount to a repudiation and that though he was not entitled to specific performance he was entitled to damages (*c*).

Delay arising from the State of the Title.—Delay which arises from the state of the title, will not prevent specific performance being decreed, if the time fixed for completing the contract is not made material either by the contract of the parties, from the nature of the property; in other words, if time is not of the essence of the contract. The purchaser may repudiate the contract as soon as he discovers that the vendor has no title, but unless he does so at once he cannot afterwards defend an action of specific performance on the ground of want of mutuality if the vendor can then make a title (*d*). After a decree for specific performance the purchaser cannot repudiate without the leave of the Court (*e*). So that, if a vendor commence an action for specific performance, it is sufficient

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(*a*) Mills *v.* Haywood, 6 C. D. 196, 203.

(*b*) Ibid., 203, 204.

(*c*) Cornwall *v.* Henson, (1900) 2 Ch. 305 (C. A.), reversing (1899) 2 Ch. 710.

(*d*) Halkett *v.* Dudley (Earl), (1907) 1 Ch. 590; and see Hoggart *v.* Scott, 1 R. & M. 293; Eyston *v.* Simonds, 1 Y. & C. Ch. 608; Chamberlain *v.* Lee, 10 Si. 444; Phillipson *v.* Gibbon, L. R. 6 Ch. 428.

(*e*) Halkett *v.* Dudley (Earl), supra.

if he can procure a good title at the time of the decree (*a*). The title, however, ought generally to be made out in time for the certificate of the Master (*b*).

If either of the parties is guilty of delay either through defect of title or conveyance, the proper course for the other side is to give a written notice to the party in default to complete within a reasonable time named in the notice, and that if the contract be not then completed it will be considered at an end (*c*). Such a notice will make time of the essence of the contract. See infra, p. 500.

A purchaser, by buying up the title of a third party which might, had it remained outstanding, have constituted a valid objection to the vendor's title, will not be able to object to specific performance on the ground that the vendor has not got that title in himself (*d*).

But where the vendor does not make out his title until after action commenced, he is liable to pay costs up to the time when he showed title (*e*); but not if the suit was occasioned solely by the conduct of the purchaser; for example, where he simply disputes the authority of the vendor to sell, and does not ask for his title (*f*); or where the requisitions were not made until after the suit was commenced (*g*), or where, although the requisitions were made before then, the noncompliance of the vendor was due to the purchaser having claimed abatement or compensation, in respect of an objection upon which he failed in the action (*h*).

In a case where the vendor had been right on all points on which objections had been taken before the suit was commenced, but might with reasonable diligence have informed himself before selling of a defect in the title, which was discovered before the certificate approving of the title was signed, no costs were given on either side

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(*a*) Wynn *v.* Morgan, 7 V. 202; cf. Mortlock *v.* Buller, 10 V. 292; 7 R. R. 417; Langford *v.* Pitt, 2 P. W. 630; Jenkins *v.* Hiles, 6 V. 646; Salisbury *v.* Hatcher, 2 Y. & C. Ch. 54; Sidebotham *v.* Barrington, 4 B. 110; Murrell *v.* Goodyear, 1 De G. F. & J. 432.

(*b*) Kirwan *v.* Blake, cited 2 Moll. 581, 582; Cowgill *v.* Lord Oxmantown, 3 Y. & C. Ex., pp. 376—7.

(*c*) Green *v.* Sevin, 13 C. D. 589; Crawford *v.* Toogood, 13 C. D. 153; Howe *v.* Smith, 27 C. D. 89; Hatten *v.* Russell, 38 C. D. 334; Compton *v.* Bagley, (1892) 1 Ch. 313; but see Laughton *v.* Port Erin Commissioners, (1910) A. C. 565.

(*d*) Murrell *v.* Goodyear, 1 De G. F. & J. 432.

(*e*) Long *v.* Collier, 4 Russ. 269; Scoones *v.* Morrell, 1 B. 251; Wilkinson *v.* Hartley, 15 B. 183.

(*f*) Peers *v.* Sneyd, 17 B. 151.

(*g*) Lyle *v.* Yarborough, Johns. 70.

(*h*) Ibid.

except the costs of the original hearing which the vendor was ordered to pay to the purchaser (*a*).

There is a disinclination to extend the rule, by which a purchaser is compelled to take the estate although a title is not made out till after the time fixed by the contract, to any case to which it has not already been applied, since the rule has in many instances been productive of great hardship: accordingly it has been held that a purchaser will not be bound where a new suit is necessary, or an account of debts remains to be taken in a suit (*b*).

Defect of conveyance, not title.—Where a person sells property, but is neither able to convey himself nor has the power to compel a conveyance of it on the day fixed, the purchaser is not entitled to repudiate the contract until he has given notice (see post, p. 500) to the vendor to remove the defect within a reasonable time, and the vendor has failed to do so (*c*).

3. Compensation for Delay.

In all cases where specific performance has been decreed notwithstanding the time for completing the contract has elapsed, care has been taken that proper compensation should be made, and the parties, in fact, put in the same situation as if the contract had been strictly fulfilled (*d*). Thus, ordinarily, the purchaser is entitled to the profits of the estate from the time when the contract ought to have been completed (*e*); and the vendor, whether the estate be in possession or reversion, is entitled to interest upon the purchase-money from the same time (*f*), even if the money were lying dead, if the delay had arisen from the fault of the purchaser (*g*); (but not if the fault had been with the vendor (*h*)); but the purchaser

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(*a*) Phillipson *v.* Gibbon, L. R. 6 Ch. 428.

(*b*) Lechmere *v.* Brasier, 2 J. & W. 289; Dalby *v.* Pullen, 1 Russ. & M. 296; Coster *v.* Turnor, 1 Russ. & M. 311; Magennis *v.* Fallon, 2 Moll. p. 580; Chamberlain *v.* Lee, 10 Si. 444; Blacklow *v.* Laws, 2 Ha. 40; Fraser *v.* Wood, 8 B. 339.

(*c*) Hatten *v.* Russell, 38 C. D. 334; and see (as to default in title) Brewer *v.* Broadwood, 22 C. D. 105; Farrer *v.* Nash, 35 B. p. 171.

(*d*) Royal Bristol, &c., Socy. *v.* Bomash, 35 C. D. 390.

(*e*) De Visme *v.* De V., 1 Mac. & G. 346 (but see Vickers *v.* Hand, 26 B. 630).

(*f*) Lowther *v.* Andover, 1 Bro. Ch. 396; Davy *v.* Barber, 2 Atk. p. 490; Owen *v.* Davies, 1 Ves. Sen. 82; Monro *v.* Taylor, 8 Ha. 70, 3 Mac. & G. 713; Grove *v.* Bastard, 1 De G. M. & G. 69; Bailey *v.* Collett, 18 B. 179; Beresford *v.* Clarke, (1908) 2 Ir. R. 317; see Hatten *v.* Russell, supra.

(*g*) Calcraft *v.* Roebuck, 1 V. 221; Enraght *v.* Fitzgerald, 2 Ir. R. Eq. 87.

(*h*) Howland *v.* Norris, 1 Cox, 59;

should give notice that the money was not making interest, and even then, if he had not appropriated it for the vendor, or had in any way benefited by it, he must pay interest (*a*).

If there is an express agreement to pay interest, the purchaser must pay it unless of course the delay in completion arises from the vendor's bad faith or gross negligence (*b*), and where there is such an agreement the purchaser cannot free himself from it by paying the purchase-money into a bank (*c*). When the contract provides that interest is to be paid unless the delay is caused by the vendor's "wilful default," the purchaser must prove such default (*d*), and, similarly, if the provision is that "the purchaser in default" is to pay interest, he is not liable if the delay arises from the state of the title or from any cause due to the vendor (*e*).

Where the delay in completion arises from the default of the vendor, the purchaser, upon depositing his purchase-money in a bank to a separate account, and giving notice of the fact to the vendor, is relieved, as from the receipt of such notice by the vendor, from payment of interest, even when he has been in possession or receipt of the rents under the contract, and the contract provides that he shall pay interest "if from any cause whatever" the purchase is not completed on the day named. The vendor is, however, entitled to the interest (if any) allowed by the bank on the deposit (*f*).

Where a purchaser makes default in payment, and the vendor is not bound to give up possession until payment, if the latter occupies the property for the purpose of his business, and continues the business not on account of the purchaser, but on his own behalf, he will not be compelled to pay the purchaser an occupation rent from the time when the purchase ought to have been completed;

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but see Sherwin *v.* Shakspear, 5 De G. M. & G. 517; Vickers *v.* Hand, 26 B. 630; Williams *v.* Glenton, L. R. 1 Ch. 200.

(*a*) Powell *v.* Martyr, 8 V. 146; Roberts *v.* Massey, 13 V. 561; M'Cann *v.* Forbes, 1 Hogan, 13; Dyson *v.* Hornby, 4 De G. & Sm. 481; Winter *v.* Blades, 2 S. & S. 393; and see *Re* Bayley-Worthington and Cohen, (1909) 1 Ch. 648.

(*b*) Sherwin *v.* Shakspear, 5 De G. M. & G. 517.

(*c*) Riley to Streatfield, 34 C. D. 386.

(*d*) *Re* Mayor of London and Tubbs, (1894) 2 Ch. 524; Bennett *v.* Stone, (1903) 1 Ch. 509; *Re* Bayley-Worthington and Cohen, (1909) 1 Ch. 648; and see *Re* Woods, &c., (1898) 2 Ch. 211.

(*e*) Denning *v.* Henderson, 1 De G. & Sm. 689; Jones *v.* Gardiner, (1902) 1 Ch. 191.

(*f*) Kershaw *v.* K., 9 Eq. 56; *Re* Monckton and Gilzean, 27 C. D. 564; Roberts *v.* Massey, 13 V. 561; *Re* Gold's and Norton's Contract, 33 W. R. 333.

but the purchaser will be ordered to pay interest on the purchase-money from that day (*a*).

In ordinary contracts, where no time is fixed for completion, interest will generally be payable by the purchaser from the time he might prudently take possession, supposing it to be offered to him, as that is at the time when a good title was shewn (*b*); especially if he has received the rents and profits (*c*). And therefore, if there is a weighty objection to the title, the purchaser is not bound to take possession, nor, consequently, to pay interest until it is cleared up (*d*).

Companies which acquire land under compulsory powers are on the same footing as ordinary purchasers in respect of the liability to pay interest on taking possession (*e*).

Upon a sale of a reversion, interest is payable from the time appointed for completing the purchase. For "upon the sale of a reversion, the time at which the purchaser takes possession has nothing to do with the question of interest on the purchase-money. The advantage obtained by the delay, and wearing out of the prior life interest, is equivalent to the receipts of the rents of a property in possession" (*f*).

On the sale *by the order of the Court* of an estate in *possession*, the purchaser will be entitled to the rents and profits from the quarter day preceding his purchase, and he must pay the purchase-money before the following one (*g*): but he will not be allowed to deduct the property tax (*h*).

If the estate be *reversionary*, the purchaser will be entitled to any benefit from the dropping of lives, from the time of confirming the report absolute, and will, consequently, be liable to pay interest from

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(*a*) Leggott *v.* Met. Ry. Co., L. R. 5 Ch. 716; but see Met. Ry. *v.* Defries, 2 Q. B. D. 387.

(*b*) *Re* Pigott and the G. W. Ry. Co., 18 C. D. p. 150; *Exp.* Manning, 2 P. W. 410; Birch *v.* Joy, 3 H. L. Cas. 565; Ballard *v.* Shutt, 15 C. D. 122; cf. Fletcher *v.* L. and Y. Ry. Co., (1902) 1 Ch. 901; and see Smith *v.* Dolman, 6 Bro. P. C. 291 (where a receiver had been appointed).

(*c*) Powell *v.* Martyr, 8 V. p. 148; and see Fludyer *v.* Cocker, 12 V. 25; Binks *v.* Lord Rokeby, 2 Swans. p. 226; A.-G. *v.* Christ Church, 13 Si. 214; but see Blount *v.* B., 3 Atk. 636; Ballard *v.* Shutt, 15 C. D. 122.

(*d*) Horniblow *v.* Shirley, 13 V. 81; Carrodus *v.* Sharp, 20 B. 56; and see Beresford *v.* Clark, (1908) 2 Ir. R. 317.

(*e*) Rhys *v.* Dare Ry. Co., 19 Eq. 93; *Re* Pigott and G. W. Ry., 18 C. D. 146; *Re* Shaw & Birmingham Corporation, 27 C. D. 614; Catling *v.* G. N. Ry. Co., 18 W. R. 121.

(*f*) Bailey *v.* Collett, 18 B., p. 182. And see Davy *v.* Barber, 2 Atk., p. 490. Owen *v.* Davies, 1 Ves. Sen. 82.

(*g*) Mackrell *v.* Hunt, 2 Madd. 34, (n.).

(*h*) Holroyd *v.* Wyatt, 1 De G. & Sm. 125.

that time (*a*), and where time was fixed for money to be paid into Court, from which date the purchaser was to have the rents and profits and pay interest, but the vendor did not deliver the abstract until long after that date, it was held that the condition did not apply and interest was not due, but the purchaser must pay interest in respect of the benefit accrued by reason of the dropping of lives (*b*).

Even where there is an express stipulation, "that interest is to be paid on the purchase money, *from whatever cause the delay may have arisen*," if the delay in completing the contract is due to the fraud or wilful delay of the vendor, he will be left in possession of the rents and profits until a good title be shown; and from that period only will he become entitled to interest, and the purchaser to the rents and profits (*c*); and if such interest be paid to the vendor under protest, it may, it seems, be recovered back from him on summons under the Vendor and Purchaser Act, 1874, s. 9 (*d*). Where, however, the delay in such a case is occasioned by the *state of the title* (*e*), alone and not by the fraud or wilful default of the vendor, he will be entitled to interest according to the express terms of the stipulation (*f*).

A vendor may lawfully stipulate that the rate of interest shall be increased on non-performance of the contract by the purchaser (*g*).

From the date of the contract for sale until completion, the vendor is a trustee for the purchaser, and, consequently, is liable to him for any injury to the property caused by his failing to take reasonable care to prevent the property deteriorating (*h*); and the purchaser may recover the loss either by compensation allowed or by a separate action for damages.

(*a*) *Ex p.* Manning, 2 P. W. 410; Davy *v.* Barber, 2 Atk. 489; Child *v.* Lord Abingdon, 1 V. 94; Champernowne *v.* Brooke, 3 Cl. & Fin. 1; 4 Cl. & Fin. 589; Townsend *v.* Champernowne, 3 Y. & C. Ex. 505.

(*b*) Wallis *v.* Sarel, 5 De G. & Sm. 429; Robertson *v.* Skelton, 13 B. 91.

(*c*) Vickers *v.* Hand, 26 B. 630; *Re* Hetling & Merton, (1893) 3 Ch. 269; *Re* Strafford & Maples, (1896) 1 Ch. 235.

(*d*) *Re* Young & Harston's Contract, 31 C. D. 168.

(*e*) See supra, p. 492, and Hatten *v.* Russell there referred to.

(*f*) Mayor of London *v.* Tubbs, (1894) 2 Ch. 524; Esdaile *v.* Stephenson, 1 S. & S. 122; Bannerman *v.* Clarke, 26 L. J. Ch. 77; Lewis *v.* S. Wales Ry. Co., 10 Ha. 113; Palmerston *v.* Turner, 33 B. 524; Bennett *v.* Stone, (1903) 1 Ch. 509; *Re* Bayley-Worthington & Cohen, (1909) 1 Ch. 648.

(*g*) Herbert *v.* Salisbury, &c. Ry. Co., 2 Eq. 221.

(*h*) Clarke *v.* Ramuz, (1891) 2 Q. B. 456; Malone *v.* Henshaw, 29 L. R. Ir. 352; Foster *v.* Deacon, 3 Madd. 394; Lord *v.* Stephens, 1 Y. & C. Ex. 222; and see Townsend *v.* Champernowne, 3 Y. & C. Ex. 508; Carrodus *v.* Sharp, 20 B., p. 59.

If the purchaser has paid the purchase-money into Court under an order, he is entitled to interest on the amount of the compensation, from the time of such payment (*a*); but he will not be entitled to compensation for deterioration after the time when he took, or ought to have taken possession (*b*); or if he has himself occasioned the deterioration, *e.g.*, by causing the tenant to quit before the completion of the contract (*c*). Where it was provided that if the purchase of a quarry which was let to a third person was not completed on the date fixed, the vendor should receive the "rents and profits" until completion in lieu of interest, he was held entitled to the royalties, payable under the lease from the date of the agreement until actual completion (*d*).

In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendor, down to the time when the purchaser could prudently take possession, that is, when a good title was shown (*e*); and until then, the vendor is also entitled to the incomings. Thus, on the sale of a manor by order of the Court which required the purchase-money to be paid into Court by a certain date, it was held that the vendor was entitled to manorial fines which were incurred before that date although not assessed until afterwards (*f*).

Where after the date of the contract to purchase a house, but before the date fixed for completion, the house is burnt down, the purchaser in the absence of any reference to the insurance is not entitled to any benefit thereof, either by way of abatement of the purchase-money, or reinstatement of the premises (*g*).

The person who claims that time is essential must insist upon the point promptly, or he will be held to have waived it (*h*).

4. Where Time is of the Essence of the Contract.

There are two exceptions to the rule of equity that time is not of the essence of the contract: (i) from the nature of the property, time may be considered of the essence of the contract: (ii) by express agreement or notice.

(*a*) Ferguson *v.* Tadman, 1 Si. 530.

(*b*) Binks *v.* Lord Rokeby, 2 Swans. p. 226; Minchin *v.* Nance, 4 B. 332; Phillips *v.* Silvester, L. R. 8 Ch. p. 178.

(*c*) Harford *v.* Purrier, 1 Madd. 532.

(*d*) Leppington *v.* Freeman, 40 W. R. 348.

(*e*) Carrodus *v.* Sharp, 20 B. 56.

(*f*) Garrick *v.* Camden, 2 Cox, 231; Cuddon *v.* Tite, 1 Gif. 395.

(*g*) Rayner *v.* Preston, 18 C. D. 1 (*James*, L.J., dissenting); Castellain *v.* Preston, 8 Q. B. D. 613.

(*h*) Monro *v.* Taylor, 8 Ha., p. 62.

From the Nature of the Property.—The rule has no application to *mercantile* contracts (*a*). Nor where the thing sold is of greater or less value, according to the effluxion of time, for instance, the sale of *reversionary* interests (*b*), unless the intention of the parties clearly appears to have been otherwise (*c*).

Time is also of the essence of the contract in contracts with ecclesiastical corporations; for example, a contract for a concurrent lease, where the lapse of every day changed the value and nature of the thing, and changed also the persons who were to participate in the sum to be paid (*d*); also, where the property was of a fluctuating value, such as stock (*e*), and mines, mining lease, and works (*f*); or of a wasting or determinable character, such as a life estate or a life annuity (*g*); or a leasehold, a short time of which only is unexpired (*h*); or if the estate were wanted for commercial purposes (*i*); or for immediate residence (*k*); or for some other immediate purpose (*l*); or if the estate were sold for the purpose of paying off debts of the vendor which bear a higher rate of interest than he would get for the unpaid purchase-money (*m*); but time is not of the essence of the contract where the land had been purchased for the purpose of building a residence on it (*n*).

Thus, upon the sale, by the occupier, of a public-house as a going concern, time is of the essence of the contract (*o*); and it is also essential

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(*a*) Per *Cotton*, L.J., Reuter *v.* Sala, 4 C. P. D., p. 249.

(*b*) Newman *v.* Rogers, 4 Bro. Ch. 393; Levy *v.* Stogdon, (1899) 1 Ch. 5. See also Spurrier *v.* Hancock, 4 V. 667; Wyvill *v.* Exeter (Bishop), 1 Price, p. 298.

(*c*) Patrick *v.* Milner, 2 C. P. D. 342, 348; Hipwell *v.* Knight, 1 Y. & C. Ex. 401, 416.

(*d*) Carter *v.* Ely (Dean), 7 Si. p. 228.

(*e*) Doloret *v.* Rothschild, 1 S. & S. 590, and see Lewis *v.* Lord Lechmere, 10 Mod. 503.

(*f*) Macbryde *v.* Weeks, 22 B. 533; Prendergast *v.* Turton, 1 Y. & C. Ch. 110; Clegg *v.* Edmondson, 8 De G. M. & G., p. 814; City of London *v.* Mitford, 14 V., p. 58; Walker *v.* Jeffreys, 1 Ha. 341; Eads *v.* Williams, 4 De G. M. & G. 674; Glasbrook *v.* Richardson, 23 W. R. 51.

(*g*) Withy *v.* Cottle, Turn. & R. 78.

(*h*) Hudson *v.* Temple, 29 B., p. 543.

(*i*) Parker *v.* Frith, 1 S. & S. 199 (n.); Wright *v.* Howard, 1 S. & S. 190; Walker *v.* Jeffreys, 1 Ha. p. 348; Macbryde *v.* Weeks, 22 B. 533.

(*k*) Tilley *v.* Thomas, L. R. 3 Ch. 61, 67; Levy *v.* Lindo, 3 Mer. p. 84; but see Gedye *v.* Duke of Montrose, 26 B. 45; Webb *v.* Hughes, 10 Eq. 281.

(*l*) Wright *v.* Howard, 1 Si. & S. 190; Parker *v.* Frith, ibid. 199 (n.).

(*m*) Popham *v.* Eyre, Lofft. 786.

(*n*) Wells *v.* Maxwell, 32 B. 408.

(*o*) Day *v.* Luhke, 5 Eq. 336; Farnham Brewery *v.* Hunt, 68 L. T. p. 443; Claydon *v.* Green, L. R. 3 C. P. 511; Cowles *v.* Gale, L. R. 7 Ch. 12; Tadcaster Brewery *v.* Wilson, (1897) 1 Ch. 705; see also Coslake *v.* Till, 1 Russ. 376; Seaton *v.* Mapp, 2 Coll. 556; Weston *v.* Savage, 10 C. D. 736.

in contracts for the working of collieries, as the object is to make them immediately productive (*a*); and in contracts for the payment of money to be applied towards obtaining patents (*b*).

So where shares in a company are by contract forfeitable by non-payment of calls for a fixed period after notice sent, no relief can be given against forfeiture, as in such cases interest would not be an adequate compensation (*c*).

But even when, from the nature of the property, the time fixed for completion is essential, if the conduct of the parties show that they contemplated that the execution of the contract might be postponed beyond the day fixed, the contract must be completed although delay has occurred (*d*).

An option to purchase is always construed strictly, and must be exercised at the time prescribed (*e*). Upon the same principle, where a general meeting of the shareholders of a company had agreed to certain conditions on which dissenting members were to have the option to retire from the company, one of which fixed the date at which the assent to the arrangement was to be declared, it was held by the House of Lords that the date was essential, and consequently, after it had expired that the directors had no power to enter into arrangements with any member who desired to retire but had not expressed his wish to do so within the limited time (*f*).

Where time is of the essence of the contract, the purchaser, who does not insist on his right to rescind the contract, but obtains a decree for specific performance, will be entitled to compensation for loss sustained in consequence of possession not having been given to him according to the contract (*g*).

In all cases where time is of the essence of the contract, the postponement of the date agreed upon does not necessarily

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(*a*) Sparrow's Case, cited 2 Sch. & L. 603; see also Pollard *v.* Clayton, 1 K. & J. 462; Macbryde *v.* Weeks, 22 B. 539; cf. Huxham *v.* Llewellyn, 21 W. R. 766.

(*b*) Payne *v.* Banner, 15 L. J. Ch. 227.

(*c*) Sparks *v.* The Liverpool Waterworks, 13 V. 428, 434, and see Campbell *v.* L. & B. Ry. Co., 5 Ha. 519.

(*d*) Webb *v.* Hughes, 10 Eq. 281; Patrick *v.* Milner, 2 C. P. D. 342, 348; cf. Nokes *v.* Lord Kilmorey, 1 De G. & Sm. 444.

(*e*) Brooke *v.* Garrod, 2 De G. & J. 62, 66; see also Alderson *v.* White, 2 De G. & J. 97; Rowlands *v.* Evans, 8 Jur. (N. S.) 88; Lord Ranelagh *v.* Melton, 2 Dr. & Sm. 278; Austin *v.* Tawney, L. R. 2 Ch. 143; Mills *v.* Haywood, 6 C. D. 196; Campbell *v.* L. & B. Ry. Co., 5 Ha. p. 529; Starkey *v.* Barton, (1909) 1 Ch. 284.

(*f*) Houldsworth *v.* Evans, L. R. 3 H. L. 263.

(*g*) Gedye *v.* Montrose (Duke), 26 B. 45.

operate as a waiver, but merely substitutes another time which is also material (*a*).

By Agreement.—It was at one time thought that the parties could not make time of *the essence of the contract* (*b*); but it is now settled, that if by the contract it *clearly appears* that the parties intended time to be of the essence of the contract, their intention will be enforced even as to matters which otherwise would not be essential (*c*), *e.g.*, with regard to payment of the deposit (*d*), the balance of the purchase-money (*e*), or to covenants for the renewal of leases (*f*).

For this purpose, the intention must be clearly expressed (*g*); it is not sufficient that a time is merely mentioned at or before which an act is to be performed (*h*). Hence a statement in the conditions of sale that the abstract will be delivered on or before a particular day, has not that effect, even if the purchaser upon the expiration of the time gave notice immediately that he would not proceed (*i*); nor has the mention of a day for completion (*k*), although the purchaser is to pay interest from such date (*l*). Nor has a mere stipulation that possession is to be given on a certain day, unless there is something in the nature of the property to make the date essential (*m*). And, a stipulation to that effect with regard to one of the steps towards completion, raises a presumption that time was *not* to be material with respect to others (*n*). Even where the parties fix the time, if the contract shows that they contemplated a possible postponement, time will not be of the essence of the contract (*o*).

Notice.—Though time be not originally of the essence of a con-

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(*a*) Barclay *v.* Messenger, 43 L. J. Ch. 449; Gedye *v.* Montrose (Duke), 26 B. 45.

(*b*) Gregson *v.* Riddle, ante, p. 481.

(*c*) Hudson *v.* Bartram, 3 Madd. p. 447; Lloyd *v.* Rippingale, cited, 1 Y. & C. Ex. 410; Hipwell *v.* Knight, 1 Y. & C. Ex. 401, 416; Nokes *v.* Lord Kilmorey, 1 De G. & S. 444; Parkin *v.* Thorold, 16 B. 59; Hudson *v.* Temple, 29 B. 536; Oakden *v.* Pike, 34 L. J. Ch. 620; Hatten *v.* Russell, 38 C. D., p. 339.

(*d*) Honeyman *v.* Marryatt, 21 B. 14, 24.

(*e*) Barclay *v.* Messenger, 43 L. J. Ch. 449.

(*f*) Baynham *v.* Guy's Hospital, 3 V. 295.

(*g*) Webb *v.* Hughes, 10 Eq. p. 286.

(*h*) Hearne *v.* Tenant, 13 V. p. 289.

(*i*) Roberts *v.* Berry, 16 B. 31, 3 De G. M. & G. 284, 292; Venn *v.* Cattell, 27 L. T. 469.

(*k*) Parkin *v.* Thorold, 16 B. 59; and see Barclay *v.* Messenger, 43 L. J. Ch. 449.

(*l*) Hatten *v.* Russell, 38 C. D. p. 334.

(*m*) Tilley *v.* Thomas, L. R. 3 Ch. 61, 66; Webb *v.* Hughes, 10 Eq. 281.

(*n*) Wells *v.* Maxwell, 32 B. p. 444 (affirmed 33 L. J. Ch. 44).

(*o*) Webb *v.* Hughes, 10 Eq. p. 286.

tract, where there has been unreasonable delay on one side, the other party has a right to fix a *reasonable* time within which the contract is to be completed (*a*).

The notice to complete must be *reasonable*. Thus, it was held that the purchaser was not justified, while negotiations were going on for the removal of his objections to the title, in giving the vendor notice to complete within a month, or the contract would be rescinded (*b*).

The reasonableness of the notice must be judged with reference to the date on which it is given (*c*), and it also depends on the nature of the subject-matter of the contract (*d*). If one party has already refused to remove an objection, a notice given to him after his refusal may be reasonable, which would not have been so in the first instance (*e*). The notice must be distinct and unequivocal (*f*); but writing is not essential (*g*).

When time is of the essence of the contract, either originally or during the negotiations, it may be enlarged or waived by subsequent agreement, or by conduct amounting to a waiver. Thus, if the time is once allowed to pass, and then the parties go on negotiating, it will amount to a waiver, and then time will cease to be of the essence of the contract (*h*), unless the negotiations were *without prejudice* (*i*).

But if, as in the principal case, a purchaser is aware of the objections to the title; or he receives the abstract after the day appointed (*k*); or proceeds with the purchase, although the time fixed for completion has elapsed, and a much longer period may be

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(*a*) Benson *v.* Lamb, 9 B. 502; Gordon *v.* Mahony, 13 Ir. R. Eq. p. 404; Morgan *v.* Gurley, 1 Ir. Ch. R. p. 495; Eads *v.* Williams, 4 De G. M. & G. 674; Nott *v.* Riccard, 22 B. 307; Taylor *v.* Brown, 2 B. 183; Compton *v.* Bagley, (1892) 1 Ch. 313.

(*b*) Wells *v.* Maxwell, 33 L. J. Ch. 44; Pegg *v.* Wisden, 16 B. 239 (6 weeks); Parkin *v.* Thorold, 16 B. 59 (14 days); McMurray *v.* Spicer, 5 Eq. 527 (5 weeks); Webb *v.* Hughes, 10 Eq. 281; Green *v.* Sevin, 13 C. D. 589; Wylson *v.* Dunn, 34 C. D. p. 578; Hatten *v.* Russell, 38 C. D. p. 334.

(*c*) Crawford *v.* Toogood, 13 C. D. 153.

(*d*) Macbryde *v.* Weeks, 22 B. 533.

(*e*) Nott *v.* Riccard, 22 B. 307.

(*f*) Reynolds *v.* Nelson, 6 Madd. (Madd. & G.) 18.

(*g*) Nokes *v.* Lord Kilmorey, 1 De G. & Sm. 444.

(*h*) Boyes *v.* Liddell, 6 Jur. 725; Flint *v.* Woodin, 9 Ha. 618; King *v.* Wilson, 6 B. 124; Pegg *v.* Wisden, 16 B. 239; Webb *v.* Hughes, 10 Eq. 286; but see Dyas *v.* Rooney, 27 L. R. Ir. 4.

(*i*) Tilley *v.* Thomas, L. R. 3 Ch. 61.

(*k*) Pincke *v.* Curteis, 4 Bro. Ch. 329; Hipwell *v.* Knight, 1 Y. & C. Ex. 401.

requisite in order to make a good title (*a*), he will have waived his right to object to the delay, and not be able to resist specific performance (*b*).

If a vendor receives and entertains the requisitions of the purchaser after the time specified, he will be considered to have waived his right under the conditions, unless he expressly reserves it (*c*).

If one party to a contract for the sale of lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract, and the other makes no prompt assertion of his right to enforce it, he will be considered to have acquiesced, and to have abandoned any right he had to enforce performance (*d*).

The time within which objections are to be made to a title may be enlarged by the consent of the vendor (*e*).

A purchaser may, under certain circumstances, waive objections to the title; for instance, by taking possession forcibly (*f*). If, however, he take possession with the consent of the vendor (*g*), or under the terms of the contract, when he knows that the objections to the title are removable (*h*), it does not amount to waiver.

There is a broad distinction with reference to acts between objections to the title which the purchaser knows are removable by the vendor, and those which are irremovable. For instance, if the purchaser takes possession, knowing that the vendor has mortgaged the property, this will not amount to a waiver of the right to have the mortgage paid off by the vendor. On the other hand, if the purchaser knew that the estate was subject to a right of sporting over it, vested in some third person over whom the vendor had no control, but nevertheless took possession, then he will have waived his right to call for the release of the sporting right, or, if it could not be released, to repudiate his contract (*i*).

(*a*) Wood *v.* Bernal, 19 V. 220; Smith *v.* Burnam, 2 Anst. 527; Paine *v.* Meller, 6 V. 349; Warde *v.* Jeffery, 4 Price, 294; Smith *v.* Dolman, 6 Bro. P. C. 291; *Ex p.* Gardner, 4 Y. & C. Ex. 503; Wood *v.* Machu, 5 Ha. 158.

(*b*) Hoggart *v.* Scott, 1 Russ. & M. 293.

(*c*) Oakden *v.* Pike, 34 L. J. Ch. 620.

(*d*) Guest *v.* Homfray, 5 V. 818; Heaphy *v.* Hill, 2 S. & S. 29; Watson *v.* Reid, 1 Russ. & M. 236; Walker *v.* Jeffreys, 1 Ha. 341.

(*e*) Cutts *v.* Thodey, 13 Si. 206.

(*f*) Calcraft *v.* Roebuck, 1 V. 221.

(*g*) Vancouver *v.* Bliss, 11 V. 458; Burroughs *v.* Oakley, 3 Swans. 159; Simpson *v.* Sadd, 4 De G. M. & G. 665.

(*h*) Dixon *v.* Astley, 1 Mer. p. 134; Stevens *v.* Guppy, 3 Russ. 171; *Re* Gloag & Miller, 23 C. D. 327.

(*i*) *Re* Gloag & Miller, 23 C. D. 329.

If a vendor turns a purchaser out of possession of a house, where residence in the house was an essential part of the contract, he will be held to have abandoned, and will be unable to enforce, the performance of the contract (*a*); but where a purchaser was let into the receipt of the rents and profits, under a contract which was to be completed at a definite period, from which time the purchaser was to receive the rents and profits, and, on the other hand, pay interest on the purchase-money, and the vendor, finding that he could get neither purchase-money nor interest, gave notice to the tenants to pay no more rent to the purchaser, it was held that he had not thereby abandoned his right to obtain specific performance (*b*).

The vendor may, it seems, insist upon the contract being rescinded, where the circumstances render it improbable that the purchase-money can be paid for a long time, *e.g.*, the bankruptcy of the purchaser; or his death, and the inability of his representatives to get in his assets (*c*).

Omission to require repayment of the deposit will not deprive a party of his right to insist that the contract is rescinded, where he has taken other sufficient steps for that purpose (*d*).

Where the vendor's bill for specific performance has been dismissed on the ground of his *laches*, without any decision on the title, the Court has declined to order the deposit to be returned to the purchaser, and has left both parties to their legal remedies (*e*).

But although time may be made of the essence of the contract, as, for instance, in taking objections to the title in reference to any matter appearing upon the abstract, yet the vendor is not entitled to enforce his rights in that respect, where there has been unfair dealing, and a plain want of *bona fides* on his part, as where the conditions were so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title (*f*).

(*a*) Knatchbull *v.* Grueber, 3 Mer. 124.

(*b*) Colby *v.* Gadsden, 34 B. 416, 420.

(*c*) Mackreth *v.* Marlar, 1 Cox, 259; Whittaker *v.* W., 4 Bro. Ch. 31; Lowther *v.* Lady Andover, 1 Bro. Ch. 396; Rome *v.* Young, 3 Y. & C. Ex. 199; Neale *v.* Mackenzie, 1 Keen, 474; and see Levy *v.* Stogdon, (1899) 1 Ch. 5.

(*d*) Watson *v.* Reid, 1 Russ. & M. 236; Southcomb *v.* Exeter (Bishop), 6 Ha. 224.

(*e*) Southcomb *v.* Exeter (Bishop), 6 Ha. 224.

(*f*) Boyd *v.* Dickson, 10 Ir. R. Eq. 239, 255. See as to misrepresentation, Tibbatt *v.* Boulter, 73 L. T. 534.

5. Compensation where the Vendor has not the interest in the Estate which he has Contracted to Sell, or there is some Deficiency in the Quantity or Quality thereof.

Strictly speaking, in granting specific performance with compensation in these cases, the Court does more than enforce the contract between the parties. It enforces performance in a way not contemplated by the contract, and payment of compensation which the parties never agreed to make. In one case, however, specific performance with compensation is decreed in accordance with the contract, that is, where the parties have expressly contracted to that effect. It is open to them also to agree expressly that no compensation shall be given for any error or misdescription of the property.

The position of the vendor is materially different from that of the purchaser. The former, as a rule, can only obtain specific performance of his contract if he is prepared to fulfil his part, but an unsubstantial error innocently made will not preclude him obtaining it. He cannot do so, where the error amounts to a misrepresentation, or where it is substantial, whether the error is made innocently or fraudulently. He cannot obtain compensation in his own favour.

The purchaser, on the other hand, can as a rule elect to take the property the vendor has, receiving compensation for the deficiency or difference in tenure. But he cannot do so, if specific performance would be prejudicial to third parties, or the difference cannot be estimated in money value, or if it would involve hardship on the vendor.

The position of the vendor and purchaser will, therefore, be dealt with under separate heads, and following them, the problems arising on a contract which excludes compensation will be discussed.

Where Vendor seeks Specific Performance.—Formerly at law, where a person contracted to sell an interest, for instance, a term of years, and it appeared that the term was of less duration than the vendor represented it to be, for example, six years instead of sixteen, the vendee might recover any deposit which he may have paid, even although the vendor might offer compensation (*a*). In *equity*, however, if the

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(*a*) Halsey *v.* Grant, 13 V. 73; Dyer *v.* Hargrave, 10 V. 505; Long *v.* Fletcher, 2 Eq. Ca. Abr. 5, pl. 4; and Spunner *v.* Walsh, 11 Ir. R. Eq 597; Nash *v.* Wooderson, (1884) W. N. 210.

purchaser could get substantially what he contracted for, specific performance would be decreed against him at the suit of the vendor, but he would be allowed compensation for the difference in value between what he would get and what he contracted for (*a*).

If the misdescription, although not fraudulent, is material and substantial, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for the misdescription, the purchaser might never have entered into the contract, the contract is avoided altogether, if the purchaser so wills (*b*) ; for the Court has been approaching nearer to the doctrine that a purchaser shall have that which he contracted for or not be compelled to take that which he did not mean to have (*c*). Thus, where a man sells a lease, and nothing is said about the title, he will not make a good title, unless he shows that he holds direct from the freeholder, or, it seems, from the copyholder under a licence from the lord (*d*). But it seems that a condition providing "that any error or mis-statement of the property, *term of years*, or other description, shall not vitiate the sale," would enable the vendor though he showed title to only an underlease to insist on specific performance, even if the misdescription were essential (*e*), although in one case, it was refused even when compensation was offered by the plaintiff (*f*).

Where, moreover, the particulars and conditions of sale which described property as held under a lease, contained enough to give notice to a purchaser that the property was held under a derivative lease, it was held that the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription (*g*).

A purchaser, however, is not bound to accept land of a different tenure from that for which he contracted (as, leaseholds instead of freeholds, even if the leaseholds might be held for so long a term as to make them nearly equal in value to freeholds), for although, when a party gets substantially that for which he contracts, any small

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(*a*) Halsey *v.* Grant, supra.

(*b*) Per *Tindal*, C.J., in Flight *v.* Booth, 1 Bing. N. C., p. 377.

(*c*) Knatchbull *v.* Grueber, 3 Mer., p. 146.

(*d*) Per *Jessel*, M.R., in Camberwell, &c. Building Society *v.* Holloway, 13 C. D. 760 ; *Re* Beyfus and Masters, 39 C. D. 110.

(*e*) See and cf. *Re* Beyfus and Masters, 39 C. D 110.

(*f*) Madeley *v.* Booth, 2 De G. & Sm. 718, 722.

(*g*) Camberwell, &c. Building Society *v.* Holloway, 13 C. D. 754; cf. Darlington *v.* Hamilton, Kay, 558 ; Henderson *v.* Hudson, 15 W. R. 860 ; Flood *v.* Pritchard, 40 L. T. 873 ; Turner *v.* T., (1881) W. N. 70, but see Broom *v.* Phillips, 74 L. T. 459.

difference might be remedied by compensation, that will not be the case where it extends the nature of the property itself (*a*). And a purchaser, unless forced to do so by the conditions (*b*), is not compelled to take copyhold instead of freehold (*c*). So, too, a person who has contracted to purchase an estate as copyhold, will not be compelled to take it, if it turned out to be partly freehold (*d*). Nor can a person be compelled to take a perpetual rent-charge instead of an estate in fee simple (*e*).

It seems, however, that specific performance cannot be successfully resisted if an estate represented as copyhold, equal in value to freehold, should turn out to be freehold (*f*), unless there is an express stipulation that the contract shall be void if it should appear that any part of the estate was freehold (*g*).

A vendor cannot obtain specific performance when his misdescription of the property amounts to a misrepresentation (*h*).

Objections to tenure may be waived by the conduct of the purchaser; for example, if he proceeds with the treaty for the purchase after becoming acquainted with the nature of the tenure (*i*). But although he is compelled to fulfil his contract, he will be entitled to compensation (*k*).

A purchaser of the entirety cannot be compelled to take an undivided share of an estate (*l*); nor can a purchaser be compelled to take a remainder expectant upon the determination of a previous life interest, instead of an estate in possession (*m*); nor an estate which is subject to a right of sporting not mentioned in the particulars of sale, but he may waive the objection, for example, by taking possession after notice of it (*n*); nor an estate subject to an

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(*a*) Drew *v.* Corp, 9 V. 368; Parker *v.* Frith, 1 S. & S. 201 (n.); Wright *v.* Howard, 1 S. & S. 190; Barton *v.* Lord Downes, 1 Flan. & K. 505.

(*b*) Price *v.* Macaulay, 2 De G. M. & G. 339.

(*c*) Twining *v.* Morrice, 2 Bro. Ch. 331; Hick *v.* Phillips, Pr. Ch. 575.

(*d*) Ayles *v.* Cox, 16 B. 23.

(*e*) Prendergast *v.* Eyre, 2 Hog. 81.

(*f*) Twining *v.* Morrice, 2 Bro. Ch. 326.

(*g*) Daniels *v.* Davison, 16 V., p. 255.

(*h*) Clermont *v.* Tasburgh, 1 J. & W. 112; Price *v.* Macaulay, supra; Dimmock *v.* Hulett, L. R. 2 Ch., p. 28; *Re* Terry & White, 32 C. D., p. 29.

(*i*) Fordyce *v.* Ford, 4 Bro. Ch. 494; Burnell *v.* Brown, 1 J. & W. 168; Martin *v.* Cotter, 3 Jo. & Lat. 496.

(*k*) Calcraft *v.* Roebuck, 1 V. 221.

(*l*) A.-G. *v.* Day, 1 Ves. Sen. 218; Roffey *v.* Shallcross, 4 Madd. 227; Dalby *v.* Pullen, 3 Si. 29; Casamajor *v.* Strode, 2 My. & K., p. 726.

(*m*) Collier *v.* Jenkins, You. 295; Nelthorpe *v.* Holgate, 1 Coll. 203; Hughes *v.* Jones, 3 De G. F. & J. 307.

(*n*) Burnell *v.* Brown, 1 J. & W. 168.

undisclosed right of digging for mines (*a*), or to watercourses (*b*), or to restrictive covenants (*c*), or to a reservation of minerals to the lord of the manor on enfranchisement (*d*); nor an estate which is a mere sheep-walk and not a freehold (*e*); nor if it is liable to the repairs of a chancel (*f*).

Where redeemed land-tax was sold, described as being charged on three houses, whereas it turned out that it consisted of three separate sums charged on three houses separately, specific performance against the purchaser was refused, as the misdescription was not susceptible of compensation (*g*).

So where particulars of sale were misleading in consequence of their not disclosing a ground rent, it was held that the purchaser was entitled to be discharged (*h*); but it seems that if there were undisclosed quit-rents, and rent-charges—at any rate, if they were of small amount—specific performance with compensation might be decreed (*i*). So also, if lands sold as tithe-free, turned out to be liable to a rent-charge in lieu of tithes, it would be a subject for compensation (*k*). If quit-rents were sold, a mistake in their amount would be immaterial, and compensation would be allowed (*l*).

Where the vendor cannot make a good title to a small portion of the estate, and compensation can be made for the deficiency, specific performance with compensation would be decreed (*m*). This doctrine was carried to a great extent in former times, but now it may be considered as settled, that where a good title cannot be made to a portion of the estate contracted to be sold *which is material to the possession and enjoyment of the rest*, specific performance would be

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(*a*) Barton *v.* Lord Downes, 1 Flan. & Kel. 505; Seaman *v.* Vawdrey, 16 V. 390.

(*b*) But see Shepherd *v.* Croft, (1911) 1 Ch. 521.

(*c*) Cato *v.* Thompson, 9 Q. B. D. 616, 618; *Re* Higgin's and Hitchman's Contract, 21 C. D. 95; Phillips *v.* Caldcleugh, L. R. 4 Q. B. 159; May *v.* Platt, (1900) 1 Ch. 616; Hone *v.* Gakstetter, 53 Sol. Jo. 286.

(*d*) Upperton *v.* Nickolson, L. R. 6 Ch. 436.

(*e*) Vancouver *v.* Bliss, 11 V. 458.

(*f*) Horniblow *v.* Shirley, 13 V. 81, cited as Forteblow *v.* Shirley, 2 Swans. 223.

(*g*) Cox *v.* Coventon, 31 B. 378.

(*h*) Jones *v.* Rimmer, 14 C. D. 588; cf. *Re* Simpson & Moy, 53 Sol. Jo. 376.

(*i*) Esdaile *v.* Stephenson, 1 S. & S. 122; Bowles *v.* Waller, 1 Hayes, p. 441; Prendergast *v.* Eyre, 2 Hog., p. 94; Portman *v.* Mill, 1 R. & M. 696.

(*k*) Howland *v.* Norris, 1 Cox, 59.

(*l*) Cuthbert *v.* Baker, Reg. Lib. A. 1790, fol. 442; Johnson *v.* J., 3 B. & P. 162.

(*m*) M'Queen *v.* Farquhar, 11 V. 467; Bowyer *v.* Bright, 13 Price, 698; Carver *v.* Richards, 6 Jur. (N. S.) 667; *Re* Fawcett and Holmes, 42 C. D. 150; Jacobs *v.* Revell, (1900) 2 Ch. 858.

refused (*a*). And so where an adjunct *essential* to the enjoyment of the property, such as fixtures in a public-house, is left to be appraised by valuers, specific performance of the contract to purchase the property without the adjunct, has not been enforced, but it is otherwise if it is not essential (*b*).

Where, however, vendors bound themselves to make out a good title to *all* the lands included in the contract, but were unable to show a title to one three hundred and thirtieth part not necessary to the enjoyment of the other parts included in the contract (which provided for compensation for errors in dimensions in the land), it was held that it was not competent to the vendors to seek specific performance with compensation (*c*).

But, it seems, if an estate is sold by auction, and a good title cannot be made to some of the lots, specific performance will be decreed as to the lots to which a good title can be made, if they are not complicated with the others (*d*); but there is no case apportioning purchase money on the sale of two estates for one sum upon the failure of title to one of the estates (*e*).

Where the vendor has a title to an estate, but misrepresents the acreage, then, whether the estate be sold at so much the acre (*f*) or not (*g*), the purchaser is entitled to compensation for a deficiency (*h*).

Unless otherwise agreed compensation is not payable for patent defects (*i*) such as an obvious public path (*k*) or a house clearly out of repair (*l*); but a latent defect such as a private way (*m*) or a deficiency in area is matter for compensation.

(*a*) Peers *v.* Lambert, 7 B. 546. And see Shackleton *v.* Sutcliffe, 1 De G. & Sm. 609; Perkins *v.* Ede, 16 B. 193; Flight *v.* Booth, 1 Bing. N. C. p. 377; *Re* Arnold, 14 C. D. 270; *Re* Puckett and Smith's Contract, (1902) 2 Ch. 258.

(*b*) Darbey *v.* Whitaker, 4 Drew. 134; Jackson *v.* J., 1 Sm. & G. 184; Milnes *v.* Gery, 14 V. 400.

(*c*) Ashton *v.* Wood, 3 Sm. & G. 436.

(*d*) Poole *v.* Shergold, 2 Bro. Ch. 118; Lewin *v.* Guest, 1 Russ. 325; Harwood *v.* Bland, 1 Flan. & Kel. 540; Casamajor *v.* Strode, 2 My. & K. 724.

(*e*) Prendergast *v.* Eyre, 2 Hog. p. 89.

(*f*) Shovel *v.* Bogan, 2 Eq. Ca. Abr. 688, pl. 4.

(*g*) Hill *v.* Buckley, 17 V. 394.

(*h*) *Re* Gore's Estate, 3 Ir. R. Eq. 260; Flewitt *v.* Walker, (1885) W. N. 151; Portman *v.* Mill, 1 R. & M. 696; Day *v.* Finn, Owen, 133; *Re* Egan's Estate, 6 Ir. Jur. (N. S.) 90; *Re* Browne's Estate, 6 Ir. Jur. (N. S.) 185; Winch *v.* Winchester, 1 V. & B. p. 377; Duke of Norfolk *v.* Worthy, 1 Camp. 337; cf. Powell *v.* Elliot, L. R. 10 Ch. 424; Hughes *v.* Jones, 3 De G. F. & J. 307.

(*i*) Dyer *v.* Hargrave, 10 V. 505.

(*k*) Bowen *v.* Round, 5 V. 508.

(*l*) Grant *v.* Munt, G. Coop. p. 177; Cook *v.* Waugh, 2 Giff. 201.

(*m*) Ashburner *v.* Sewell, (1891) 3 Ch. 405.

It seems that the intimate acquaintance of the purchaser with the estate (*a*), or even the fact of his being the occupier of it, raises no inference that he was acquainted with its exact admeasurement, so as to disentitle him to an abatement (*b*).

Where there is a mis-statement in the description of the property, made in good faith, *and there is no stipulation for compensation*, then *after conveyance* no claim for compensation can be maintained (*c*), unless there is a provision in the contract for compensation being made in case of mis-statement (*d*).

If lands are purchased with the usual condition for compensation for misdescription, and they turn out to be of *much greater extent* than they were described, the purchaser can enforce the contract on payment of compensation, but the vendor cannot compel the purchaser to complete, on payment of a proportionately larger sum (*e*).

The question sometimes arises, how far a purchaser's knowledge of a defect of title will prevent his setting up that defect as a defence to specific performance.

It seems to be clear that if there is no mis-statement in the particulars or condition of sale, and the purchaser is aware of a defect of the title (*f*), or if he has notice by reason of the defect being a patent one (*g*), he cannot do so.

Where, however, particulars contain a statement which is literally true, but which is susceptible of another meaning, which is more likely to be taken than the true one by a person reading the particulars, a purchaser, who knows nothing of the real facts, and understands the particulars in the untrue sense, is entitled to set up such deception as a defence in an action for specific performance (*h*).

In the absence of express agreement, a vendor, it seems, cannot obtain specific performance with compensation in his own favour (*i*),

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(*a*) Winch *v.* Winchester, 1 V. & B. 375.

(*b*) King *v.* Wilson, 6 B. 124.

(*c*) Joliffe *v.* Baker, 11 Q. B. D. 255, distinguished in Palmer *v.* Johnson, 13 Q. B. D. p. 359; and see Clayton *v.* Leech, 41 C. D. 103; Greswolde-Williams *v.* Barneby, 83 L. T. 708; Debenham *v.* Sawbridge, (1901) 2 Ch. 98; Conolly *v.* Keating (No. 2) (1903), 1 Ir. R. 356, and post, p. 514.

(*d*) Palmer *v.* Johnson, 13 Q. B. D. 351, where Cann *v.* C., 3 Si. 447, and Bos *v.* Helsham, L. R. 2 Ex. 72, were followed.

(*e*) Price *v.* North, 2 Y. & C. Ex. 620; *Re* Orange, (1885) W. N. 72.

(*f*) Cato *v.* Thompson, 9 Q. B. D. p. 619; and see *Re* Hare & O'More, (1901) 1 Ch. 93.

(*g*) Bowles *v.* Round, 5 V. 508; but see Martin *v.* Cotter, 3 Jo. & Lat. 506.

(*h*) Farebrother *v.* Gibson, 1 De G. & J. 602; Leyland *v.* Illingworth, 2 De G. F. & J. 248.

(*i*) Manser *v.* Back, 6 Ha. p. 447, 448.

but, if the mistake be serious, the Court will not grant to the purchaser specific performance unless he agrees to take what the vendor meant to sell or to pay the price which he meant to ask. In such cases, however, the Court will not rescind the contract at the instance of the vendor (*a*).

Where the Purchaser seeks Specific Performance.—A purchaser may, if he choose, subject, however, to some few exceptions, compel a vendor, who has contracted to sell a larger interest than he has, to convey to him such interest as he is entitled to, with compensation for the difference (*b*).

Thus, if a tenant for life (*c*), or *pur autre vie* (*d*), or a tenant in fee subject to a life estate (*e*), or a right to dower (*f*), contract to sell the fee simple in possession, the purchaser can compel the vendor to convey such interest as he has with an abatement of the purchase-money (*g*). Even where a person contracts to sell a fee simple, and has only a term of years, the purchaser has a right to have an assignment of the term if he thinks fit (*h*).

If a landlord is unable to give, in point of duration, a lease for the whole of the interest which he agreed to give, and the intended lessee is willing to take—for it cannot be forced upon him—the interest which the landlord can give, the latter must grant a lease to the full extent which his estate or power authorises, and compensation will be made by the Court to the lessee for any loss that he may have sustained by reason of the agreement not being carried out to the full extent (*i*). So likewise, although, as before observed, the purchaser of the entirety cannot, upon a failure to make a title to the whole, be compelled to take a part only of the estate, he may, in

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(*a*) Neap *v.* Abbott, Coop. C. P. 333; Leslie *v.* Tompson, 9 Ha. 268; Alvanley *v.* Kinnaird, 2 Mac. & G. p. 7; cf. North *v.* Percival, (1898) 2 Ch. 128.

(*b*) Mortlock *v.* Buller, 10 V. 315; see also Bolingbroke's Case, 1 Sch. & L. 19 (n.); Halsey *v.* Grant, 13 V. 73; Dyer *v.* Hargrave, 10 V. 505.

(*c*) Mortlock *v.* Buller, supra.

(*d*) Barnes *v.* Wood, 8 Eq. 424.

(*e*) Nelthorpe *v.* Holgate, 1 Coll. 203; and see Barker *v.* Cox, 4 C. D. 464.

(*f*) Wilson *v.* Williams, 3 Jur. (N. S.) 810.

(*g*) See also Hughes *v.* Young, 3 De G. F. & J. 307, 315; Barrett *v.* Ring, 2 Sm. & G. 43.

(*h*) Wood *v.* Griffith, 1 Wils. Ch. Ca. 44; Mortlock *v.* Buller, supra.

(*i*) Leslie *v.* Crommelin, 2 Ir. R. Eq. 134, 140; Jones *v.* Evans, 17 L. J. Ch. 469; Dale *v.* Lister, cited 16 V. p. 7 (see per Lord *Eldon* at p. 11). See also Hanbury *v.* Litchfield, 2 My. & K. 629; Neale *v.* Mackenzie, 1 Keen, 474; Graham *v.* Oliver, 3 B. 124; Painter *v.* Newby, 11 Ha. 26.

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general, if he wishes it, take what he can get, with compensation (*a*), and, where A. agreed to let premises to B. for a term of years, and it turned out that A. was only possessed of a moiety of the premises, the other moiety being vested in his son, a minor, it was held that A. was bound to perform specifically so much of the contract as he was able, with an abatement of one moiety of the rent (*b*). So if A. enters into an agreement to purchase property from B. and C., and it afterwards appears that B. has no interest in the property, C. may nevertheless be compelled to convey his interest to A. (*c*).

But where the purchaser, at the time of the contract, knows of the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest, with compensation (*d*).

Where it turns out that land is subject to some undisclosed right, such as a right to dig for mines, although the vendor cannot, the purchaser may demand specific performance, with compensation (*e*).

Where the title of the vendor is doubtful or defective, the purchaser cannot compel a conveyance of such interest as he has, with compensation (*f*). Upon the same principle, where before the Married Women's Property Acts, a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey, it was held that the purchaser could not compel the husband to convey his interest, and accept an abated price (*g*).

The neglect of a purchaser to make inquiries, may disentitle him from claiming compensation for some defect which with ordinary care he might have discovered (*h*).

(*a*) A.-G. *v.* Day, 1 V. 218; and see Paton *v.* Rogers, 1 V. & B. p. 353; Western *v.* Russell, 3 V. & B. 187; Hooper *v.* Smart, 18 Eq. 683; Richardson *v.* Smith, L. R. 5 Ch. 648; McKenzie *v.* Hesketh, 7 C. D. 675.

(*b*) Burrow *v.* Scammell, 19 C. D. 175.

(*c*) Horrocks *v.* Rigby, 9 C. D. 180, but see Wheatley *v.* Slade, 4 Si. 126; Jones *v.* Evans, 12 Jur. 664; Price *v.* Griffith, 1 De G. M. & G. 80, 85; Reynell *v.* Sprye, 1 De G. M. & G. 660; Burrow *v.* Scammell, 19 C. D. p. 183; Hexter *v.* Pearce, (1900) 1 Ch. 341.

(*d*) Lawrenson *v.* Butler, 1 Sch. & L. p. 19; Mortlock *v.* Buller, 10 V. 292; Nelthorpe *v.* Holgate, 1 Coll. p. 215; Colyer *v.* Clay, 7 B. 188; Edwards *v.* Sykes, 62 L. T. 445; Besley *v.* B., 9 C. D. 103; Clayton *v.* Leech, 41 C. D. 103; cf. Hone *v.* Gakstetter, 53 Sol. Jo. 286.

(*e*) Seaman *v.* Vawdrey, 16 V. 390; see also Peacock *v.* Penson, 11 B. 355; Painter *v.* Newby, 11 Ha. 26.

(*f*) Williams *v.* Higden, 1 Coop. C. P. 500.

(*g*) Castle *v.* Wilkinson, L. R. 5 Ch. 534; see also Emery *v.* Wace, 5 V. 846.

(*h*) Edwards-Wood *v.* Marjoribanks, 1 Gif. 384, affirmed 7 H. L. Ca. 806.

And where a vendor contracted to sell certain property and the purchaser, who knew that it was in the occupation of a tenant, afterwards discovered that the tenant had an agreement for a lease, it was held, upon the purchaser seeking specific performance, that as he was affected with notice of the lease, he was not entitled to specific performance with compensation (*a*).

The distinction which appears now to be established is this, that if a purchaser has, from his knowledge of a tenancy constructive notice of a right of the tenant affecting the subject-matter of the purchase, upon proceedings being taken by the purchaser, specific performance will be decreed, but only upon the terms of his electing to take the property without compensation in respect of the right of the tenant; but if proceedings are taken by the vendor in such a case for specific performance of the contract, it will be refused.

Where, however, the statement as to quantity was simply a mistake, and it would be unjust to the vendor to decree specific performance, with compensation, the purchaser has been compelled to elect whether he would perform the contract without compensation, or have his bill dismissed (*b*). Compensation for restrictive covenants is not assessable, and therefore, if they exist, a purchaser who bought without knowledge of them, must either take the land as it is without compensation, or rescind the contract (*c*).

A purchaser, moreover, will not be entitled to compensation for any deficiency in the quantity of land, if he bought with a knowledge thereof, but such knowledge will not be presumed from his intimate acquaintance with the property (*d*), even if he is tenant (*e*).

Compensation excluded by Express Contract.—The right to compensation may be excluded also by express contract. Thus, where one of the conditions of sale was, "That the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way," and the purchaser claimed specific performance with compensation, the Court decreed specific

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(*a*) James *v.* Lichfield, 9 Eq. 51; but see Caballero *v.* Henty, L. R. 9 Ch. 447; Phillips *v.* Miller, L. R. 9 C. P. 196.

(*b*) Durham *v.* Legard, 34 L. J. Ch. 589.

(*c*) Rudd *v.* Lascelles, (1900) 1 Ch. 815.

(*d*) Shackleton *v.* Sutcliffe, 1 De G. & Sm. 609; Winch *v.* Winchester, 1 V. & B. 375.

(*e*) King *v.* Wilson, 6 B. 124.

performance, without compensation, and ordered the plaintiff to pay the costs of the suit (*a*).

But such a condition will, as a rule, be construed so as to extend to small unintentional inaccuracies only, and not to considerable deficiencies of area (*b*).

The purchaser's right to compensation will not be excluded by a mere condition that he shall not object to complete his purchase if the quantity should turn out less than that stated in the particulars (*c*). Nor by acts on his part which merely amount to a waiver of objections to the title (*d*).

Where any deficiency exists as to the extent or duration of an interest in an estate contracted to be sold, and that deficiency does not admit of compensation, then, unless a special provision provides for it (*e*), a purchaser cannot be compelled to take, nor a vendor to give, an indemnity (*f*).

Specific performance will not be decreed if there has been misrepresentation on the part of the person claiming it, even although he be satisfied with a performance of the contract subject to any outstanding interests, without compensation (*g*).

Where it turned out that the vendor could not make out a title, the purchaser's bill for specific performance has been dismissed, without costs, leaving him to his remedy for damages (*h*). But where the vendor has filed a bill in such a case, he has been ordered to return his deposit with interest (*i*).

Although, as a general rule, a purchaser will not be allowed to pay his purchase-money into Court, and to enter into the possession of the purchased land, until after the acceptance of the title, where he only asks that his claim to compensation may be reserved, an order

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(*a*) Cordingley *v.* Cheeseborough, 4 De G. F. & J. 379. And see Nicoll *v.* Chambers, 11 C. B. 996.

(*b*) Whittemore *v.* W., 8 Eq. 603; Jacobs *v.* Revell, (1900) 2 Ch. 858.

(*c*) Frost *v.* Brewer, 3 Jur. 165.

(*d*) Calcraft *v.* Roebuck, 1 V. 221.

(*e*) Aylett *v.* Ashton, 1 My. & C. 105; Paterson *v.* Long, 6 B. 598; and see Walker *v.* Barnes, 3 Madd. 247. Cf. Shepherd *v.* Croft, (1911) 1 Ch. 521.

(*f*) Balmanno *v.* Lumley, 1 V. & B. 225; Paton *v.* Brebner, 1 Bligh, p. 66; Powell *v.* S. Wales Ry. Co., 1 Jur. (N. S.) 773; Bainbridge *v.* Kinnaird, 32 B. 346; Ridgway *v.* Gray, 1 Mac. & G. 109; Milligan *v.* Cooke, 16 V. 1; and see Campbell *v.* Hay, 2 Moll. 102; *Re* Bunbury's Estate, 1 Ir. R. Eq. 458.

(*g*) Clermont *v.* Tasburgh, 1 J. & W. 112.

(*h*) Thomas *v.* Dering, 1 Keen, 729; Malden *v.* Fyson, 9 B. 347.

(*i*) Lord Anson *v.* Hodges, 5 Si. 227.

to pay the purchase-money into Court will be made even before the title has been accepted (*a*).

Where there is a special provision for compensation, the purchaser may, *even after a conveyance* and payment of the purchase-money (unless by the conditions the claim for compensation must be made before completion (*b*)), claim compensation under the condition for any deficiency, as, for instance, in the acreage, the rental, or the length of a term, as stated in the particulars (*c*). In *Debenham* v. *Sawbridge* (*d*) a condition providing for compensation for errors or misstatements in the particulars or conditions of sale of the property sold was held to apply only to the subject-matter and not to a defect in title discovered one year after completion.

But where there has been no special contract as to compensation, compensation cannot after the conveyance be claimed for innocent misrepresentation by the auctioneer upon which the purchaser relied (*e*); although it doubtless might be claimed if there had been a fraud or breach of some contract or warranty contained in the conveyance (*f*).

In one case, where the purchaser in his requisitions claimed compensation for a misdescription of the length of an underlease, and afterwards a conveyance had been executed, and the purchase-money paid into Court, he was held still to be entitled because as the claim had not been withdrawn at the time the conveyance was executed, and the purchase-money, which was trust property, had not been distributed, and a reference was directed to Chambers to ascertain the amount, if the parties could not agree (*g*). It would, however, have been different if the purchase-money had been distributed by the trustees in accordance with the trust (*h*).

Rescission by Vendor.—The vendor frequently makes it a term of

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(*a*) Man *v.* Ricketts, 5 De G. & Sm. 116.

(*b*) See e.g., Farrer, Conditions of Sale, 2nd ed., pp. 93 *et seq.*

(*c*) Cann *v.* C., 3 Si. 447; Horner *v.* Williams, Jones & C., 274; Bos *v.* Helsham, L. R. 2 Ex. 72; *Re* Turner and Skelton, 13 C. D. 130; Phelps *v.* White, 5 L. R. Ir. 318; Palmer *v.* Johnson, 13 Q. B. D. 351; (overruling Manson *v.* Thacker, 7 C. D. 620; Besley *v.* B., 9 C. D. 103; and Allen *v.* Richardson, 13 C. D. 524;) Brownlie *v.* Campbell, 5 A. C. 936; Louty *v.* Hillas, 2 De G. & J. 110.

(*d*) (1901) 2 Ch. 98.

(*e*) Brett *v.* Clowser, 5 C. P. D. 376; Joliffe *v.* Baker, 11 Q. B. D. 255; cf. *Re* Hare and O'More, (1901) 1 Ch. 93.

(*f*) Joliffe *v.* Baker, 11 Q. B. D. 255; Nash *v.* Wooderson, (1884) W. N. 210.

(*g*) Perrian *v.* P., (1884) W. N. 5; and see Hewitt *v.* Walker, 53 L. T. 287.

(*h*) Ibid.

Seton v. Slade.

the contract that if the purchaser makes any requisition or objection which the vendor shall be unable or unwilling to comply with or remove (or some similar provision), the vendor shall be at liberty to rescind the contract. In such a case, however, he will not be allowed to rescind if he fails to show any title either to the whole (*a*) or any material part of the property (*b*); or if he has been guilty of wilful misrepresentation (*c*), or if he has omitted to state in the particulars something which it was essential the vendor should tell the purchaser (*d*), or if the purchaser is willing to waive all objections to the title, and to take the property without compensation (*e*).

So if the right to rescind only arises upon a requisition being sent upon information appearing in the abstract, which the vendor is unable or unwilling to satisfy, he will not be able to rescind when the requisition is made in respect of a fact which does not appear there, for instance, an equitable mortgage by deposit of an underlease (*f*).

The right to rescind may, moreover, be lost by the vendor replying to the purchaser's objections or requisitions (*g*), and by acquiescence in, or confirmation of, the contract (*h*), unless the replies have been made without prejudice (*i*).

If the vendor makes it a term of the contract that he may rescind the sale, upon being "unwilling or unable" to make a title (*k*), or upon the purchaser "declining to waive any valid objection to the title (*l*), he must inform the purchaser of his intention, and not serve a notice to rescind until the latter has insisted upon his contention.

He cannot exercise a right to rescind when he has been guilty of

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(*a*) Bowman *v.* Hyland, 8 C. D. 588; and see *Re* Deighton and Harris, (1898) 1 Ch., p. 462.

(*b*) Mawson *v.* Fletcher, L. R. 6 Ch., p. 93; Nelthorpe *v.* Holgate, 1 Coll. 203; *Re* Jackson and Haden, (1905) 1 Ch. 603; but see Thomas *v.* Dering, 1 Keen, 729.

(*c*) Price *v.* Macaulay, 2 De G. M. & G., p. 346.

(*d*) Brewer *v.* Brown, 28 C. D. 309; Denny *v.* Hancock, L. R. 6 Ch. 1; *Re* Simpson and Moy, 53 Sol. Jo. 286.

(*e*) Page *v.* Adam, 4 B. 269; but see Williams *v.* Edwards, 2 Si. 78.

(*f*) *Re* Jackson and Oakshott, 14 C. D. 851.

(*g*) Tanner *v.* Smith, 10 Si. 410; M'Culloch *v.* Gregory, 1 K. & J., p. 295.

(*h*) Cole *v.* Gibbons, 3 P. W. 290; Attwood *v.* Small, 6 Cl. & F., p. 432; Flint *v.* Woodin, 9 Ha. 618.

(*i*) Morley *v.* Cook, 2 Ha., p. 111.

(*k*) Duddell *v.* Simpson, L. R. 2 Ch. 102; Powell *v.* P., 19 Eq. 422; *Re* Dames and Wood, 29 C. D. 626; Heppenstall *v.* Hose, (1884) W. N. 199.

(*l*) *Re* G. N. Ry. Co., 25 C. D. 788; and see Greaves *v.* Wilson, 25 B. 290; Page *v.* Adam, 4 B. 269.

misrepresentation, or cannot make a title to the property or a material part of it (*a*), or has otherwise acted in bad faith (*b*), so that the Court would prevent him relying on his right. Where the purchaser's requisitions are reasonable, the vendor cannot arbitrarily rescind (*c*).

But where a purchaser has in fact accepted the title and has his purchase-money ready, the vendor cannot, under a condition that if "any objection or requisition is made or insisted on, which the vendor shall be unable or unwilling to comply with rescind the sale," come to the Court and ask for rescission merely because the vendor required that the conveyance should be taken subject to certain "covenants, conditions, and restrictions," the nature of which he did not explain, but alleged they were contained in a deed recited in an abstracted deed, and the purchaser declined to take a conveyance until being first informed of their nature (*d*). Nor will vendors under similar conditions be able to rescind simply because the purchaser strikes out of the draft conveyance words added by them, and upon the insertion of which they had no right to insist (*e*).

Where a vendor sold an estate under conditions of sale, one of which was, that if the vendor should be unable or unwilling to meet any requisition or objection, he might annul the sale and return the purchaser's deposit without interest and costs, notwithstanding any previous litigation. An objection to the title having been taken by the purchaser, the vendor took out a summons under the Vendor and Purchaser Act, 1874, to decide the question, and judgment was given against him. It was held that it was too late for the vendor after the judgment to exercise his power of annulling the sale (*f*).

(*a*) Williams *v.* Edwards, 2 Si. 78; Mawson *v.* Fletcher, L. R. 6 Ch. 91; Duddell *v.* Simpson, L. R. 2 Ch. 112; *Re* Terry and White, 32 C. D. 14; Woolcott *v.* Peggie, 15 A. C. 42.

(*b*) Smith *v.* Wallace, (1895) 1 Ch. 385; *Re* Starr Bowkett Society and Sibun, 42 C. D. 375.

(*c*) Quinion *v.* Horne, (1906) 1 Ch. 596.

(*d*) *Re* Monckton and Gilzean, 27 C. D. 555.

(*e*) Hardman *v.* Child, 28 C. D. 712; cf. *Re* Sparrow and James, (1910) 2 Ch. 60.

(*f*) *Re* Arbib and Class, (1891) 1 Ch. 601; and see *Re* Spindler and Mear's Contract, (1901) 1 Ch. 908.

WOOLLAM *v.* HEARN.

1802. 7 V. 211; 6 R. R. 113.

Distinction between Seeking and Resisting Specific Performance, as to the Admission of Evidence.

Though a defendant resisting a specific performance, may go into parol evidence [to show] that, by fraud, the written agreement does not express the real terms, a plaintiff cannot do so, for the purpose of obtaining a specific performance with a variation. [Unless the real agreement has been part performed by him (*a*).]

William Hearn, being possessed of a house in Ely Place, under an agreement for a lease of seven, fourteen or twenty-one years, from the 25th of December, 1794, agreed to let the house to Penelope Woollam for seventeen years; and a memorandum, dated the 11th of December, 1798, was executed by them, stating an agreement for a lease to the plaintiff from the defendant for seventeen years, to commence at Christmas next, at the yearly rent of 73*l.* 10*s.*, the tenant paying all taxes except the land tax, which Hearn agreed to pay: the lease to contain all usual covenants, and also covenants that no public trade should be carried on in the premises; and that no alteration should be made in the front; that the lessee should leave the premises in tenantable repair, with other covenants relative to the situation of Ely Place, as being extra-parochial.

The bill was filed by Mrs. Woollam against Hearn, stating, that the rent of 73*l.* 10*s.* was inserted by mistake, or with some unfair view; the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that he did not pay more than 60*l.*: and in confidence that a lease would be executed to her, she paid 60*l.* to the defendant at the time of executing the agreement, being the moiety of the sum which the

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(*a*) See the notes to the report in 6 R. R. 113, and infra, Notes at pp. 523 *et seq.*

defendant alleged he had laid out in repairs. She also paid 33*l.* 15*s.* 6*d.* for fixtures.

The bill prayed a specific performance, and that the defendant may be decreed to execute a lease according to the agreement, at the rent of 60*l.*, or such other rent as the defendant paid his lessor.

The defendant by his answer denied that 73*l.* 10*s.* was inserted by mistake, or with any unfair view; or that the agreement was, that the plaintiff should pay the same rent as the defendant paid, which he admitted to be 63*l.* He stated that he believed he might say, in the course of the treaty, that she would have the premises upon the same terms as the defendant had; not meaning that she was to have them at the same rent, but that she would, on the whole, have them upon terms of equal advantage with the defendant, considering the money he had expended upon them. He admitted the payment of 60*l.*, stating, that it was not a moiety of the money laid out by him, though at the time of payment it might have been so called.

On the part of the plaintiff, her son stated by his depositions, that when he treated with the defendant for a lease of the house, he said he had got a lease of it, but could not at that moment lay his hands upon it; that he did not exactly know what the rent was, but it was somewhere about 70*l.* a year, that he did not want to get anything by her, and she should have the house upon the same terms he had it himself, which he repeated several times afterwards. The plaintiff's solicitor stated, that the defendant repeatedly said, upon being pressed to execute a lease, that the plaintiff held the house upon the same terms upon which he held; but, when the deponents proposed to him to execute an assignment of the original lease, he objected, that it was always his maxim not to part with the original lease, but to hold it in his own possession for his security.

Mr. *Romilly* and Mr. *Wetherell*, for the plaintiff.—To the objection that the plaintiff cannot vary the written agreement, the answer is, that this is a case of fraud, upon which you must have recourse to parol evidence, otherwise it cannot be made out; and that takes it out of the statute (*a*). * * * There are several cases before Lord *Thurlow*, in which it is laid down that a party may alter a

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(*a*) Stat. 29 Car. 2, c. 3.

Woollam v. Hearn.

term in the agreement, in the case of fraud. * * * In *Joynes* v. *Statham* (*a*), and *Walker* v. *Walker* (*b*), Lord *Hardwicke* intimates an opinion that the plaintiff might have done so, if the parties had been reversed. * * * The defendant must go the length of saying, that no proof of fraud, however clearly it may be made out that the written agreement was not the actual agreement, will be adequate.

[They also cited *Buxton* v. *Lister* (*c*).]

Mr. *Leach*, for the defendant.—The plaintiff signed this agreement under the notion that the rent specified was paid by the defendant to his landlord. Assume that fact. She undertook it with full knowledge. This is not within the principle upon which the Court permits a written agreement to be varied by parol. The meaning of that rule is, that the writing must differ from the intention of the party when signing it. * * * If she meant only to pay a rent of 63*l.*, and the other by fraud inserted 73*l.*, the Court would correct it; but this is an attempt to repeal the Statute of Frauds (*d*). * * *

Mr. *Romilly*, in reply.—* * * It has been decided in many instances that a case of fraud is always an exception out of the statute. If the party undertakes to show, that by fraud he was induced to sign an agreement different from the actual agreement, he may read evidence to that. There can be no difference whether the party producing the evidence is plaintiff or defendant: the question being as to the rule of evidence, and a positive rule of evidence being equally applicable to both cases. * * *

1802. *June* 3.

The Master of the Rolls (*e*).—This bill calls upon the Court for a specific execution of an agreement for a lease, at a rent of 60*l.* a year. There is no agreement in writing for a lease at that rent; the agreement expressing a rent of 73*l.* 10*s.* The plaintiff contends, however, that she signed that agreement under a belief that such was the rent payable by the defendant: the real agreement being for a lease at the same rent he paid to his land-

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(*a*) 3 Atk. 388.

(*b*) 2 Atk. 98.

(*c*) 3 Atk. 383.

(*d*) 29 Car. 2, c. 3.

(*e*) Sir Wm. Grant.

Woollam v. Hearn.

lord. The defendant in his answer admits he might have said, she should have it upon the same terms; not meaning the same rent, but upon terms upon the whole equally advantageous; insisting that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement, that she was to have it upon the same terms as he had it, and to show that nothing could be meant by that expression, but the same rent, nothing being in discussion between them but the amount of the rent. He alleges a particular reason for not stating it—that he had not his own lease at hand. The question is, whether the evidence is admissible? for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can be received: but I own, my opinion is, that, if received, it will make out the plaintiff's case; for taking the whole together, there is hardly a doubt that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

By the rule of law, independent of the statute (*a*) parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply.

Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed: and there are many cases in which parol evidence of such circumstances has been admitted, as in *Buxton* v. *Lister* (*b*), which is very like this case. There, upon the face of the instrument, a specific sum was to be given for the timber; but it was shown by parol that the defendants were induced to give that upon

(*a*) 29 Car. 2, c. 3.

(*b*) 3 Atk. 383.

the representation that it was valued by two timber merchants, which was not true. So here by the agreement upon the face of it she is to pay this rent; but by the evidence she was induced to do so, because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree: first to falsify the written agreement, and then to substitute in its place a parol agreement, to be executed by the Court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence than I am forced by precedent. There is no case in which the Court has gone the length now desired. But two cases are produced, in which it is said there is an intimation from Lord *Hardwicke* to that effect. Upon that it might be sufficient to say, it was not decided. But it is evident, from the manner in which that great Judge qualifies his own doubts, that he thought it impossible to maintain such a proposition as the plaintiff is driven to maintain. In *Walker* v. *Walker* (*a*), it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting anything in the written agreement. It was admitted, that, as far as it went, it stated the true meaning. But it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute before he could have the benefit of the written agreement. It was evidence, too, offered in defence to resist a decree. Lord *Hardwicke*, after stating the ground, expresses himself thus:—

"The plaintiff, for these reasons, is not entitled to relief in this Court, for supplying the defect of a legal conveyance, but it is rebutted by the equity set up by the defendant. I am not at all clear, whether, if the defendant had brought his cross bill to have this agreement established, the Court would not have done it, upon considering it in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other; and the defendant would have had the benefit of it as an agreement."

(*a*) 2 Atk. 98.

So he states the special reason; not being at all clear that the defendant would have been so entitled. There is nothing of admitting parol evidence to contradict a written agreement, and next to set up a parol agreement, to be executed by the Court.

The other case referred to is *Joynes* v. *Statham*, supra, referred to for the opinion expressed by Lord *Hardwicke*:—

"Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the Court."

But the reason is assigned:—

"Because it was an agreement executory only; and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes, and, therefore, the proof offered here is not a variation of the agreement, but is explanatory only of what those taxes were. I am of opinion to allow the evidence of the omission in the lease to be read."

The parol evidence was received for the purpose of resisting performance of the agreement, and received likewise, not to contradict it, but to show, that, as it stood, it did not fully express the meaning and intention of the parties, there being another stipulation agreed upon, but not introduced into the written instrument. And even if that had been a bill by the defendant, to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict anything in it; for he allowed it to contain the intention, as far as it went; but the provision, that the rent was to be clear of taxes, was omitted. And Lord *Hardwicke*, from the particular nature of that stipulation, expresses a doubt whether, if the defendant had been plaintiff, he might not have been permitted to give evidence, it being usual to leave that open; intimating that it would be merely explanatory as to the taxes.

But this is evidence to vary an agreement in a material part; and having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being that it ought not, I must dismiss the bill, but without costs (*a*).

(*a*) The bill was dismissed without prejudice to another bill for a lease at the rent of 73*l.* 10*s.*

Woollam v. Hearn.

NOTES.

1. Rectification and enforcement of rectified contracts.
2. Defences: Parol variation and mistake, p. 525; misrepresentation, want of fairness, p. 530; hardship and uncertainty, p. 531; surprise, p. 534; breach of trust, p. 534; doubtful title, p. 535; entirety, p. 536; want of mutuality, p. 537.

The leading case has been retained in this edition, though for the reasons appearing below it is doubtful how far it has been of authority since the Judicature Act, 1873. The decision rests upon the rule of evidence that parol evidence cannot be received to vary or contradict a written agreement, and that to admit such evidence would be "to falsify the written agreement and substitute in its place a parol agreement to be executed by the Court" (*a*). It also appears that the Court desired to avoid any further encroachment upon sect. 4 of the Statute of Frauds.

The authorities are conflicting, but it appears that in cases of mutual mistake the Court has always had jurisdiction to rectify not only deeds and instruments made in execution of antecedent agreements, but also executory agreements when the written executory agreement fails to express the actual agreement of the parties (*b*).

At the same time the rule in the leading case was fully recognised in cases where the relief asked for was specific performance of an executory agreement, though it is clear that in those cases the plaintiff's claim really depended on the existence or non-existence of a right to rectification (*c*). In *Davies* v. *Fitton* (*d*) rectification was asked of a lease made in strict conformity with the terms of a written agreement upon the ground that the written agreement omitted a term of the real agreement between the parties. Lord *St. Leonards* (*e*) refused to admit parol evidence to rectify the lease

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(*a*) See L. C., at p. 521.

(*b*) Henkle *v.* Money (1749), 1 Ves. Sen. 317; Baker *v.* Paine (1750), ibid. 456; Hodgkinson *v.* Wyatt (1846), 9 V. 566; Stedman *v.* Collett (1854), 17 B. 608; but see Davies *v.* Fitton, infra.

(*c*) See e.g., Rich *v.* Jackson (1794), 4 Bro. Ch. 514; Clowes *v.* Higginson (1813), 1 V. & B. 524; and see Squire *v.* Campbell (1836), 1 My. & C. 459, at p. 480; Okill *v.* Whittaker (1847), 2 Ph. 338; Manser *v.* Back (1848), 6 Ha. 445; but cf. Pember *v.* Mathers, 1 Bro. Ch. 52.

(*d*) 2 Dr. & W. 225, 232, followed by *Farwell, J.*, in May *v.* Platt, (1900) 1 Ch. 616, and by *Neville, J.*, in Thompson *v.* Hickman, (1907) 1 Ch. 550.

(*e*) Citing Townshend (Marquis) *v.* Stangroom, 6 V. 328.

on the ground that he could not have admitted parol evidence to vary the written agreement and then have ordered specific performance of the agreement so varied.

Under sub-sect. 7 of sect. 24 of the Judicature Act, 1873, the Court can, in an action in which rectification is asked for and given, also order specific performance of the agreement so rectified if that is a proper remedy under the circumstances of the case. Acting under this sub-section the Court has rectified and specifically enforced executory agreements so rectified where no difficulty was raised by the Statute of Frauds (*a*). The Statute of Frauds cannot be pleaded in answer to a claim to rectify an executed contract, *e.g.*, a lease (*b*), a marriage settlement (*c*), and on principle it is submitted that there is no reason why a mutual mistake in a written memorandum intended by the parties to be a complete memorandum of an executory contract, falling within sect. 4 of the Statute of Frauds, should not be rectified by parol evidence (*d*).

In *May* v. *Platt* (*e*), *Farwell*, J., however, treated the rule in the leading case as still subsisting, and following *Davies* v. *Fitton* (supra) limited relief by way of rectification on the ground of mutual mistake to cases of executed contracts where the deed was not in accordance with the written agreement.

In view of this conflict of judicial opinion, it is impossible to say how far the rule laid down in the principal case is now of authority.

The rule of evidence excluding parol evidence varying the terms of a written contract does not exclude evidence of terms not inconsistent with the instrument where it is proved that the parties did not intend the instrument to be a complete statement of the whole agreement (*f*). Further, in such a case parol evidence showing the intentional incompleteness of the instrument is not excluded by the Statute of Frauds. Thus in *Jervis* v. *Berridge* (*g*),

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(*a*) Olley *v.* Fisher, 34 C. D. 367; Shrewsbury and Talbot Co. *v.* Shaw, 89 L. T. Jo., p. 274; and see Fry on Spec. Perf. (1903), 353.

(*b*) Mortimer *v.* Shortell, 2 Dr. & W. 363.

(*c*) Johnson *v.* Bragge (1901), 1 Ch. 28.

(*d*) See Williams V. & P., 2nd ed., pp. 787-791; Fry on Spec. Perf. (1903), 353; but see dictum to the contrary per *Alderson, B.*, in A.-G. *v.* Sitwell, 1 Y. & C. Ex. 559, 583.

(*e*) (1900) 1 Ch. 616. Both of these cases were criticised, but followed with reluctance by *Neville, J.*, in Thompson *v.* Hickman, (1907) 1 Ch. 550, see pp. 561, 562, where the rule in the L. C. is criticised.

(*f*) Stephen, Digest of Law of Evidence, (1893) p. 96.

(*g*) L. R. 8 Ch. 351.

J., the purchaser of an estate had, previously to the signature of the contract of purchase, verbally agreed to assign the benefit of the contract when formed to B., upon certain terms. A written memorandum of the assignment was drawn up before the purchase, from which, at B.'s request, certain stipulations in favour of J. were omitted. The vendors completed the sale with B., who reconveyed the estate to them to secure payment of the balance of the purchase-money. B. repudiated the omitted stipulations. J., treating B.'s rights under the verbal agreement and memorandum as determined by that repudiation, brought an action against the vendors and B., claiming in substance specific performance of his contract of purchase. The Court held that B. could not set up the memorandum in answer to the claim. Evidence of the whole contract between J. and B. was admitted, and B., by his repudiation having determined his rights thereunder, the written agreement between J. and the vendors was in effect specifically enforced.

Lord *Selborne* remarked (*a*), that it was "argued that the bill was an attempt either to enforce a verbal contract contrary to the Statute of Frauds, or to vary, in the plaintiff's favour, the effect of a written contract by the introduction of terms agreed upon by parol, and designedly omitted from the writing. In my view of the bill, it asks neither of these things. It certainly does not ask for specific performance of the verbal agreement which has been repudiated by the defendant. It does not seek to enforce any hybrid agreement, compounded of the written instrument and some terms omitted therefrom; but it asks the Court to say that, under the circumstances alleged, the written instrument does not constitute such a binding contract between the plaintiff and the defendant Berridge as can be allowed to be set up in equity by Berridge to prevent the performance in the plaintiff's favour, of the contract between themselves and the Law Life Society (the vendors). To the question so raised, the *Statute of Frauds (which is a weapon of defence, not offence, and which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties) is wholly irrelevant*" (*b*).

2. Defences.

Parol Variation and Mistake.—As a *defence* to specific performance, parol evidence has long been admissible to show, not only that by

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(*a*) L. R. 8 Ch. 359.

(*b*) See also Hussey *v.* Horne-Payne, 4 A. C. 311; Rochefoucauld *v.* Boustead, (1897) 1 Ch. p. 207.

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fraud, but by mistake, or even surprise, the written agreement does not contain the real terms (*a*); and, for this purpose, such evidence is admissible not only as collateral to the written agreement (*b*), but also in contradiction to it (*c*).

Where the terms of a written agreement are ambiguous, and on one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce the agreement (*d*), and that, whether the plaintiff or defendant is the author of the ambiguity (*e*).

So where a purchaser entered into a contract to purchase land under a mistake as to the boundaries, caused by a plan which was presented to him, drawn by the vendor's agent, the Court refused to decree specific performance (*f*). The refusal is not in the arbitrary discretion of the Judge; the Court must be satisfied that the agreement would not have been entered into if its true effect had been understood (*g*).

When a defendant sets up a parol variation as a defence to specific performance of a written agreement, it will depend on the circumstances of each case whether it will defeat the plaintiff's title to specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for (*h*).

Thus, where it appears that after the agreement had been come to, a mistake occurred in putting the agreement into writing, specific performance will be decreed with the variation necessary to make the written contract really agree with the intention of the parties (*i*).

(*a*) Joynes *v.* Statham, 3 Atk. 388; Ramsbottom *v.* Gosden, 1 V. & B. 165; Townshend *v.* Stangroom, 6 V. 328.

(*b*) Clowes *v.* Higginson, 1 V. & B. 524.

(*c*) See Ramsbottom *v.* Gosden, supra; Winch *v.* Winchester, 1 V. & B. 375; Price *v.* Ley, 32 L. J. Ch. 530.

(*d*) Calverley *v.* Williams, 1 V. 210; Jenkinson *v.* Pepys, cited 6 V. 330; Clowes *v.* Higginson, 15 V. p. 521, 1 V. & B. 524; Neap *v.* Abbott, Coop. C. P. 333, and cases there collected.

(*e*) Baxendale *v.* Seale, 19 B. 601; Swaisland *v.* Dearsley, 29 B. 430; Moxey *v.* Bigwood, 4 De G. F. & J. 351.

(*f*) Denny *v.* Hancock, L. R. 6 Ch. 1, 12; and see Manifold *v.* Johnston, (1902) 1 Ir. R. 7.

(*g*) See Watson *v.* Marston, 4 De G. M. & G. pp. 238, 239; Jones *v.* Rimmer, 14 C. D. p. 592; Phelps *v.* White, 5 L. R. Ir. p. 335; Brewer *v.* Brown, 28 C. D. 309.

(*h*) London & Birmingham Ry. Co. *v.* Winter, Cr. & Ph. p. 62; Smith *v.* Wheatcroft, 9 C. D. 223; Nash *v.* Dix, 78 L. T. 445.

(*i*) Joynes *v.* Statham, 3 Atk. 388; Walker *v.* W., 2 Atk. 98; Fife *v.* Clayton, 13 V. 546; Gwynn *v.* Lethbridge, 14 V. 585.

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But where the mistake or parol variation set up shows that there was a misunderstanding between the parties, the Court will refuse specific performance (*a*).

And the Court will not decree specific performance with a parol variation where it would be inequitable or unjust to either party to do so (*b*). The Court has also refused to decree specific performance of a covenant, where from circumstances it had become unconscientious strictly to perform it, except on the terms of the plaintiff submitting to a conscientious modification of the covenant. In *Davis* v. *Hone* (*c*), the Court granted specific performance subject to such modifications, principally upon the ground that the conduct of the parties for a great length of time, had caused the covenant to be acted upon, as to make it unconscionable to refuse a specific performance (*d*).

When a plaintiff submits to perform a provision omitted in a written agreement, the Court, in the absence of fraud or mistake, will make a decree in his favour (*e*). But where, however, a parol variation set up by the defendant shows that he entered into the written contract, by mistake, the plaintiff will be put to his election either to have his action dismissed, or to have specific performance of the written contract with the parol variation : thus if one of the parties has reasonable grounds for presuming that a certain stipulation is implied in the contract, specific performance will only be decreed against him, upon the terms of such stipulation being inserted, for instance, in a lease (*f*).

Where there is a *mutual* mistake in an instrument intended by the parties to express or execute an antecedent contract, the remedy is rectification (*g*).

(*a*) Clowes *v.* Higginson, 1 V. & B. 524; Butterworth *v.* Walker, 13 W. R. 168; cf. Dear *v.* Verity, 38 L. J. Ch. 486; Clark *v.* Grant, 14 V. 519; Micklethwaite *v.* Nightingale, 12 Jur. 638; Flood *v.* Finlay, 2 Ball & B. 9.

(*b*) Legal *v.* Miller, 2 Ves. Sen. 299; Price *v.* Dyer, 17 V. p. 364; Garrard *v.* Grinling, 2 Swans. 244; Lindsay *v.* Lynch, 2 Sch. & L. 1; Jeffery *v.* Stephens, 8 W. R. 427; Clowes *v.* Higginson, supra; Vezey *v.* Rashleigh, (1904) 1 Ch. 634.

(*c*) 2 Sch. & L. 341.

(*d*) 2 Sch. & L. 341; and see Sayers *v.* Collyer, 28 C. D. 103.

(*e*) Martin *v.* Pycroft, 2 De G. M. & G. 785; Barnard *v.* Cave, 26 B. 253; see also Leslie *v.* Tompson, 9 Ha. 268; Smith *v.* Wheatcroft, 9 C. D. 223; Gordon *v.* Marquis of Hertford, 2 Madd. p. 122.

(*f*) Ramsbottom *v.* Gosden, 1 V. & B. 165, and as to implied terms see Ricketts *v.* Bell, 1 De G. & Sm. 335; and see Chappell *v.* Gregory, 34 B. 250; Leslie *v.* Tompson, 9 Ha. 268.

(*g*) McKenzie *v.* Hesketh, 7 C. D. 675; and cases cited infra, next page.

Where, however, the mistake in the instrument is *unilateral;* where it carries out the expressed but not the real intention of one of the parties, that party cannot claim rectification ; his remedy, if any, is rescission, and that only in case of fraud (*a*). In certain cases, however, where the defendant knew that the real intention of the plaintiff differed from that expressed in the instrument the Court has put the defendant to the option of taking what the plaintiff meant to give, or rescission of the contract (*b*).

Mistake as to the existence of a private legal right may be a ground for equitable relief (*c*), but a mere mistake, either as to the legal effect of the contract (*d*), or of the legal consequences of an act (*e*), or a mistake as to the interest which the purchase will enable a person to acquire (*f*), cannot be set up as a defence against proceedings for specific performance. Nor can a mere *indefinite misrepresentation,* such as ought to put a person upon inquiry (*g*).

And this will especially be the case where the purchaser has equal means of acquiring knowledge with the vendor, even though he may not avail himself of them (*h*).

Mistake on the part of a defendant, set up as a defence to specific performance, must be clearly proved ; but for such purpose parol evidence is sufficient (*i*).

Where there has been no misrepresentation, and there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance thereof by the simple statement that he has made a mistake (*k*).

(*a*) See, e.g., Fowler *v.* F., 4 De G. & J., at pp. 264, 265, 273; Thompson *v.* Whitmore, 1 J. & H. 268; May *v.* Platt, (1900) 1 Ch. 616.

(*b*) Paget *v.* Marshall, 28 C. D. 255; Garrard *v.* Frankel, 30 B. 445; Harris *v.* Pepperell, 5 Eq. 1. See as to these cases, May *v.* Platt, (1900) 1 Ch. at p. 621, and Pollock's Contracts, 7th ed., 477; and see Young *v.* Halahan, 9 Ir. R. Eq. 70, 78, 81 ; Gun *v.* M'Carthy, 13 L. R. Ir. p. 309; Bloomer *v.* Spittle, (1907) 1 Ch. 564.

(*c*) Cooper *v.* Phibbs, L. R. 2 H. L. 149, 170.

(*d*) Powell *v.* Smith, 14 Eq. 85.

(*e*) G. W. Ry. Co. *v.* Cripps, 5 Ha. 91.

(*f*) Mildmay *v.* Hungerford, 2 Vern. 243; see also Marshall *v.* Collett, 1 Y. & C. Ex. 232, 238.

(*g*) Fenton *v.* Browne, 14 V. 144; Lowndes *v.* Lane, 2 Cox, Eq. 363; Scott *v.* Hanson, 1 Russ. & My. 128; Trower *v.* Newcome, 3 Mer. 704; Partridge *v.* Usborne, 5 Russ. 215; Abbott *v.* Sworder, 4 De G. & Sm. 448; Colby *v.* Gadsden, 34 B. 416.

(*h*) Attwood *v.* Small, 6 Cl. & Fin. 232 ; Clapham *v.* Shillito, 7 B. p. 149 ; Pulsford *v.* Richards, 17 B. p. 96; Jennings *v.* Broughton, 5 De G. M. & G. 126.

(*i*) Webster *v.* Cecil, 30 B. 62 ; Clay *v.* Rufford, 14 Jur. 803; Monro *v.* Taylor, 8 Ha. p. 56 ; Alvanley *v.* Kinnaird, 2 Mac. & G. 1 ; Darnley (Earl) *v.* L. C. & D. Ry. Co., L. R. 2 H. L. 43.

(*k*) Per *Baggalay, L. J.*, in Tamplin

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Thus, the inadvertent omission to propose an intended term to an agreement (*a*), or its intentional omission upon the supposition that it was illegal (*b*), is not a sufficient reason for the Court declining to grant specific performance. And if an agreement is drawn up without certain stipulations, negotiated by a party who deliberately and without any fraud or surprise being suggested, executes such agreement, the omission is no bar to specific performance (*c*).

And where two parties in the same agreement contract to purchase each an estate from the other, unless it is clearly stipulated that the two contracts are to be dependent on each other, one party may enforce specific performance of the contract to sell his estate, although the other party is unable to make a good title to his property (*d*).

A parol waiver of a written contract, amounting to a complete abandonment, and clearly proved, will bar a specific performance (*e*).

Where a written agreement is *afterwards* varied by parol, upon proceedings being taken for specific performance with or without the variation, the Court will, it seems, put the defendant to his election, and, if he declines to elect, will decree specific performance of the written agreement without the variation (*f*). But it seems that if an agreement is correctly put into writing, and at the *same time* the parties add a term by parol, evidence of it is not admissible even as a defence to specific performance (*g*). But, although parol variations of a written contract are not of themselves sufficient to prevent a decree for specific performance of the written contract, yet

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v. James, 15 C. D. 217; Powell *v.* Smith, 14 Eq. 85; Van Praagh *v.* Everidge, (1902) 2 Ch. 266 (reversed on other grounds, (1903) 1 Ch. 434); Swaisland *v.* Dearsley, 29 B. 430.

(*a*) Parker *v.* Taswell, 2 De G. & J. 559; but see Broughton *v.* Hutt, 3 De G. & J., 501; cf. Zimbler *v.* Abrahams, (1903) 1 K. B. 577.

(*b*) Lord Irnham *v.* Child, 1 Bro. Ch. 92.

(*c*) Shelburne *v.* Inchiquin, 1 Bro. Ch. 350.

(*d*) Croome *v.* Lediard, 2 My. & K. 251; Sugd. V. & P. 162, 14th edit.; Lloyd *v.* L., 2 My. & C. 192; Green *v.* Low, 22 B. 625.

(*e*) Price *v.* Dyer, 17 V. 356; Inge *v.* Lippingwell, Dick, 469. And see Jordan *v.* Sawkins, 1 V. p. 404; Rich *v.* Jackson, 4 Bro. Ch. 519; Filmer *v.* Gott, 6 V. 337 (n.); Coles *v.* Trecothick, 9 V. p. 250; Robinson *v.* Page, 3 Russ. 119; Legal *v.* Miller, 2 Ves. Sen. 299; Vezey *v.* Rashleigh, (1904) 1 Ch. 634.

(*f*) Robinson *v.* Page, 3 Russ. 114. And see Price *v.* Dyer, 17 V. 356; Saunderson *v.* Graves, L. R. 10 Ex. 234.

(*g*) Omerod *v.* Hardman, 5 V. p. 730; see Jenkins *v.* Hiles, 6 V. pp. 654, 655; cf. De Lasalle *v.* Guildford, (1901) 2 K. B. 215.

if they are so acted upon as to make it impossible to enforce the written contract without injury to the party, specific performance will only be decreed of the contract with those variations (*a*).

Misrepresentation, Want of Certainty and Fairness, &c.—Since the jurisdiction is discretionary, unless the plaintiff comes with perfect propriety of conduct (*b*), clear from all circumvention and deceit (*c*), and the agreement is certain (*d*), fair and just in all its parts (*e*), and the conditions of sale are not misleading or erroneous (*f*), specific performance will not be decreed. But an agreement, fair as between the parties, is not affected merely because it is brought about by a third party, with the fraudulent intention of benefiting himself (*g*). So, too, an agreement which is so uncertain that the Court would not grant specific performance of it, will be specifically enforced in spite of that objection if it has been confirmed by Act of Parliament (*h*).

If a definite representation be made, by one party affecting the value of the subject of the contract, and the other relies upon it, and it turns out to be untrue, the person deceived can resist specific performance of the contract (*i*).

And the rule is the same, where the misrepresentation has been made by the agent of the vendor. Thus, an agent, commissioned by

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(*a*) Anon., 5 Vin. 522, pl. 38; Legal *v.* Miller, 2 Ves. Sen. 299; Pitcairn *v.* Ogbourne, ibid., 375; Price *v.* Dyer, 17 V. 356; Van *v.* Corpe, 3 My. & K. 277.

(*b*) Harnett *v.* Yielding, 2 Sch. & L. 554; Cadman *v.* Horner, 18 V. 10; Robinson *v.* Wall, 2 Ph. 372.

(*c*) Davis *v.* Symonds, 1 Cox 407; Reynell *v.* Sprye, 8 Ha. 222; 1 De G. M. & G. 660.

(*d*) Tillett *v.* Charing Cross Bridge Co., 26 B. 419; Darbey *v.* Whitaker, 4 Drew. 134; Williams *v.* Brisco, 22 C. D. 441.

(*e*) Underwood *v.* Hitchcox, 1 Ves. Sen. 279; Buxton *v.* Lister, 3 Atk. 383, 386; Ellard *v.* Lord Llandaff, 1 Ball & B. 241; Martin *v.* Mitchell, 2 J. & W. 413; Stanley *v.* Robinson, 1 Russ. & M. 527; Warde *v.* Dickson, 28 L. J. Ch. 315.

(*f*) Harnett *v.* Baker, 20 Eq. 50; *Re* Banister, 12 C. D. 131; *Re* Marsh and Earl Granville, 24 C. D. 11; Heywood *v.* Mallalieu, 25 C. D. 357.

(*g*) Bellamy *v.* Sabine, 2 Ph. 425.

(*h*) Manchester S. C. Co. *v.* Manchester Racecourse Co., (1900) 2 Ch. 352.

(*i*) Lord Brooke *v.* Rounthwaite, 5 Ha. 298; and see Brealey *v.* Collins, You. 317; Lowndes *v.* Lane, 2 Cox. Eq. 363; Stewart *v.* Alliston, 1 Mer. 26; Harris *v.* Kemble, 5 Bligh, (N. S.) 730; Cox *v.* Middleton, 2 Drew. 209; Price *v.* Macaulay, 2 De G. M. & G. 339; Rawlins *v.* Wickham, 3 De G. & J. 304; Higgins *v.* Samuels, 2 John. & H. 460; Leyland *v.* Illingworth, 2 De G. F. & J. 248; Caballero *v.* Henty, L. R. 9 Ch. 447; Redgrave *v.* Hurd, 20 C. D. 1; Smith *v.* Land &c. Corporation, 28 C. D. 7. But see Johnson *v.* Smart, 2 Gif. 151; Cook *v.* Waugh, 2 Gif. 201; Farebrother *v.* Gibson, 1 De G. & J. 602.

a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which affects the value, so as to bind the vendor, and if he makes a false statement as to the description or value (though not instructed so to do), upon which the purchaser relies, the vendor cannot obtain specific performance (*a*).

A party who obtains an agreement by a misrepresentation as to part of the subject-matter, is not entitled to specific performance on waiving the part affected by it, as such a misrepresentation does not alter or modify the agreement *pro tanto*, but destroys it entirely, and operates as a bar to the person who has practised it (*b*).

Not only actual misrepresentation, but also suppression of the truth will prevent specific performance being decreed (*c*). But the mere suppression of the fact that the plaintiff has done acts which the defendant must have known were done by somebody, is not a sufficient reason for refusing specific performance (*d*). In one case the plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless. It was held that the defendant could not resist a specific performance, on the ground of the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable (*d*).

In the absence of fraud or undue advantage, specific performance would not be refused merely because the price was inadequate (*e*), except in the case of the sales of reversionary interests (*f*) before the Sales of Reversions Act (*g*). From that Act, probably, every sale at an inadequate price but open to no other objection ought, *prima facie*, to be enforced (*h*); except in cases coming within the Moneylenders Act, 1900 (*i*).

Hardship and Uncertainty.—Again, specific performance of a

(*a*) Mullens *v.* Miller, 22 C. D. 194.

(*b*) Lord Clermont *v.* Tasburgh, 1 J. & W. 112, 120; Cadman *v.* Horner, 18 V. 10.

(*c*) See Young *v.* Clerk, Pr. Ch. 538; Maddeford *v.* Austwick, 1 Si. 89; Bonnett *v.* Sadler, 14 V. 526; Drysdale *v.* Mace, 5 De G. M. & G. 103; Shirley *v.* Stratton, 1 Bro. Ch. 440; Baskcomb *v.* Beckwith, 8 Eq. 100; Denny *v.* Hancock, L. R. 6 Ch. 1; Brewer *v.* Brown, 28 C. D. 309; Lucas *v.* James, 7 Ha. 410; distinguished in Hope *v.* Walter, (1900) 1 Ch. 257.

(*d*) Haywood *v.* Cope, 25 B. 140.

(*e*) Stillwell *v.* Wilkins, Jac. 280; Abbott *v.* Sworder, 4 De G. & Sm. 448, Fry, S. P. (1903), p. 194.

(*f*) Playford *v.* P., 4 Ha. 546. See Vol. I., pp. 329—336, and note.

(*g*) 31 & 32 Vict. c. 4, Vol. I., p. 332.

(*h*) See Fry, S. P., (1903) p. 201.

(*i*) 63 & 64 Vict. c. 51, Vol. 1, p. 336.

contract will not be enforced where it would subject a person to great *hardship*, but the plaintiff will be left to obtain damages (*a*).

In general, hardship, to be a sufficient defence against specific performance, must have existed at the date of the contract (*b*) ; mere ignorance of the nature of the property, which turns out to be worthless, will not prevent the specific performance of a contract respecting it. As, for instance, where a person contracts to take a lease of an abandoned colliery which turns out to be worthless (*c*). Nor will a person, who has purchased property merely as agent for an undisclosed principal, be able to resist specific performance on account of hardship (*d*).

But where the defendant agreed to take from the plaintiff a lease of an unfinished house, containing covenants on the part of the defendant to repair and keep in repair, and the plaintiff agreed to finish the house, the defendant was held entitled to refuse to take the lease, upon the ground that the house had been finished in such a defective manner as to make it unreasonable for him to take the liability upon himself (*e*).

Upon the same principle, a decree will not be made for specific performance of an agreement of which the consequence would be a *forfeiture* (*f*). But when a defendant sets up this defence, the Court must be satisfied that forfeiture will follow from specific performance of the agreement, and it must look also at the fact by whose act and conduct the forfeiture would be occasioned; for the Court will not permit a defendant to put himself in such a position that performance of his agreement will create a forfeiture, and then to turn round and say that the plaintiff shall not for that reason have specific performance (*g*).

And a purchaser cannot be compelled to take a lease when a forfeiture may be incurred by reason of a continuing breach of covenant (*h*).

(*a*) Wedgewood *v.* Adams, 6 B. 600; 8 B. 103; Pope *v.* Harris, cited Lofft, 791; Howell *v.* George, 1 Madd. 1; White's case, 3 Swans. 108 (n.); Kimberley *v.* Jennings, 6 Si. 340; Talbot *v.* Ford, 13 Si. 173; Ryan *v.* Daniell, 1 Y. & C. Ch. 60; Watson *v.* Marston, 4 De G. M. & G. 230, 239; Browne *v.* Coppinger, 4 Ir. Ch. R. 72; Williamson *v.* Wooton, 3 Drew. 210.

(*b*) Webb *v.* Direct London & Portsmouth Ry. Co., 1 De G. M. & G. 521.

(*c*) Haywood *v.* Cope, 25 B. 140.

(*d*) Saxon *v.* Blake, 29 B. 438; and see Chadwick *v.* Maden, 9 Ha. 188.

(*e*) Tildesley *v.* Clarkson, 30 B. 419. See and consider Oxford *v.* Provand, L. R. 2 P. C. 135.

(*f*) Faine *v.* Brown, cited 2 Ves. Sen. 307; Peacock *v.* Penson, 11 B. 355; cf. Stevens *v.* Theatres Ltd., (1903) 1 Ch. 857.

(*g*) Helling *v.* Lumley, 3 De. G. & J. pp. 498, 499; Lewis *v.* Bond, 18 B. 85.

(*h*) Lewis *v.* Bond, 18 B. 87;

Nor will specific performance be decreed where there is uncertainty (*a*), or a mistake as to what forms the subject-matter of the contract (*b*). But it will be decreed, where, although the description of the property sold be general, parol evidence can be produced to show what was intended (*c*). Where a person purchases an estate at an auction, under a mistake as to the lot put up, he would not be compelled to complete his contract (*d*). So where, at the time of the sale of a sum of money as a reversionary interest, neither of the parties were aware that it had fallen into possession by the death of the tenant for life, as both of the parties had entered into the contract under a common mistake, it was held to be manifestly unjust to enforce it as it stood and specific performance was refused (*e*). As it was in a case where a vendor, believed by mistake that he had given the auctioneer a discretion to sell, but not to let the property go under a reasonable sum, and consequently told a friend not to bid for him, with the result that the property sold for a less sum than he intended (*f*).

The same rule was applied in an action by a purchaser where the vendor offered to sell an estate for 1,100*l*., a sum he had arrived at by a wrong addition, instead of 2,100*l*. (*g*).

So a decree will not be made when it is doubtful whether the defendant meant to contract to the extent to which it is sought to charge him (*h*), or when the parties cannot be put into the condition stipulated for when the agreement was entered into (*i*).

Gregory *v.* Wilson, 9 Ha. 683; cf. White *v.* Hay, 72 L. T. 281.

(*a*) Swaisland *v.* Dearsley, 29 B. 430; Tillett *v.* Charing Cross Bridge Company, 26 B. 419; Morrison *v.* Barrow, 1 De G. F. & J. 633; Taylor *v.* Portington, 7 De G. M. & G. 328; Price *v.* Salusbury, 32 L. J. Ch. 441; Pearce *v.* Watts, 20 Eq. 492.

(*b*) See Harnett *v.* Yielding, 2 Sch. & L. 549, 554; Neap *v.* Abbott, Coop. C. P. 333; Butterworth *v.* Walker, 13 W. R. 168; *Re* Tottenham's Estate, 15 Ir. Ch. R. 308; Hood *v.* Oglander, 34 L. J. Ch. 528; Denny *v.* Hancock, L. R. 6 Ch. 1; Bray *v.* Briggs, 26 L. T. 817; Brewer *v.* Brown, 28 C. D. 309; Plant *v.* Bourne, (1897) 2 Ch. 281.

(*c*) Ogilvie *v.* Foljambe, 3 Mer. 53; Bleakley *v.* Smith, 11 Si. 150; Shardlow *v.* Cotterell, 20 C. D. 90.

(*d*) Malins *v.* Freeman, 2 Keen, 25; Van Praagh *v.* Everidge, (1902) 2 Ch. 266.

(*e*) Colyer *v.* Clay, 7 B. 188; cf. Cochrane *v.* Willis, L. R. 1 Ch. 58; Scott *v.* Coulson, (1903) 1 Ch. 249.

(*f*) Day *v.* Wells, 30 B. 220.

(*g*) Webster *v.* Cecil, 30 B. 62; Tamplin *v.* James, 15 C. D. 221; Cochrane *v.* Willis, L. R. 1 Ch. 58; but see Griffiths *v.* Jones, 15 Eq. 279, where the Court refused to open the biddings in such a case.

(*h*) Per Lord *Redesdale*, in Harnett *v.* Yielding, 2 Sch. & L. p. 554, and see Lehmann *v.* McArthur, L. R. 3 Ch. 496.

(*i*) *Re* The Mercantile and Exchange Bank, 12 Eq. 268.

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Surprise.—Surprise is another ground upon which specific performance may be refused (*a*). In *Twining* v. *Morrice* (*b*), the vendor's agent bid, and purchased the property for the plaintiff, but specific performance was refused, as the transaction was a surprise upon third parties; for it might appear to the persons present as a bidding for the vendor, and as that might damage the sale, it proved such an impediment to specific performance, that the party should be left to law (*c*).

The mere improvidence of a contract is ordinarily no sufficient defence against proceedings for specific performance (*d*), but the omission by an agent of all usual specific stipulations in favour of his principal may be so (*e*).

Where, moreover, mere instructions are given to an agent to find a purchaser for landed property, but without instructions as to the conditions to be inserted in the contract as to title, he will have no authority to sign a contract on the part of the vendor, and if he does, specific performance thereof will be refused (*f*). So, likewise, where one of two executors erroneously believing that he was acting with the authority of the other, contracted to sell part of the testator's estate, it was held that the purchaser could not enforce specific performance of the contract (*g*).

Breach of Trust, &c.—Nor will specific performance of a contract be decreed which was entered into for an illegal purpose (*h*), or which would be against public policy (*i*), or would involve a breach of trust (*k*),

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(*a*) Willan *v.* W., 2 Dow, 275; Magrane *v.* Archbold, 1 Dow, 107; Blakeney *v.* Baggott, 3 Bligh (N. S.) 237.

(*b*) 2 Bro. Ch. 326.

(*c*) See Townshend *v.* Stangroom, 6 V. 338; Mortlock *v.* Buller, 10 V. 313; and see Pym *v.* Blackburn, 3 V. 34; Mason *v.* Armitage, 13 V. 25; Hill *v.* Buckley, 17 V. 394.

(*d*) Sullivan *v.* Jacob, 1 Moll. 472, 477.

(*e*) Helsham *v.* Langley, 1 Y. & C. Ch. 175; White *v.* Cuddon, 8 Cl. & Fin. 766; Dawson *v.* Brinckman, 3 De G. & Sm. 376; Manser *v.* Back, 6 Ha. 443.

(*f*) Hamer *v.* Sharp, 19 Eq. 108; but see Rosenbaum *v.* Belson, (1900) 2 Ch. 267.

(*g*) Sneesby *v.* Thorne, 7 De G. M. & G. 399.

(*h*) Thomson *v.* T., 7 V. 470; Knowles *v.* Haughton, 11 V. 168; Ewing *v.* Osbaldiston, 2 My. & C. 53, 85; London & Brighton Ry. Co. *v.* L. & S. W. Ry. Co., 4 De G. & J. 389; but see Aubin *v.* Holt, 2 K. & J. 66; Carolan *v.* Brabazon, 3 Jo. & Lat. 200.

(*i*) Cooth *v.* Jackson, 6 V. 12, 30.

(*k*) Mortlock *v.* Buller 10 V. 292; Ord *v.* Noel, 5 Madd. 438; Bridger *v.* Rice, 1 J. & W. 74; Turner *v.* Harvey, Jac. 169; Neale *v.* Mackenzie, 1 Keen, 474; Wood *v.* Richardson, 4 B. 174; Thompson *v.* Blackstone, 6 B. 470; Bellringer *v.* Blagrave, 1 De G. & Sm. 63; Shrewsbury &c. Ry. Co. *v.* L. &

or of a former agreement (*a*), or an act *ultra vires* (*b*), or render a person liable for a devastavit (*c*), or which would give a benefit to a person in a fiduciary position, or to a firm of which he is member, as against the persons for whom he stands in the position of trustee (*d*).

And a person will not be compelled specifically to perform an act which he is not lawfully authorised to do, for, if he were, he would be exposed to an action for damages at the suit of the person injured. Thus, if proceedings be taken for a specific performance of an agreement entered into by a vendor who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such title as he can give; and that only in cases where an injury would be sustained by the plaintiff, in case he were not to get such an execution of the agreement as the defendant can give (*e*).

Doubtful Title.—Nor will a contract be enforced where the Court considers the title good, but yet sufficiently doubtful, that it might reasonably give rise to litigation at a future time between the purchaser and persons not bound by the decree of the Court (*f*). To force a title upon a purchaser, the opinion of the Court must be so clear that it does not apprehend that another judge would form a different opinion (*g*).

Where a contract for a purchase is entered into, subject to the approval of the title by a specified person, for instance the purchaser's solicitor, in the absence of bad faith or unreasonable conduct, his opinion on the matter will be conclusive, and specific performance will not be decreed in opposition thereto (*h*).

Upon the same principle specific performance will not be decreed of the contract for the purchase of a lease, where, from pending or

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N. W. Ry. Co., 4 De G. M. & G. 115; Maw *v.* Topham, 19 B. 576; Law *v.* Urlwin, 16 Si. 377; Rede *v.* Oakes, 4 De G. J. & S. 505 (and the remarks thereon in Morris *v.* Debenham, 2 C. D. 540); Tolson *v.* Sheard, 5 C. D. 19.

(*a*) Willmott *v.* Barber, 15 C. D. 96.

(*b*) Corbett *v.* S. E. & C. Ry. Co., (1906) 2 Ch. 12.

(*c*) Sneesby *v.* Thorne, 7 De G. M. & G. 399.

(*d*) Flanagan *v.* G. W. Ry. Co., 7 Eq. 116.

(*e*) Harnett *v.* Yielding, 2 Sch. & L. 554; Lawrenson *v.* Butler, 1 Sch. & L. 19; Ellard *v.* Lord Llandaff, 1 Ball & B, 241; Peacock *v.* Penson, 11 B. 355; Howe *v.* Hunt, 31 B. 420.

(*f*) Parkin *v.* Thorold, 16 B. 67.

(*g*) Rogers *v.* Waterhouse, 4 Drew. 329; but cf. Baker *v.* White, 20 Eq. 166. And see Fry, S. P. (1903), p. 382; Williams, V. & P., 2nd edit., pp. 1076, 1110, et seq.

(*h*) Hudson *v.* Buck, 7 C. D. 683.

threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and consequently the purchaser must be involved in immediate litigation (*a*). Where, however, there is a condition, that the last receipt of rent shall be conclusive evidence that all covenants have been performed, or the breaches thereof waived up to the time of the completion of the purchase, the purchaser is bound by his agreement, to assume that the covenants have been kept or the breaches so condoned as not to affect the title (*b*). But a vendor who has committed a wilful breach of the covenant after the contract, cannot avail himself of the condition (*c*).

Specific performance of a contract which it is impossible to perform (*d*), or the material terms whereof the Court has it not in its power to enforce (*e*), will not be decreed.

Entirety of Agreement.—As a general rule, all agreements must be considered as *entire*. The consideration for the performance of an agreement by one party to it, is, usually, the performance of the whole of it by the other, and therefore if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of his part, the Court will not compel the defendant to perform his part of the agreement or any of it (*f*).

Where property is sold in one lot, the contract will generally be considered indivisible, and specific performance of a part thereof to which only a good title could be made will be refused (*g*).

Where, however, property is sold in separate lots, a vendor in the absence of special circumstances can compel the purchaser of two or more lots to complete the purchase of one lot, although he may be unable to make out the title to the other lots (*h*).

(*a*) Pegler *v.* White, 33 B. 403; *Re* Hollis' Hospital and Hague's Contract, (1899) 2 Ch. 540; George *v.* Thomas, 90 L. T. 505.

(*b*) Bull *v.* Hutchens, 32 B. 615; Lawrie *v.* Lees, 7 A. C. 19; cf. Conveyancing Act, 1881, s. 3 (4); and *Re* Highett and Bird, (1903) 1 Ch. 287.

(*c*) Howell *v.* Knightley, 21 B. 331.

(*d*) Green *v.* Smith, 1 Atk. 573.

(*e*) Waring *v.* M. S. & L. Ry. Co., 7 Ha. p. 492. See also Downs *v.* Collins, 6 Ha. p. 437; S. Wales Ry. Co. *v.* Wythes, 5 De G. M. & G. 880; Ford *v.* Stuart, 15 B. 493; Counter *v.* Macpherson, 5 Moo. P. C. 83.

(*f*) Per *Mellish*, L. J., in Wilkinson *v.* Clements, L. R. 8 Ch. p. 110; and see Blackett *v.* Bates, L. R. 1 Ch. 117; Gervais *v.* Edwards, 2 Dr. & War. 80; Hills *v.* Croll, 2 Ph. 60; Kernot *v.* Potter, 3 De G. F. & J. p. 459; Merchants' Trading Co. *v.* Banner, 12 Eq. 23. See per Parker, J., in Jones *v.* Tankerville (Earl), (1909) 2 Ch. 440, at p. 444.

(*g*) Roffey *v.* Shallcross, 4 Madd. 227; and see Price *v.* Griffith, 1 De G. M. & G. 80; and cf. Hexter *v.* Pearce, (1900) 1 Ch. 341.

(*h*) Casamajor *v.* Strode, 2 My. & K. 724; Lewin *v.* Guest, 1 Russ. 325

Woollam v. Hearn.

The fact that different prices are fixed upon different parts of the property comprised in a contract for sale will not of itself make the contract divisible (*a*).

Where, however, an agreement is divisible, that is to say, it is so worded as to constitute two or more separate agreements, specific performance may be decreed of one of such separate agreements, although the party seeking specific performance has not, and possibly never will, perform the rest of the whole agreement. And the assignee of the whole agreement is entitled to the same relief (*b*).

Want of Mutuality.—With regard to want of mutuality in the contract, as a defence to specific performance, the doctrine is stated thus: Where from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other (*c*).

The Court acts upon the ground that if the remedy exists at all it ought to be mutual and reciprocal as well for the vendor as the purchaser (*d*).

The mutuality is to be judged of at the time the contract was entered into, so that although the defendant may by subsequent conduct have lost his right against the plaintiff, the right of the latter will not be affected thereby (*e*).

The rule is applied in many cases of want of capacity. Thus, an infant cannot obtain specific performance (*f*), nor can a remainder-man enforce the contract of the tenant for life (*g*), and formerly it would seem a married woman could not obtain a decree (*h*).

(*a*) Crosse *v.* Lawrence, 9 Ha. 462; Crosse *v.* Keene, 9 Ha. 469; and see Richardson *v.* Smith, L. R. 5 Ch. 648.

(*b*) Wilkinson *v.* Clements, L. R. 8 Ch. 96. See also Odessa Tramways Co. *v.* Mendel, 8 C. D. 243.

(*c*) See Fry, S. P. (1903), p. 203, citing Flight *v.* Bolland, 4 Russ. 298; and Clayton *v.* Ashdown, 9 Vin. Abr. 393. See also Avery *v.* Griffin, 6 Eq. 606; Vansittart *v* V., 4 K. & J. 62; Firth *v.* Ridley, 33 B. 516; Jones *v.* Tankerville (Earl), (1909) 2 Ch. 440.

(*d*) Story, Eq. Jurisprudence (1892), s. 723, p. 480, citing Withy *v.* Cottle, 1 Si. & S. 174; Forrest *v.* Elwes, 4 V. 497; cf. Blyth *v.* Carpenter, 2 Eq. 501.

(*e*) Fry, S. P. (1903), p. 206, citing S. E. Ry. Co. *v.* Knott, 10 Ha. 122; Hawkes *v.* E. C. Ry. Co., 5 H. L. C. 331. See Bolton *v.* Lambert, 41 C. D. p. 300.

(*f*) Per *Lindley*, L. J., in Lumley *v.* Ravenscroft, (1895) 1 Q. B. p. 684.

(*g*) Ricketts *v.* Bell, 1 De G. & Sm. 335; Armiger *v.* Clarke, Bunb. 111; but see Ingle *v.* Jenkins, (1900) 2 Ch. 368.

(*h*) Avery *v.* Griffin, 6 Eq. 606; but see Married Women's Property Acts, 1882, s. 1 (2).

In *Wylson* v. *Dunn* (*a*), *Kekewich*, J., said the doctrine was a technical one, founded on common sense, and simply amounted to this, that one party to a bargain should not be held bound to that bargain when he could not enforce it against the other. In the case before him, the plaintiff, in effect, said to the defendant, "We have not got this land; you know it belongs to W. H., but if you will agree to buy from us half an acre for £350 we will purchase the whole" (*b*). That, so far, was a case of non-mutuality and could not be enforced on either side. But the defendant having agreed to this, and the plaintiff having subsequently got a contract which he could enforce against the owner of the land, he became entitled to enforce it against the defendant, Dunn (*c*).

There are many exceptions to the rule as stated. Thus, as before set out (*d*), where a vendor has not substantially all the interest he has contracted to sell, he cannot enforce his contract against the purchaser, but the purchaser can insist upon having all the vendor can convey, with compensation for the difference (*e*).

So a contract which by the Statute of Frauds does not require to be signed by both parties may be enforced by the one who has not signed it (*f*), and a contract contained in a unilateral instrument, such as a deed poll, may be enforced (*g*). It must be remembered that since the Judicature Act, damages may now be claimed in the alternative in an action for specific performance (*h*), so that an action cannot now, as formerly, be dismissed for want of mutuality, leaving the plaintiff to bring his action for damages (*i*), for the Court can give the proper relief in the same action.

(*a*) 34 C. D. p. 576.

(*b*) Ibid., p. 577.

(*c*) See also Lee *v.* Soames, 36 W. R. 884; Bolton *v.* Lambert, 41 C. D. p. 300; and see supra, p. 491.

(*d*) Ante, pp. 504—516.

(*e*) Halsey *v.* Grant, 13 V. 73, 77; Cleaton *v.* Gower, Finch, 164; Dyer *v.* Hargrave, 10 V. 506; Fry, S. P. (1903), p. 209.

(*f*) Fry, S. P. (1903), p. 208.

(*g*) Ibid.

(*h*) See ante, pp. 452—458.

(*i*) See Lawrenson *v.* Butler, 1 Sch. & L. 13; Harnett *v.* Yielding, 2 Ib. 549; cited Fry, S. P. (1903), p. 209.

SURETIES.

DERING *v.* EARL OF WINCHELSEA.

1787. 1 Cox, 318; 2 B. & P. 270; 1 R. R. 41 (*a*).

Contribution between Co-sureties.

> The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burthen and benefit. Therefore, where three sureties are bound by *different instruments*, but for the same principal and the same engagement, they shall contribute.

THOMAS DERING, Esq., having been appointed collector of some of the duties belonging to the customs, it became necessary, upon such appointment, for him to enter into bonds to the Crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the Crown in the penalty of 4,000*l.*; another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous, in the same penalty of 4,000*l.*; all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the Crown to the amount of 3,883*l.* 14*s.*, the Crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum; whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause had been argued at length in Michaelmas Term last, and now stood for judgment.

(*a*) Sir John Rous and the A.-G. (as the creditor) were defendants with the Earl of Winchelsea.

Lord Chief Baron [Eyre](*a*).—This bill is brought by one surety against his two co-sureties, under the circumstances (above-mentioned). Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted.

The demand is resisted on two grounds: first, that there is no foundation for the demand in the nature of the contract; and, secondly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection, which I shall take notice of hereafter.

I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money; and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this Court under these circumstances. He might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the Court that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say, that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be that a man must come into a Court of equity with clean hands: but when this is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal, as well as in a moral sense. In a moral sense, the companion, and perhaps, the conductor of Mr. Dering, may be said to be the author of the loss, but, to legal purposes, Mr. Dering himself is the author

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(*a*) According to the report in Cox the Court consisted of the L. C. B. and Hotham B., but that in B. & P. mentions that Perrin B. was present.

of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognizance of. Cases, indeed, might be put, in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech, as applied to Sir Edward Dering in this case.

The real point is, whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted, that, if there had been only one bond in which the three sureties had joined for 12,000*l.*, there must have been a contribution amongst them to the extent of any loss sustained: but it is said, that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connection with each other, and it is added, that the contribution can never be *eodem modo* as in the three joining in one bond for 12,000*l.*; for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of 6,000*l.* each, whereas here it is impossible to make them contribute beyond the penalty of the bond. Mr. Madocks has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond. If this means only that there is no contract, then it comes back to the question whether the right of contribution is founded on contract.

If we take a view of the cases, both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in *Swain* v. *Wall* (*a*). In the register, 176 b, there are two writs of contribution—one *inter co-hæredes,* the other *inter co-feoffatos;* these are founded on the Statute of Marlbridge. The

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(*a*) 1 Ch. R. 149.

great object of the statute is, to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in Fitzherbert (*a*), there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay (*b*). In the same page Fitzherbert takes notice of contribution between co-heirs and co-feoffees; and as between co-feoffees, he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "*ex eorum assensu;*" and yet this seems to contravene the express provision of the statute. As to co-heirs, the statute is express; it does not say so as to feoffees, but gives contribution in the same manner. In *Sir William Harbert's case* (*c*), many cases of contribution are put; and the reason given in the books is, that in *æquali jure* the law requires equality: one shall not bear the burthen in ease of the rest; and the law is grounded in great equity. *Contract* is never mentioned. Now, the doctrine of equality operates more effectually in this Court than in a Court of law. The difficulty in *Coke's Cases* was, how to make them contribute; they were put to their *auditâ querelâ* or *scire facias.* In equity there is a string of cases, in 1 Eq. Ca. Abr., tit. "Contribution and Average." Another case occurs in Hargr. Law Tracts (*d*), on the right of the King on the prisage of wine. The King is entitled to one ton before the mast, and one ton behind; and in that case a right of contribution accrues, for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely. But the contribution is given of course on general principles, which govern all these cases.

Now, to come to the particular case of sureties. It is clear that one surety may compel a contribution from another towards payment of a debt for which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common interest and a common burthen;

(*a*) Fitz. Nat. Brev., p. 162 b.

(*b*) Vide Leigh *v.* Dickeson, 15 Q. B. D. p. 68.

(*c*) 3 Co. 11 b.

(*d*) P. 120.

they are joined by the common end and purpose of their several obligations as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute; whereas if they had joined in one bond, it must have depended on other circumstances.

In this case, the three sureties are all bound that Mr. Dering shall account for the moneys he receives. This is a common burthen. All the bonds are forfeited at law and in this Court, as far as the balance due. The balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now, who ought to pay this? The one who is sued must pay it to the Crown, as in the case of prisage; but, as between themselves, there shall be a contribution, for they are *in æquali jure.* This principle is carried a great way where they are joined in one obligation; for if one should pay the whole 12,000*l.* and the second were insolvent, the third shall contribute a moiety, thought he certainly never meant to be liable for more than a third: this circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the same principal and the same engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted. If, in the common case of a joint bond no distinction is to be made, why shall not the same rule govern here? As in the case of average of cargo in a Court of law, *qui sentit commodum sentire debet et onus.* This principle has a direct application here; for the charging one surety discharges the other, and each therefore ought to contribute to the onus. In questions of average, there is no contract or privity in ordinary cases; but it is the result of general justice, from the equality of burthen and benefit. Then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute, for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form it ought to have been brought on by demurrer; but, in substance, the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declares that the balance due from Thomas Dering being admitted on all hands to amount to the sum of 3,883*l.* 14*s.* 8½*d.*, the plaintiff, Sir Edward Dering, and the two defendants, the Earl of Winchelsea and Sir John Rous, ought to contribute in equal shares to the payment of that sum, and direct that the plaintiff and defendants do pay in discharge thereof, each of them, the sum of 1,294*l.* 11*s.* 7*d.*; and that on payment thereof, the Attorney-General shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

NOTES.

1. Generally.
2. Contribution between sureties, p. 546.
    Guarantees, p. 551.
    Continuing Guarantees, p. 552.
    Statutes of Limitation, p. 553.
3. Contribution where there is a common liability, p. 553.
4. Contribution between wrongdoers, p. 556.
5. Right of surety to securities of co-surety and creditor, p. 557.
6. Right of surety paying debt, to stand in the place of the creditor in bankruptcy, p. 566.
    Proof by surety against co-surety, p. 569.
    The rule in ex parte Waring, p. 569.

1. Generally.

Lord *Eldon*, who was counsel for the defendants, in later cases (*a*), mentioned that at the time he was much dissatisfied with the

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(*a*) Coope *v.* Twynam, 1 T. & R. at p. 429; Craythorne *v.* Swinburne, 14 V. at p. 165.

judgment, and that it ran counter to the commonly accepted view in Westminster Hall, but he had since been convinced that the decision was based on right principles.

With the possible exception of a principal debtor who is under disability, suretyship necessarily implies the principal liability of another (*a*), for " there can be no suretyship unless there is a principal debtor, who may of course be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time ; but until there is a principal debtor, there can be no suretyship. Nor can a man guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed " (*b*). And consequently if the principal debtor is absolutely released by the creditor from his debt, as by novation, the liabilities of the surety come to an end (*c*), unless the contract of suretyship contains provisions to the contrary (*d*). But the surety is not released by the principal debt becoming unenforceable through the Statutes of Limitation (*e*).

The relation of principal and surety arises from the contract between them, but as regards the creditor, the surety's rights arise by notice to the creditor of the relation, which notice he may acquire either as a party to the contract or in any other way (*f*). Until he has notice, the creditor may deal with a principal debtor as with any other debtor, but not afterwards (*g*). The rule is : " where two or more persons, bound as full debtors, arrange, either at the time when the debt was contracted or *subsequently*, that, *inter se*, one of them shall only be liable as surety, the creditor, after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors " (*h*).

Not every person liable for another's debt is a surety. Where his liability arises from contract he is not a surety when there

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(*a*) See per Lord *Campbell*, C. J., in Amott *v.* Holden, 18 Q. B. at p. 615 ; *Re* Albert Life Ass. Co., 11 Eq. at p. 177.

(*b*) Per Lord *Selborne*, in Mountstephen *v.* Lakeman, L. R. 7 H. L. at p. 24.

(*c*) Commercial Bank of Tasmania *v.* Jones, (1893) A. C. 313.

(*d*) Perry *v.* Nat. Prov. Bank, (1910) 1 Ch. 464, following Cowper *v.* Smith, 4 M. & W. 519 ; Union Bank of Manchester *v.* Beech, 3 H. & C. 672.

(*e*) Carter *v.* White, 25 C. D. 666.

(*f*) Per Lord *Selborne*, in Duncan Fox & Co. *v.* N. & S. Wales Bank, 6 A. C. p. 11 ; per Lord *Cottenham*, in Hollier *v.* Eyre, 9 Cl. & F. p. 45 ; and per *Coleridge*, J., in Pooley *v.* Harradine, 7 E. & B. at pp. 434—6.

(*g*) Stainbank *v.* Davies, 6 De G. M. & G. 679 ; Oakeley *v.* Pasheller, 4 Cl. & F. 207 ; Oriental, &c., Corporation, *v.* Overend, &c., L. R. 7 H. L. 348 ; Duncan Fox & Co. *v.* N. & S. Wales Bank, 6 A. C. 1, 12.

(*h*) Per Lord *Watson*, in Rouse *v.* Bradford Bank, (1894) A. C. at p. 598.

is no privity of contract between him and the other person liable. Thus, although an accommodation party to a bill is a surety (*a*), the indorser of a bill is not (*b*), although when the bill matures he is in a position sufficiently analogous thereto to bring him within the principle of *Dering* v. *Winchelsea.* So too the original lessee liable for the breaches of covenant of an assignee is not a surety, for his liability arises from his own covenant, which is quite independent of the assignee's liability (*c*). So too a person liable by operation of law, as for example, the transferor of shares not fully paid up (*d*) or the owner of goods distrained upon (*e*), is not a surety even though he has a right to recover against the person primarily liable.

The distinction between a contract of suretyship and of insurance is frequently hard to draw. The use of either word is not conclusive; it is a question of construction in each case (*f*).

Suretyship is always for a debt incurred or to be incurred by the principal debtor, and the surety is bound to see that the debtor pays.

Insurance is a contract to pay an amount upon the happening of a specified event or events, and covers not only matters within the field of suretyship, but also losses due to acts of strangers or accidents.

The distinction is important, for insurance is a contract *uberrimae fidei*, but suretyship is not (*g*); and an insurer against the default of a principal debtor *and a surety* is solely entitled to the securities held by the creditor (*h*).

2. Contribution between Sureties.

In *Craythorne* v. *Swinburne* (*i*), Lord *Eldon* said of the leading case that "it is decided that whether they (the sureties) are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates. * * * The doctrine of contribution * * * stands on this: that all sureties are equally liable to the creditor; and it does not lie with him to determine upon whom the burden shall be thrown

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(*a*) Overend, &c., *v.* Oriental, &c., Corporation, L. R. 7 H. L. 348; cf. Godsell *v.* Lloyd, 27 T. L. R. 383.

(*b*) Duncan Fox & Co. *v.* N. & S. Wales Bank, 6 A. C. 1, 11.

(*c*) Per *Fry*, L. J., Baynton *v.* Morgan, 22 Q. B. D. at p. 80.

(*d*) *Re* Contract Corporation, Hudson's Case, 12 Eq. 1; Nevill's Case, L. R. 6 Ch. 43.

(*e*) Exall *v.* Partridge, 8 T. R. 308.

(*f*) Seaton *v.* Heath, (1899) 1 Q. B. 782, at p. 792; *Re* Denton, (1904) 2 Ch. 178; Dane *v.* Mortgage, &c., Corporation, (1894) 1 Q. B. p. 60.

(*g*) See post, p. 576.

(*h*) See *e.g. Re* Denton, supra; and Subrogation, Vol. I., 152—155.

(*i*) 14 V. at pp. 165, 169.

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exclusively; that equality is equity; and if he will not make them contribute equally, this Court will finally, by some arrangement, secure that object" (*a*).

The result of *Dering* v. *Winchelsea* is that "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law adds, that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equal, then proportionately to the amount for which each is a surety" (*b*).

The principle, which is quite independent of contract (*c*), is the same as that of marshalling, and is similar to that of subrogation (*d*).

The right "is a personal right and the remedy a personal remedy, and there is no lien for the amount of the moneys in respect of which the right of contribution arises" (*e*).

It is clear that a surety may compel contribution from another for payment of a debt for which they are jointly or severally, or jointly and severally, bound by the same instrument (*f*). But it was decided, for the first time, in the leading case that there is no difference whether the parties are bound in the same or different instruments, provided they are co-securities for the *same* principal and in the *same* engagement. Nor is there any difference if they are bound in *different sums*, except that contribution can not be required beyond the sum for which they have become bound (*g*), each surety being ordinarily bound to contribute his proportionate part (*h*).

(*a*) Cited by *Wright*, J., in Wolmershausen *v.* Gullick, (1893) 2 Ch. 521.

(*b*) Per *Alderson*, B., in Pendlebury *v.* Walker, 4 Y. & C. Ex. p. 441; and see Steel *v.* Dixon, 17 C. D. at p. 830; Ellesmere Brewery Co. *v.* Cooper, (1896) 1 Q. B. 75.

(*c*) Per Lord *Redesdale*, in Stirling *v.* Forrester, 3 Bli. p. 590; see also *Ex p.* Gifford, 6 V. p. 808; Spottiswoode's case, 6 De G. M. & G. p. 371; Ramskill *v.* Edwards, 31 C. D. 100; Robinson *v.* Harkin, (1896) 2 Ch. p. 426; and see per *Farwell*, L. J., Mills *v.* United Counties Bank, (1912) 1 Ch. p. 242.

(*d*) Per Lord *Eldon*, in Aldrich *v.* Cooper, 8 V. p. 389. See Duncan Fox *v.* N. & S. Wales Bank, 6 A. C. pp. 12, 13. As to subrogation generally, see Vol. I., pp. 152—155, and for its application in suretyship, infra, note (5).

(*e*) Per *Fry*, J., in *Re* Leslie, 23 C. D. p. 563.

(*f*) Fleetwood *v.* Charnock, Nels. 10; Underhill *v.* Horwood, 10 V. at p. 226.

(*g*) See Craythorne *v.* Swinburne, 14 V. at p. 169; Ware *v.* Horwood, 14 V. at p. 31; Mayhew *v.* Crickett, 2 Swans. 192.

(*h*) *Re* MacDonaghs, Minors, 10 Ir. R. Eq. 269; Whiting *v.* Burke, L. R. 6 Ch. 342.

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And the right of a surety to enforce contribution against co-sureties will not be affected by his ignorance at the time he became surety that they were also co-sureties (*a*).

A surety has no right of contribution against a person who is a surety both for the principal debtor and for him (*b*). Where, however, sureties are bound by different instruments for distinct portions of a debt due from the same principal, if the suretyship of each is a *separate* and *distinct* transaction, and not the same transaction split into different parts, there will be no right of contribution among the sureties (*c*). And the same applies to sureties, bound by the *same* instrument, if they are only liable for *distinct* portions of a debt from the same principal, for which none of them are liable in the aggregate. Suppose, for instance, the principal under a bond was bound to the creditor in 1000*l.*, and four sureties became thereby guarantors for the payment, not of the whole 1000*l.*, jointly and severally with the others, but each severally for 250*l.* parcel of the 1000*l.* Then the creditor could only apply to each surety for payment of the 250*l.*, or such proportion of it as remained due, and there could be no contribution between the sureties, because *they were not liable for the same debt* (*d*).

The liabilities of successive indorsers of a bill or note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of law merchant, whereby a prior indorser must indemnify a subsequent one; if, however, it appear from the evidence that the parties made the indorsements pursuant to a mutual agreement to be co-sureties, they will be entitled and liable to equal contributions *inter se* (*e*).

Courts of common law in modern times assumed a jurisdiction to compel contribution (*f*). But such jurisdiction was much more confined and less beneficial than that in equity. "Before the passing of the Judicature Act a right to contribution or indemnity arising otherwise than by special agreement was only enforceable at law by a person who could prove that he had already sustained a

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(*a*) Craythorne *v.* Swinburne, supra; Reynolds *v.* Wheeler, 10 C. B. (N. S.) 561, approved in Macdonald *v.* Whitfield, 8 A. C. 733.

(*b*) Craythorne *v.* Swinburne, supra; *Re* Denton, (1904) 2 Ch. 178.

(*c*) Coope *v.* Twynam, 1 T. & R. 426; Pendlebury *v.* Walker, 4 Y. & C. Ex. 429; Arcedeckne *v.* Lord Howard, 45 L. J. Ch. 622.

(*d*) See dictum by *Blackburn*, J., in Ellis *v.* Emmanuel, 1 Ex. D. at p. 162; and see Johnson *v.* Wild, 44 C. D. 146.

(*e*) Macdonald *v.* Whitfield, 8 A. C. 733, 744, 745; Reynolds *v.* Wheeler, 10 C. B. (N. S.) 561.

(*f*) See Craythorne *v.* Swinburne, 14 V. at p. 164.

loss. But in equity it was very reasonably held that even in the absence of any special agreement a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss provided loss was imminent" (*a*), and this principle will now prevail in all divisions of the High Court (*b*).

The right of a surety to claim contribution from a co-surety arises (1) when the surety is liable to pay (*c*) or has paid either the whole or more than a just proportion of the debt for which he is liable to the principal creditor (*d*);

(2) when the surety has not paid, but has had judgment against him for the full amount of the debt (*e*);

(3) where the claim of the principal creditor against the deceased surety has been allowed (*f*).

And a person entitled to contribution is not obliged to wait until he has suffered, and has perhaps been ruined (*g*), but when called upon to pay, he can bring an action against his co-sureties to compel them to contribute to pay the debt to the creditor (*h*).

Where the debt guaranteed is entire and indivisible but is payable by instalments, a surety who pays the whole of an instalment is not entitled to contribution from a co-surety if the amount of the instalment is less than his proportion of the debt (*i*).

A surety, who has been compelled to pay the debt, may in the same action sue the principal debtor for repayment and the co-sureties for contribution. And in an action for contribution to which the principal debtor is a party, the principal debtor will be ordered to pay not

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(*a*) Lindley on Partnership, (1905) p. 410. See Wolmershausen *v.* Gullick, (1893) 2 Ch. at p. 527, cf. Hughes-Hallett *v.* Indian, &c., Co., 22 C. D. p. 565.

(*b*) Lindley on Partnership (1905), at p. 410; and Judicature Act, 1873, s. 25, s.s. 11.

(*c*) See Gardner *v.* Brooke, (1897) 2 Ir. R. p. 17. Cf. Dixon *v.* Steel, (1901) 2 Ch. 602.

(*d*) *Ex p.* Gifford, 6 V. 805; Davies *v.* Humphreys, 6 M. & W. at pp. 168, 169; *Ex p.* Snowdon, 17 C. D. 44; *Re* Wolmershausen, 62 L. T. 545; Gardner *v.* Brooke, (1897) 2 Ir. R. pp. 12, 17.

(*e*) Macdonald *v.* Whitfield, 8 A. C. 733; Wolmershausen *v.* Gullick, (1893) 2 Ch. p. 527. A judgment or an award against the principal does not bind the surety, and is not evidence against him. *Ex p.* Young, 17 C. D. 674.

(*f*) Wolmershausen *v.* Gullick, supra.

(*g*) See Lindley on Partnership, (1905) pp. 410, 411; Wolmershausen *v.* Gullick, supra; and see Note 7 to Rees *v.* Berrington, post, p. 603.

(*h*) Per James, L. J., in *Ex p.* Snowdon, 17 C. D. at p. 47.

(*i*) Stirling *v.* Burdett, (1911) 2 Ch. 418; explaining Lawson *v.* Wright, 1 Cox, 275; distinguishing *Re* Macdonald, (1888) W. N. 130 and discussing judgment of *Cotton*, L. J., in *Ex p.* Snowdon, 17 C. D. at p. 48.

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only the amount which a co-surety has been ordered to pay by way of contribution to the plaintiff surety, but also the amount due to the plaintiff not satisfied by such contribution (*a*).

Where the creditor is a party to the action the surety may obtain an order upon his co-surety to pay his proportion to the creditor. Where the creditor is not a party the surety may obtain a prospective order directing his co-surety, upon payment by the surety of his own share, to idemnify him against further liability (*b*).

The surety, moreover, has the right (although it appears in practice to be rarely exercised) at any time to apply to the creditor and pay him off, and then, on giving a proper indemnity for costs, to sue the principal debtor in the creditor's name (*c*).

A surety is entitled to interest from the date of payment by him on the amount recoverable from the principal debtor and his co-sureties respectively (*d*), except as against the estate of a deceased principal, and even then, if a fund assigned as a further security has made interest, he is allowed interest (*e*).

An executor may retain payments made by him on account of his testator's liability as surety for a person who is a beneficiary under the will (*f*).

A surety who has paid off a mortgage debt is entitled to *prove* against the estate of a co-surety to the extent of the *whole debt*, but he can only actually recover the proportion due as between himself and his co-surety (*g*).

Although the principle of contribution is not founded upon contract, still a person may by contract qualify, or take himself out of the reach of, the principle. Thus, where three persons became bound as sureties, and agreed among themselves that, if the principal debtor failed to pay, they would pay their respective parts; two became insolvent, and the third paid the money; one of the insolvent sureties, afterwards becoming solvent, was held liable to contribute one-third only (*h*).

(*a*) Lawson *v.* Wright, 1 Cox, 275; Hitchman *v.* Stewart, 3 Drew. 271; Greerside *v.* Benson, 3 Atk, 253 (n). Seton, (1901) pp. 213, 216, 217.

(*b*) Wolmershausen *v.* Gullick, (1893) 2 Ch. 514.

(*c*) Swire *v.* Redman, 1 Q. B. D. 541.

(*d*) Lawson *v.* Wright, Hitchman *v.* Stewart, supra; Petre *v.* Duncombe, 15 Jur. 1187; *Re* Swan, 4 Ir. R. Eq. 209; *Ex p.* Bishop, 15 C. D. 400; as to the rate, see L. C. & D. Ry. Co. *v.* S. E. Ry. Co., (1892) 1 Ch. 120.

(*e*) Caulfield *v.* Maguire, 2 Jo. & Lat. 141.

(*f*) *Re* Watson, (1896) 1 Ch. 925.

(*g*) *Re* Parker, (1894) 3 Ch. 400.

(*h*) Swain *v.* Wall, 1 Ch. R. 149. See also Craythorne *v.* Swinburne, 14 V. 165; Coope *v.* Twynam, 1 T. & R.

So also a person may take himself entirely out of the principle, as where he becomes merely a *collateral* surety, by limiting his liability to payment of the debt upon the default of the principal and other sureties ; and on a bill in such a case, filed for contribution, parol evidence is admissible to show what the real contract was, and to rebut the implied contract which equity raises in cases of contribution (*a*). See also *Hartley* v. *O'Flaherty* (*b*), where Lord *Plunket* says, "In the case of A. undertaking that if the principal does not pay, and if B., who has already become security, does not pay, he, A., will pay, it seems perfectly clear that B., in that case paying the whole, would have no claim of contribution against A."

Guarantees (*c*).—A question of construction often arises for the decision of the Court, as to whether it was the *intention* that the surety should merely guarantee *part* of the debt *or* whether he should guarantee the *whole* of the debt with a limitation on his liability as surety. It has been laid down in the case of *Ellis* v. *Emmanuel* (*d*), where all the cases were reviewed and considered, that where a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (*primâ facie* at least) as applicable to a *part* only of the debt coextensive with the amount of the guarantee, and this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety (*e*).

"And further, that if a creditor taking a limited security for a floating balance means it to be a security for the whole of the debt, and not merely for a part, he should take care that this is clearly expressed, for the *primâ facie* construction is the other way, and the Court ought not to split hairs or make nice verbal distinctions on the words used" (*f*).

There is, however, no case which lays down that where the suretyship limited in amount is for a debt already ascertained which exceeds that limit, it is *primâ facie* to be construed as a security for part of

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426; Collins *v.* Prosser, 1 B. & C. 682; Armstrong *v.* Cahill, 6 L. R. Ir. 440; *Re* Ennis, (1893) 3 Ch. 238; Buchanan *v.* Main, 3 Fraser 215.

(*a*) Craythorne *v.* Swinburne, supra.

(*b*) L. & G. t. Plunk. 217.

(*c*) See Birkmyr *v.* Darnell, and notes Smith's L. C., (1902) p. 299.

(*d*) 1 Ex. D. 157 (C. A.)

(*e*) Per *Blackburn*, J., in Ellis *v.* Emmanuel, supra.

(*f*) Ibid., p. 168.

the debt only; and there does not appear to be any principle on which such a construction ought to be adopted. It is in such a case a question of construction on which the Court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only (*a*).

Continuing Guarantees.—A continuing guarantee secures the payment of a general balance of account between debtor and creditor, and not merely the amount due in respect of one or more particular transactions or in respect of transactions up to a certain amount where the payment, or satisfaction (*b*), of that amount in respect of the first items satisfies the guarantee, even though the course of dealings eventually shows a balance due to the creditor (*c*).

In general, a continuing guarantee is clearly expressed (*d*), but in many cases difficulty arises from the want of care of the parties in expressing their meaning. It is a question of construction in each case and no general rule can be laid down. Formerly there was considerable controversy as to the canon of interpretation which was to be applied (*e*), and consequently the old cases can only be used with caution. It is now settled that these documents are construed in the same way as other instruments (*f*). The natural meaning of the words used must first be looked to (*g*). The form of the guarantee is a material factor (*h*), and so is the absence of limitation of time or amount (*i*), for if a man means to limit his liability, he should take care to say so (*k*).

To be held to be continuing, a guarantee must not only be prospective (*l*), but also contemplate a course of dealing, and not merely one or more definite transactions (*m*). Evidence of the

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(*a*) Ellis *v.* Emmanuel, 1 Ex. D. p. 169.

(*b*) For instance, under the Rule in Clayton's case, 1 Mer. 585, 608. See as to this rule, Deeley *v.* Lloyds Bank, (1910) 1 Ch. 648.

(*c*) Kirby *v.* Marlborough, 2 M. & S. 18; Bovill *v.* Turner, 2 Chit. 205; Kay *v.* Groves, 6 Bing. 276.

(*d*) See Parr's Bank *v.* Yates, (1898) 2 Q. B. 460.

(*e*) See Mayer *v.* Isaac, 6 M. & W. 605; and cf. Nicholson *v.* Paget, 5 C. & P. 395, and Melville *v.* Hayden, 3 B. & Ald. 593; with Mason *v.* Pritchard, 2 Camp. 436, and Weston *v.* Empire, &c., Co., 19 L. T. 305.

(*f*) Hargrave *v.* Smee, 6 Bing. 244 at pp. 248, 250.

(*g*) Allnutt *v.* Ashenden, 6 Scott. N. R. at p. 133; Wood *v.* Priestner, L. R. 2 Ex. 282; and Nottingham, &c., Co. *v.* Bottrill, L. R. 8 C. P. 694.

(*h*) Walker *v.* Hardman, 4 Cl. & F. 258.

(*i*) Coles *v.* Pack, L. R. 5 C. P. 65.

(*k*) Merle *v.* Wells, 2 Camp. 413.

(*l*) Allnutt *v.* Ashenden, 6 Scott, N. R. 127.

(*m*) Hitchcock *v.* Humfrey, 5 Man. & G. 559; Nicholson *v.* Paget, 5 C. & P. 395.

circumstances, under which the guarantee was given, is admissible, not to alter the terms, but as part of the conduct of the parties in order to determine the scope and object of the arrangement (*a*). And consequently where the guarantee is given under such circumstances that the intention appears to be to maintain another in his profession or trade, it will be held to be continuing even though there is a limitation of amount (*b*).

Statutes of Limitation.—In actions for contribution, time does not begin to run under the statutes until the liability of one of the sureties is ascertained, that is, until the claim of the principal creditor is established against the surety (*c*). A surety who has been made liable can proceed against a co-surety, though at the time that the action for contribution is brought the claim of the principal creditor against that co-surety may be statute barred (*d*).

3. Contribution where there is a Common Liability (other than in Tort).

Trustees.—Where one of two or more trustees, who are *in pari delicto*, has made good a loss occasioned by a breach of trust, for which they are jointly and severally liable, he may obtain contribution to that loss from his co-trustee (*e*), or from the representative of a deceased co-trustee, even though the actual loss occurs after the death of that co-trustee (*f*).

Where the trustee who has made good the loss is also a *cestui que trust* benefiting from the breach, then the rule stated above is modified by two other rules; first, that a *cestui que trust* cannot make a trustee liable for a breach of trust which he himself has authorised and assented to (*g*), for "*volenti non fit injuria*" (*h*); and secondly in such a case the trustee is entitled to be recouped out of

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(*a*) Heffield *v.* Meadows, L. R. 4 C. P. 595; Bastow *v.* Bennett, 3 Camp. 220; Lawrie *v.* Scholfield, L. R. 4 C. P. 622; Grahame *v.* G., 19 L. R. Ir. 249; Browning *v.* Baldwin, 40 L. T. 248.

(*b*) Allan *v.* Kenning, 9 Bing. 618; Martin *v.* Wright, 6 Q. B. 917; Batson *v.* Spearman, 9 Ad. & E. 298; Pease *v.* Hirst, 10 B. & C. 122; Williams *v.* Rawlinson, 3 Bing. 71.

(*c*) Wolmershausen *v.* Gullick, (1893) 2 Ch. p. 529; followed in Gardner *v.* Brooke, (1897) 2 Ir. R. 6.

(*d*) Wolmershausen *v.* Gullick, supra.

(*e*) Baynard *v.* Woolley, 20 B. 583.

(*f*) Jackson *v.* Dickinson, (1903) 1 Ch. 947; *Re* Harrison, (1891) 2 Ch. 349; cf. Ramskill *v.* Edwards, 31 C. D. 100.

(*g*) Walker *v.* Symonds, 3 Swans. at p. 64. Where the *cestui que trust* is a married woman, her active participation seems essential for this rule to apply. Sawyer *v.* S., 28 C. D. at p. 605; but see Trustee Act, 1893, s. 45 (1), and infra, p. 682.

(*h*) Per Lord *Langdale*, in Fyler *v.* F., 3 B. 560.

the interest of the *cestui que trust* in the trust funds any loss he may sustain by reason of his having to make good such breach of trust (*a*).

Therefore a trustee who is a *cestui que trust* can only claim contribution from his co-trustee when the amount he has expended in making good the breach of trust exceeds the value of his interest in the trust funds (*b*), for his interest is liable not merely to the extent of the benefit he has derived as *cestui que trust* but for the whole breach (*c*).

In certain cases a trustee can throw the whole liability for a breach of trust on the other trustee. Mere inaction, however, is not enough (*d*). The Court requires very special circumstances. Thus where a trustee derives a direct benefit he will be made to indemnify his co-trustee (*e*), and so too if he is a solicitor and the other trustee acts under his advice and control (*f*), though the mere fact that one of the trustees is a solicitor is not a sufficient reason for the Court ordering him to indemnify the others (*g*).

The Statutes of Limitation do not begin to run against a claim for contribution until the original liability is actually ascertained (*h*).

Companies.—In the same way a director who has to make good a loss arising out of a transaction which is *ultra vires* or unauthorised can claim contribution from his directors (*i*), and this liability to contribution is not discharged by the death or bankruptcy of the directors (*k*).

Mere knowledge is not enough, thus where a director was only present at a meeting which confirmed the minutes of the meeting at which the transaction was authorised he was held not to be liable to contribute (*l*).

Promoters or directors of a company are liable to contribution to damages recovered against one of them for misrepresentations in a prospectus (*m*).

(*a*) Trafford *v.* Boehm, 3 Atk. 444; Lincoln *v.* Wright, 4 B. 432; Raby *v.* Ridehalgh, 7 De G. M. & G. 104; Trustee Act, 1893, s. 45 (1).

(*b*) Chillingworth *v.* Chambers, (1896) 1 Ch. 685, 710; cf. Lingard *v.* Bromley, 1 V. & B. 114.

(*c*) Butler *v.* Carter, 5 Eq. at p. 281.

(*d*) Bahin *v.* Hughes, 31 C. D. 390; Bacon *v.* Camphausen, 58 L. T. 851.

(*e*) See Butler *v.* B., 7 C. D. 114.

(*f*) Lockhart *v.* Reilly, 1 De G. & J. 464; Thompson *v.* Finch, 8 De G. M. & G. 560; *Re* Turner, (1897) 1 Ch. 536; *Re* Linsley, (1904) 2 Ch. 785.

(*g*) Head *v.* Gould, (1898) 2 Ch. 250.

(*h*) Robinson *v.* Harkin, (1896) 2 Ch. 415.

(*i*) Ashurst *v.* Mason, 20 Eq. 225; Ramskill *v.* Edwards, 31 C. D. 100.

(*k*) Ramskill *v.* Edwards, supra; Shepheard *v.* Bray, (1906) 2 Ch. 235; (but see S. C. (1907) 2 Ch. 571).

(*l*) Ramskill *v.* Edwards, supra.

(*m*) Gerson *v.* Simpson, (1903) 2 K. B. 197; Shepheard *v.* Bray, (1906) 2

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In *Shepheard* v. *Bray* (*a*) a director of a company sought contribution from co-directors in respect of compensation and costs incurred on claims against the directors under sec. 3 of the *Directors' Liability Act*, 1890 (*b*). The claims were mostly compromised. It was held that the co-directors must pay their share of the compensation and the costs of the shareholders, which had been paid, but not of the costs of the defendant in the action by the shareholder nor the extra costs of the plaintiff in that action, nor the costs of appeal nor other payments made otherwise than under the provisions of the Act. The representatives of a deceased director appealed, but the matter was compromised (*c*).

Where a company has illegally started business, the shareholders are liable for calls for payment of debts incurred at that time (*d*).

Partners.—The general rule is that partners are liable to contribute to one another in respect of debts and losses of the partnership. The only defences seem to be that the partnership is illegal, or that the act relied on as giving rise to the claim for contribution was a personal and not a partnership act (*e*). An innocent partner may even be exonerated (*f*). Where, however, the partners are *in pari delicto* it is doubtful if contribution would be given (*g*), but the better opinion appears to be that it is claimable, except in cases of pure tort or the violation of a statute or an illegal partnership (*h*).

Joint adventure renders the members of the adventure liable to contribution for payments of losses made by one of the members (*i*).

Co-ownership does not give rise to a right of contribution from the other co-owners for payments voluntarily made by one of them in keeping relation to the common property so long as the property is enjoyed in common (*k*), *secus*, where payments are made by one of them in discharge of a common liability (*l*). The conditions under which one of several persons jointly interested in a policy can claim a lien on the policy for premiums paid by him are discussed by *Fry*, J., in *Re Leslie* (*m*).

Ch. 235; (1907) 2 Ch. 571; Companies (Consolidation) Act, (1908) s. 84.

(*a*) (1906) 2 Ch. 235.

(*b*) Now Companies (Consolidation) Act, (1908), s. 84.

(*c*) (1907) 2 Ch. 571.

(*d*) *Ex p.* Longworth's Executors, 1 De G. F. & J. 17.

(*e*) Thomas *v.* Atherton, 10 C. D. 185.

(*f*) Campbell *v.* C., 7 Cl. & F. 166.

(*g*) A.-G. *v.* Wilson, Cr. & Ph. 1.

(*h*) Lindley on Partnership (1905), pp. 413—415.

(*i*) Lowe *v.* Dixon, 16 Q. B. D. 455.

(*k*) Leigh *v.* Dickeson, 15 Q. B. D. 60. As to the rights in Partition, see Vol. I., pp. 213 et seq.

(*l*) See per *Cotton*, L. J., in Leigh *v.* Dickeson, supra.

(*m*) 23 C. D. 552.

Underlessees.—Where the underlessee of part of land comprised in a single head lease was forced to pay the rent for the whole land, it was held he had no right to contribution from the under-lessee of the other part of the land, there being no common demand (*a*).

In all the above cases, it is necessary to bear in mind the Mercantile Law Amendment Act, sec. 5 (*b*).

Procedure.—A person entitled to contribution or indemnity may, instead of bringing another action, adopt, in the action against him, the procedure set out in R. S. C. Order xvi. rr. 48, 55 (*c*), unless, it seems, the action be one for administration (*d*). Where co-defendants in an action are decreed to pay the costs, one of them cannot, by an independent proceeding, obtain contribution from the other in respect of such costs, but only in the action itself (*e*).

4. Contribution between Wrongdoers.

The rule that one wrongdoer cannot recover contribution against another is a modification of the general rule, *ex turpi causâ non oritur actio* (*f*). The leading case on contribution between wrongdoers is *Merryweather* v. *Nixan* (*g*). Qualifications to the rule are given in the notes to *Merryweather* v. *Nixan* and *Lampleigh* v. *Braithwaite* (*h*). In *Palmer* v. *Wick, &c., Shipping Co.* (*i*), Lord *Herschell* said that although it was now too late to question *Merryweather* v. *Nixan*, the rule as there stated was not founded on any principle of justice, or equity, or even public policy, which justifies its extension to the jurisprudence of other countries, and referred with approval to the judgment of *Best*, C. J., in *Adamson* v. *Jarvis* (*k*), that from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against such other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

In *Betts* v. *Gibbins* (*l*), Lord *Denman* said: "The general rule is that

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(*a*) Johnson *v.* Wild, 44 C. D. 146; (Webber *v.* Smith, 2 Vern. 103, was cited.)

(*b*) See post, p. 564.

(*c*) Annual Practice (1912), pp. 263, 279; Butler *v.* B., 14 C. D. 320; Sawyer *v.* S., 28 C. D. 601;

(*d*) Per *Wright*, J., in Wolmershausen *v.* Gullick (1893), 2 Ch. at p. 528. See Seton (1901), pp. 2136—2143.

(*e*) Dearsly *v.* Middleweek, 18 C. D. 236.

(*f*) Per *Wilmot*, C. J., in Collins *v.* Blantern, 9 Wils. 341; 1 Smith, L. C. (1902), p. 369.

(*g*) 8 T. R. 186; 1 Smith, L. C. (1902), p. 398.

(*h*) 1 Smith, L. C. (1902), pp. 398, 141.

(*i*) (1894) A. C. 319, 324.

(*k*) 4 Bing. at p. 72; cf. Halbronn *v.* International, &c., Agency, (1903) 1 K. B. 270.

(*l*) 2 Ad. & E. 57; see pp. 74, 75, and 76.

between wrongdoers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself," and *Taunton* J., said, "The principle laid down in *Merryweather* v. *Nixan* is too plain to be mistaken; the law will not imply an indemnity between wrongdoers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances, whether the act be wrong or not." *Merryweather* v. *Nixan* is also commented upon and followed in *The Englishman* (*a*). "It was never decided that one wrongdoer could not sue another for contribution, but *that an implied promise to indemnify* did not arise from the mere fact of payment of the whole of the joint liabilities, by one of several wrongdoers."

An agreement by one of two joint tort feasors to indemnify the other in respect of a wrongful act committed by both has been held to be unenforceable at law (*b*).

An innocent person who, by reason of fraudulent misrepresentations that the proceeding is lawful, has been induced to take part in the commission of a criminal offence, can maintain an action for damages against another participant for loss he has sustained in consequence (*c*).

5. Right of Surety to Securities of Co-Surety and Creditor.

Co-sureties.—As a general rule (*d*) sureties are entitled to call upon any one of their co-sureties (*e*) who may have obtained from the principal debtor a counter security for the liability he may have undertaken, to bring into hotchpot, for the benefit of all the sureties, whatever he may receive from that source. And this rule applies even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for a security. Nor does it make any difference if the security is given after the others have become sureties (*f*).

So if one of several co-sureties pays off the debt and obtains from the creditor an assignment of policies of assurance effected on the

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(*a*) (1895) P. 212, pp. 216, 217.

(*b*) Smith *v.* Clinton, 99 L. T. 840.

(*c*) Burrows *v.* Rhodes, (1899) 1 Q. B. 825.

(*d*) But see per *Jessel*, M.R., in Duncan Fox & Co. *v.* N. and S. Wales Bank, at p. 95, and see per *Hall*, V.-C., in Forbes *v.* Jackson, 19 C. D. 622.

(*e*) *Secus*, where two sureties are not co-sureties, *Re* Denton, (1904) 2 Ch. 178, following Craythorne *v.* Swinburne, 14 V. 160.

(*f*) Steel *v.* Dixon, 17 C. D. 825, followed Berridge *v.* B., 44 C. D. 168; Lake *v.* Brutton, 8 De G. M. & G. 441; Drysdale *v.* Piggott, 8 De G. M. & G. 546.

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life of the debtor, contribution will only be enforced against the other co-sureties in his favour, upon the terms of his bringing into account the moneys received upon the policies on the death of the debtor, credit being first given for the premiums and other moneys paid in reference to the transaction (*a*). When by means of the counter-security the surety has been repaid what he has paid on account of the principal debt, and has shared the amount thus received with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on, until the whole of the payments made by the co-sureties on account of the principal debt have been refunded, or the value of the counter-security has been exhausted (*b*). That is to say, if a debtor gives to one of several sureties an indemnity or counter-security, it is available not merely to the extent of the liability of the surety to whom it is given, but of the liability of all the sureties to the full extent of its value.

The other sureties may contract themselves out of the benefit of the security, and the question therefore arises in each case whether there has been such a contract between the co-sureties (*c*); and in such a case as *Re Arcedeckne* (*d*), transactions might take place between the surety taking an assignment of securities and his co-sureties, which would show that the co-sureties abandoned the securities altogether. Also one co-surety may by default in performing his duty towards another, estop himself from asserting the equity which he would otherwise have had against him (*e*).

The right of a surety to the benefit of securities, either of a co-surety or of a creditor, does not depend on his having been called upon to pay anything (*f*).

Creditors.—As a general rule, a surety is entitled to the benefit of all the securities which the creditor has against the principal debtor. This right flows from the obligation of the principal to indemnify his surety (*g*). Thus, if a surety join with the principal debtor in a promissory note or bond, and the surety pays the debt, he will be entitled to have a transfer of any mortgage which the creditor may

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(*a*) *Re* Arcedeckne, 24 C. D. 709.

(*b*) Berridge *v.* B., 44 C. D. 168. See the minutes of order in this case, Report, p. 178.

(*c*) Per *Fry*, J., in Steel *v.* Dixon, 17 C. D. 832.

(*d*) 24 C. D. 716.

(*e*) 17 C. D. 832.

(*f*) Dixon *v.* Steel, (1901) 2 Ch. 602, explaining South *v.* Bloxam, 2 H. & M. 457.

(*g*) Yonge *v.* Reynell, 9 Ha. 809.

have taken for his debt. "I take it," says Lord *Eldon*, "to be exceedingly clear, if at the time a bond is given a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee; and, as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid" (*a*).

It is immaterial that the surety was not aware of the existence of the security (*b*), or whether they were taken by the creditor before *or after* the contract of the suretyship (*c*). In *Newton* v. *Chorlton* (*d*), *Wood*, V.-C., had expressed an opinion that the principle did not extend to additional securities taken after the contract; but in *Forbes* v. *Jackson* (*e*), *Hall*, V.-C., held that it was settled that the surety was entitled to have all the securities preserved for him, whether taken at the time of the suretyship *or subsequently*.

The surety may lose his right against the security held by the principal creditor, by taking from the principal debtor a security upon other property (*f*), unless he has done so without knowledge of the security held by the creditor, which was available for his own indemnity (*g*).

Where, moreover, a surety for a mortgagor pays off part of the mortgage debt, he is entitled as against the *mortgagor* to a charge on the estate for the amount he has so paid (*h*). But a surety for *part* of a debt, is not entitled to the benefit of a security given by the debtor to the creditor at a different time in a distinct transaction for another part of the debt (*i*).

Where a surety pays a sum of money, in discharge of his guarantee, leaving a balance for which he was not surety still unpaid, if the security of the principal creditor is not delivered up, nor anything

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(*a*) Copis *v.* Middleton, T. & R. 231; see also Hodgson *v.* Shaw, 3 My. & K. 183; Drew *v.* Lockett, 32 B. 499; Goddard *v.* Whyte, 2 Gif. 449; Brandon *v.* B., 3 De G. & J. 524; Newton *v.* Chorlton, 10 Ha. 646; Nicholas *v.* Ridley, (1904) 1 Ch. 192.

(*b*) Mayhew *v.* Crickett, 2 Swans. 191; Duncan Fox & Co. *v.* N. & S. Wales Bank, 6 A. C. 1; Scott *v.* Knox, 2 Jones, 778.

(*c*) Pledge *v.* Buss, Johns. 663; Pearl *v.* Deacon, 24 B. 186; Coates *v.* C., 10 Jur. (N.S.) 532; Campbell *v.* Rothwell, 47 L. J. Q. B. 144.

(*d*) 10 Ha. 646.

(*e*) 19 C. D., p. 619.

(*f*) Cooper *v.* Jenkins, 32 B. 337.

(*g*) Lake *v.* Brutton, 8 De G. M. & G. 440; Brandon *v.* B., 3 De G. & J. 524.

(*h*) Gedye *v.* Matson, 25 B. 310; and see *Re* Parker, (1894) 3 Ch. 400, infra, p. 566.

(*i*) Wade *v.* Coope, 2 Si. 155; South *v.* Bloxam, 2 Hem. & M. 457.

said about it, the presumption is that the original security was intended to remain as to the balance, and it will not be treated as released (*a*).

The question has been much discussed whether a mortgagee whose original advance has been secured by a surety, can, where he has the right to tack a subsequent mortgage as against the principal debtor, exercise that right against the surety, or whether the surety, upon paying off the original advance alone, cannot call for an assignment of the original security. After some conflict of authority, it now appears clear that a mortgagee making a second advance with notice of the suretyship cannot tack the two securities, as against the surety paying off the sum secured by the first (*b*). It has been held that where separate debts are due upon distinct securities from the principal debtor to the creditor, the latter will not lose his right to consolidate, by the fact that a third party who has become surety for one of the debts, has paid off such debt, and that the surety therefore cannot call for an assignment of the securities for the debt he had paid off (*c*). This case, which was afterwards compromised on appeal (*d*), is contrary to the principles of the decisions on tacking in which the right of the surety to an assignment of securities for the debt he has satisfied has been upheld (*e*). Where the surety contracts with the creditor that he will be liable as a principal debtor the rights to tack and consolidate available against the debtor avail against him (*f*).

A surety who pays off the debt secured is entitled to all the equities of the creditor not only against the principal debtor, but also against all persons claiming under him. Hence a surety will not be deprived of his right to the security, by a further mortgage by the debtor to a person who had notice of the first mortgage, though the latter

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(*a*) Waugh *v.* Wren, 11 W. R. 244.

(*b*) Bowker *v.* Bull, 1 Si. (N. S.) 29; Forbes *v.* Jackson, 19 C. D. p. 622; Williams *v.* Owen, 13 Si. 597 contra, was not followed in Forbes *v.* Jackson, 19 C. D., p. 622; was considered in Dawson *v.* Bank of Whitehaven, 4 C. D. 649, 650 (reversed on another point, 6 C. D. 218); was disapproved, *Re* Kirkwood's Estate, 1 L. R. Ir. 108; and considered overruled by *Byrne*, J., in Nicholas *v.* Ridley, (1904) 1 Ch. 192; and see Newton *v.* Cherlton, 10 Ha. 646; Pearl *v.* Deacon, 1 De G. & J. 461; Dixon *v.* Steel, (1901) 2 Ch. 602; Cf. *Re* Toogood's Legacy Trusts, 61 L. T. 19.

(*c*) Farebrother *v.* Wodehouse, 23 B. 18, followed with reluctance by Byrne, J., in Nicholas *v.* Ridley, (1904) 1 Ch. 192.

(*d*) 26 L. J. Ch. 240.

(*e*) See cases cited in note (*b*), supra.

(*f*) Duncan Fox & Co. *v.* N. & S. W. Bank, 6 A. C. 1; Nicholas *v.* Ridley (C. A.), supra.

has got in the legal estate. Thus, in *Drew* v. *Lockett* (*a*), A. mortgaged his estate to C., and B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D., who had notice of the first mortgage. The first mortgage was afterwards paid off, partly by B. the surety, but D. got the transfer of the legal estate. It was held that the surety still had priority over D. for the amount paid by him under the first mortgage.

Upon the same principle a surety has been held entitled to marshal securities, not only as against the principal debtor, but also as against all persons claiming under him, and this is "not by force of the contract: but that equity upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety, and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor:" (*b*) Thus, in *Heyman* v. *Dubois* (*c*), A., having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for sucessive loans. In one mortgage B. became surety for repayment of the amount borrowed. A. subsequently became bankrupt, and B. was compelled to pay part of the debt. Upon A.'s death, it was held that as against A.'s assignee in bankruptcy, B. was entitled to marshal the securities so as to obtain repayment of the amount which he had been compelled to pay out of the balance of the several policy moneys (*d*). And if the surety is unable from some disability to obtain the benefit of the creditor's securities, equity will restrain the creditor from proceeding against the surety till he has resorted to these securities (*e*).

A surety, moreover, has a right to set off against the creditor, a debt due from the creditor to the debtor arising out of the same transaction in which the liability of the surety arose. Thus in *Becherraise* v. *Lewis* (*f*), the defendant as surety joined R. in a joint and several note to the plaintiff. Afterwards, without the consent of the defendant, the plaintiff received debts which he had sold to R., and to secure payment for which the note was given, and thereby became indebted to R., and rendered it impossible for the defendant, either to proceed against R. or his representatives in order to indemnify himself in respect of the note. It was held that

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(*a*) 32 B. 499; see also Lancaster *v.* Evors, 10 B. 154.

(*b*) Per *Eldon*, C., in Aldrich *v.* Cooper, Vol. I., cited with approval by *Selborne*, C., in Duncan Fox & Co. *v.* N. & S. Wales Bank, supra.

(*c*) 13 Eq. 158.

(*d*) See also *Re* Westzinthus, 5 B. & Ad. 817.

(*e*) Wright *v.* Nutt, 3 Bro. Ch. 326.

(*f*) L. R. 7 C. P., 372.

the surety, by way of equitable defence, might plead a special plea of a set-off due from the creditor, since the debt arose out of the same transaction, as the liability of the surety did. "A surety, has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties. The surety, however, has another right, viz., that as soon as his obligation to pay is become absolute, he has a right in equity to be exonerated by his principal. Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him. In this state of things we are bound to conclude that the surety has a defence in equity against the creditor; and we are justified in doing so by the authority of the civil law alluded to in the course of the argument" (*a*).

Where, moreover, a surety pays off a mortgage debt of the principal debtor, he may set off in bankruptcy the money which thus becomes due to him as being entitled to the benefit of the securities, against money due from himself to the owner of the equity of redemption, and where the equity of redemption belongs to a joint-stock company, to which calls are due from the surety, he may set off his payment against the calls (*b*). And, as any person who is liable to pay the debt of another, whether for value or gratuitously, is, as between himself and the person primarily liable, a surety, a broker, who contracts for the purchase of goods without disclosing his principal, is entitled, upon payment of the price of the goods, to the benefit of the vendor's lien (*c*).

When a mortgagor has given a collateral security for the original debt, and borrows a further sum, which is guaranteed by a surety, the latter is entitled to the surplus value of the securities, after payment of the original debt, towards payment of that debt for which he is surety. Thus in *Praed* v. *Gardiner* (*d*), A. being indebted to B., lodged several securities with him, as collateral securities for that debt. A. afterwards borrowed a further sum from B., for which C.

(*a*) Per *Willes*, J., L. R. 7 C. P., at p. 377; and see Murphy *v.* Glass, L. R. 2 P. C. 408; Hobson *v.* Bass, L. R. 6 Ch. 792.

(*b*) *Ex p.* Barrett, 34 L. J. Bank. 41; see Williams, Bankruptcy, (1908) p. 160.

(*c*) Imperial Bank *v.* London and St. K. Dock, 5 C. D. 195, at p. 200.

(*d*) 2 Cox, 86.

became his surety. A. became bankrupt, and B. called upon C. to pay the second debt. It was held that, the securities in the hands of B. being more than sufficient to pay the first debt, C. ought to have the benefit of the surplus in reduction of the second debt (*a*).

The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any indorser who afterwards pays it. The indorser is a surety for the payment to the holder and on payment is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor whether he knew at the time of indorsing of such deposit or not. Thus, where the facts were as follows: in December, 1874, a partner of S. R. & Co. deposited title deeds of his own with the defendant bank, as security for an advance to the firm. In November, 1875, the plaintiffs sold to S. R. & Co. a cargo to be paid for in cash. Cash was paid only for part, and a bill of exchange for the rest was offered but declined. The plaintiffs were customers of the defendant bank to whom S. R. & Co. referred plaintiffs, and, on the manager saying that he believed the plaintiffs would not incur more than a nominal liability by putting their name on the bill, the plaintiffs consented to take the bill and it was indorsed by them and discounted for their account by the defendant bank. In January, 1876, S. R. & Co. stopped payment, and in February the bill was dishonoured. The plaintiffs claiming to be sureties to the defendant bank for the amount due on the bill, brought an action to have the benefit of the securities deposited in December, 1874, and were held to be so entitled (*b*).

Where a surety discharges an obligation at a less sum than its full amount, he cannot claim from his principal the whole amount, but only what he has actually paid in discharge of the common obligation (*c*).

At one time, Courts of equity compelled assignments of securities to sureties to a much greater extent than they took upon themselves to do in later times (*d*).

Thus, at one time the Court would compel a creditor to assign his judgment to a surety who had been compelled to satisfy the debt (*e*), but later refused to do so on the ground that the judgment not

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(*a*) See also Copis *v.* Middleton, T. & R., p. 231; Hodgson *v.* Shaw, 3 My. & K. 183, 195; Dixon *v.* Steel, (1901) 2 Ch. 602; cf. Sawyer *v.* Goodwin, 1 C. D. 351.

(*b*) Duncan Fox & Co. *v.* N. & S. Wales Bank, 6 A. C. 1.

(*c*) Reed *v.* Norris, 2 My. & C. 361, 375.

(*d*) Cf. Parsons *v.* Briddock, (1708) 2 Vern. 608, with Armitage *v.* Baldwin, (1841) 5 Beav. 278.

(*e*) Parsons *v.* Briddock, 2 Vern. 608.

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being available at law for the creditor, could not be available in equity for the debtor (*a*).

And although it was at one time thought that a surety paying off the debt of the principal, secured by bond, was entitled to have from the creditor an assignment of the debt and of the bond by which it was evidenced or secured, the contrary was fully established in two cases decided by *Eldon*, C., and *Brougham*, C., where the whole subject was examined in a most elaborate manner (*b*).

It followed from these decisions, contrary to what was formerly considered to be the law, that a surety, who paid off the bond debt of the principal, was in the administration of his assets merely a simple contract creditor, and not a specialty creditor (*c*).

Now, however (*d*), " Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, and no co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

(*a*) Dowbiggin *v.* Bourne, 2 Y. & C. Ex. 462; Armitage *v.* Baldwin, 5 B. 278.

(*b*) See Copis *v.* Middleton, T. & R. 229; Hodgson *v.* Shaw, 3 My. & K. 190.

(*c*) But see now Hinde Palmer's Act, 32 & 33 Vict. c. 46, s. 1; and see Badeley *v.* Consolidated Bank, 34 C. D., at p. 556; *Re* Allen, (1896) 2 Ch. 345.

(*d*) 19 & 20 Vict., c. 97 (Mercantile Law Amendment Act), 1856, s. 5.

The surety is therefore now entitled to securities which have been satisfied by his payment. The section applies to a co-debtor as well as to a surety. Thus a debtor who has paid the whole debt, recovered under a judgment against himself and his co-debtors, has a right to an assignment of such judgment (*a*). If the judgment creditor refuses to assign, the surety may bring an action against him, and is, *primâ facie*, entitled to recover as damages the value of specific assets which would have been available for execution under the judgment (*b*). The word "recover" in this section means, "bring into his own pocket" (*c*). And a trustee suing his co-trustee for an indemnity against a breach of trust is within the Act (*d*). This section "was never intended to apply to cases where there was no liability to contribute as between the persons jointly liable. It was intended to apply only in cases where the joint liability arose out of, or sprang from contract" (*e*).

The Act is applicable to a contract made before the passing of the Act, where a breach of it has taken place and a payment has been made by a surety or co-debtor under such contract after the passing of the Act (*f*).

It may be here mentioned that when an executor, who has joined as surety with his testator, *pays the amount of the debt* after the testator's death, he is entitled to retain the amount out of the testator's assets as against all creditors of equal degree (*g*).

Although under this section a surety who discharges a specialty debt becomes a specialty creditor of the principal debtor, he does not become such merely by reason of his enforcing his right to indemnity where the debt for which he is liable but which he has not discharged is a specialty debt. Thus, in *Ferguson* v. *Gibson* (*h*), A., wife of the testator, under a power mortgaged her estate as a collateral security for the mortgage debt of her husband. He died leaving a deficient estate, his wife and daughter being executrixes. The mortgage debt *not having been paid* at the date of a decree for administration, it was held that the widow executrix was entitled to

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(*a*) Batchellor *v.* Lawrence, 9 C. B. (N. S.) 543; Silk *v.* Eyre, 9 Ir. R. Eq. 393; *Re* Swan, 4 Ir. R. Eq. 209.

(*b*) Oddy *v.* Hallett, 1 C. & E. 532.

(*c*) See *Re* Parker, (1894) 3 Ch. 400

(*d*) Lockhart *v.* Reilly, 1 De G. & J. 464; Robinson *v.* Harkin, (1896) 2 Ch., p. 426.

(*e*) Per *Bruce*, J., in The Englishman, (1895) P. 212, 215. See the judgment in Gardner *v.* Brooke, (1897) 2 Ir. R. 6.

(*f*) Lockhart *v.* Reilly, 1 De G. & J. 464; *Re* Cochran's Estate, 5 Eq. 209.

(*g*) *Ex p.* Boyd, 13 W. R. 419.

(*h*) 14 Eq. 379, 386.

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retain as against the simple contract creditors only, inasmuch as her right to indemnity did not amount to a specialty debt. If, however, she had actually paid the mortgage debt, or it had been raised out of her estate by a mortgage, she might have acquired a right of retainer as against the specialty creditors (*a*).

A co-surety who has satisfied a judgment against the debtor and his sureties has a right under the statute to stand in the place of the judgment creditor, although he has not obtained an assignment of the judgment (*b*), and a surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority in the administration of his principal's estate (*c*).

6. Right of Surety paying Debt to stand in the place of the Creditor in Bankruptcy.

A surety who has paid the debt has, generally speaking, the right to stand in the place of the creditor and to prove for the whole amount (*d*), and under the Bankruptcy Act of 1883, s. 37, the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt proveable in the bankruptcy (*e*). It seems that the surety for a bankrupt principal may prove against the estate before he has paid the debt for which he is liable (*f*).

Where after proof of a debt by a creditor a surety for the whole pays *part* only to the creditor, not in discharge of the whole, the creditor may receive dividends on the full amount of his proof, provided he does not receive in the whole more than 20*s*. in the pound (*g*). If, however, the surety afterwards pays the creditor the whole of the debt remaining due, he will be entitled to stand in

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(*a*) 14 Eq. 379, 386. See Hinde Palmer's Act 1869, and *Re* Illidge, 27 C. D., p. 482 (C. A.), where Ferguson *v.* Gibson is explained.

(*b*) *Re* M'Myn, 33 C. D. 575.

(*c*) *Re* Churchill, 39 C. D. 175. And see Reg. *v.* Robinson & Salter, 1 H. & N. 274; *Re* Bentinck (1897) 1 Ch. 673.

(*d*) See Bankruptcy Act, 1883, s. 37; Wace (1904), p. 117; Williams, Bankruptcy (1908), p. 144; *Re* Parker, (1894) 3 Ch. 400; cf. *Re* Moss, (1905) 2 K. B. 307.

(*e*) Wolmershausen *v.* Gullick, (1893) 2 Ch. 514; *Re* Blackpool, &c., Co., (1901) 1 Ch. 77. A payment to a surety who has not been called upon to pay may be a fraudulent preference under s. 48 of the Act: *Re* Paine, (1897) 1 Q. B. 122; but see *Re* Warren, (1900) 2 Q. B. 138.

(*f*) *Re* Delmar, 38 W. R. 752.

(*g*) *Re* Snell, 4 Deac. 54; see also *Re* Fothergill, 3 C. D. 445.

the place of the creditor as to the future dividends until, by means of those dividends, he has been fully satisfied (*a*).

If a surety, *before* the bankruptcy of the principal debtor, pays *part* of the debt, he will be entitled to prove for so much as he paid (*b*). But the right of the surety in such cases to stand in the place of the creditor as to the dividend upon the amount paid by him, may by contract be waived in favour of the creditor until he has received the full amount of his debt (*c*).

Where under the old law a surety paid the debt with interest subsequent to the bankruptcy of the debtor, he could not prove for such subsequent interest (*d*). Interest can now be proved for under the Bankruptcy Act, 1883, Sched. II., rr. 17, 20 (*e*).

Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, and default is made in the payment of any one instalment, the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition and not merely for the amount of the unpaid instalments of the composition (*f*). But the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the arrangement *in toto* or reject it *in toto* (*g*).

Where a person is surety for a limited part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum, and the Court will order the payment to the surety of the future dividends on such sum, and will order the creditor to pay to the surety the proportion of any dividend he may have already received (*h*); and

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(*a*) *Re* Bulmer, 3 De G. M. & G. 218, 238.

(*b*) *Ex p.* Rushforth, 10 V. 409; Paley *v.* Field, 12 V. 435; Ellis *v.* Emmanuel, 1 Ex. D. 157.

(*c*) Midland Banking Co. *v.* Chambers, L. R. 4 Ch. 398; *Ex p.* Miles, De G. 623; *Ex p.* National Provincial Bank, 17 C. D. 98; Gee *v.* Pack, 33 L. J. Q. B. 49; *Re* Sass, *Ex p.* National Provincial Bank, (1896) 2 Q. B. 12.

(*d*) *Ex p.* Wilson, 1 Rose, 137; *Ex p.* Houston, 2 G. & J. 36.

(*e*) *Re* Evans, 32 L. J. N. of C. 281. Compare *Ex p.* Sanderson, 8 De G. M. & G. 849; *Re* Evans, 66 L. J. Q. B. 499.

(*f*) *Ex p.* Gilbey, 8 C. D. 248.

(*g*) Ibid.

(*h*) *Ex p.* Rushforth, 10 V. 409; Paley *v.* Field, 12 V. 435; *Ex p.* Brook, 2 Rose, 334; Bardwell *v.* Lydall, 7 Bing. 489; Hobson *v.* Bass,

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in this respect there is no difference between a bankruptcy and winding up (*a*).

The rule, however, established in *Ex p. Turner* (*b*), viz. that in similar cases in bankruptcy the sum paid by the surety is, in calculating the proportion of dividend, to be considered as expunged, does not apply to cases in winding up: there the order is made directing the surety to receive the portion of dividend due on the sum paid by him without considering the sum paid by him as having been expunged (*c*).

A surety for a limited amount of the debt may, however, agree to waive his right to prove on its payment for the benefit of the creditor, and it is now not unusual for contracts of guarantee to be expressly worded so as to do so. But although the creditor can prove and receive dividends for the whole debt, he will not be entitled to receive more than 20*s*. in the pound, including the sum paid by the surety (*d*).

Where, however, a person is with others a surety for the whole of a debt, with a limit on the amount of his liability, on the bankruptcy of the debtor the surety will not be entitled to the benefit of a rateable proportion of the dividends paid on the whole debt, but is bound to pay the creditor the sum due within the limit of his liability (*e*).

Proof by Surety against Co-surety.—Where the creditor, by enforcing his claims against the estate of one co-surety, has received from his estate more than the proportion due from it, that estate is entitled to the benefit of a proof by the creditor against the estate of another co-surety, and can take a dividend thereunder up to the amount of contribution due (*f*). Similarly, if one co-surety pays off the creditor and takes an assignment of the securities, he can have the benefit of the creditor's proof for the whole amount of the debt against the co-surety's estate, but can only receive a dividend up to the proportionate amount due from the bankrupt co-surety (*g*).

In *Ex p. Snowdon* (*h*), it was held a surety could not prove against

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L. R. 6 Ch. 792; Goodwin *v.* Gray, 22 W. R. 312; Thornton *v.* M'Kewan, 1 Hem. & M. 525; Ellis *v.* Emmanuel, 1 Ex. D. 157; Seton (1901), p. 2138.

(*a*) Gray *v.* Seckham, L. R. 7 Ch. 680, 684.

(*b*) 3 V. 243.

(*c*) Gray *v.* Seckham, L. R. 7 Ch. 680, 685.

(*d*) See cases, note (c), p. 567, ante.

(*e*) Ellis *v.* Emmanuel, 1 Ex. D. 157.

(*f*) *Ex p.* Stokes, De G. 618.

(*g*) *Re* Parker, (1894) 3 Ch. 400; see the quære as to proof by co-surety in his own right, per *Davey*, L. J., at p. 407.

(*h*) 17 C. D. 44; *Ex p.* Gifford, 6 V. 805; per *Wright*, J., in Wolmershausen *v.* Gullick, (1893) 2 Ch. at p. 526; and see Stirling *v.* Burdett, his co-surety for contribution until he had paid more than his proportion of the debt.

The Rule in *Ex p.* Waring.—If a debtor deposits securities with his surety to indemnify him against liability under the suretyship, the surety does not become a trustee for the creditor, and the creditor has no right that the securities shall be applied in payment of the debt (*a*). This principle is, however, qualified by the rule in *Ex p. Waring* (*b*). The circumstances under which this rule operates may be stated as follows (*c*): A. and B. are separate parties to a bill of exchange (*d*), and each is liable thereon to C., the holder of the bill. As between A. and B., A. is ultimately liable, and B. is liable as a quasi surety for A. (*e*). B. holds goods or securities belonging to A. (*f*) by way of indemnity against liability on the bill (*g*). A. and B. both become insolvent (*h*); each of their estates is being administered under the control of a court of justice (*i*), and the securities are unrealised when B.'s insolvency commences (*k*).

Before his insolvency A. would have been entitled to a re-transfer of the securities if he had paid C. in full, or if B. had been compelled to pay C., then A. would have become entitled to the surplus (if any) of the securities remaining after B. had indemnified himself. These rights remain after A.'s insolvency, and exist for the benefit of A.'s general creditors (*l*). On the other hand B.'s general creditors, succeed to his rights, and therefore on B.'s estate paying C. in full, they would have been entitled to be recouped out of the proceeds of the securities, the balance (if any) going into A.'s estate for the benefit of his general creditors. C. is merely a general creditor entitled to prove in each insolvent estate, but with no claim apart

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(1911) 2 Ch. 418, explaining Lawson *v.* Wright, 1 Cox, 275, and distinguishing *Re* Macdonald, (1888) W. N. 130.

(*a*) *Re* Walker, (1892) 1 Ch. 621, explaining Mawer *v.* Harrison, cited 1 Eq. Cas. Abr., p. 93, pl. 5, and not following dictum of Sir *W. Grant*, M. R., in Wright *v.* Morley, 11 V., at p. 22.

(*b*) 19 V. 345, 2 Rose 182; 2 G. & J. 404.

(*c*) See the statement of the rule in Eddis: "The rule in *Ex p.* Waring," (1876) adopted by *Brett*, M. R., in *Ex p.* Dever, *Re* Suse (No. 2), 14 Q. B. D. 611, at p. 620.

(*d*) Vaughan *v.* Halliday, L. R. 9 Ch. 561.

(*e*) See above, p. 562.

(*f*) *Ex p.* Lambton, L. R. 10 Ch. 405; *Ex p.* Banner, 2 C. D. 278: Banner *v.* Johnston, L. R. 5 H. L., at p. 174.

(*g*) Levi & Co.'s Case, 7 Eq. 449.

(*h*) Hickie & Co.'s Case, 4 Eq. 226; Powles *v.* Hargreaves, 3 De G. M. & G. 430.

(*i*) Powles *v.* Hargreaves, supra, at p. 451.

(*k*) *Ex p.* Dever, *Re* Suse (No. 2), supra.

(*l*) *Ex p.* Waring, ubi supra, at p. 350.

from necessities of administration to be satisfied out of the securities. If full effect had been given to the equities between the estates of A. & B., B.'s estate would, *in so far* as C. received dividends out of it, have been entitled to be recouped out of the securities, and the balance (if any) would have availed for the general creditors including C. in the A. estate. Under the circumstances, however, neither A.'s estate nor B.'s estate could pay C. in full, and so neither could at the time insist on their respective equities; further, until B.'s estate had been finally administered the amount ultimately paid to C. in dividends, and therefore chargeable against the securities, could not be ascertained. In this deadlock in the administration, Lord *Eldon*, in *Ex p. Waring*, held that the securities should be applied, so far as they would go, first in discharge of C.'s claim—that any surplus remaining should go into A.'s general estate, but that if the securities were insufficient C. should be at liberty to prove for the unsatisfied balance against each estate. Where, as in *Ex p. Waring*, the securities are sufficient to satisfy the bill, this rule cannot prejudice B.'s general creditors. Where the securities are insufficient B.'s general creditors invariably suffer, for C. proves with them and B.'s estate has been deprived of all indemnity out of the securities. The rule, though open to serious criticism on principle (*a*), and probably only justifiable on the ground of convenience, is of unquestionable authority (*b*).

(*a*) Per Lord *Blackburn*, in Royal Bank of Scotland *v.* Commercial Bank, 7 A. C. 366, at p. 392, and per Lord *Selborne*, ibid., at pp. 383 et seq.

(*b*) See the rule explained by *Cranworth*, C., and *Turner*, L. J., in Powles *v.* Hargreaves, 3 De G. M. & G., at pp. 447, 457, by *Hatherley*, C., in City Bank *v.* Luckie, L. R. 5 Ch., at p. 776; by Lord *Cairns*, in Banner *v.* Johnston, L. R. 5 H. L., at p. 174; by *James*, L. J., in Vaughan *v.* Halliday, L. R. 5 Ch., p. 567; by *Cotton*, L. J., in *Ex p.* Dever, 14 Q. B. D., at p. 623.

REES *v.* BERRINGTON.

1795. 2 V. 540. 3 R. R. 3.

Release of Surety by the Creditor giving Time to Debtor.

Obligee in a bond with a surety, without communication with the surety, takes notes from the principal, and gives farther time: the surety is discharged.

Thomas, Daniel, and Richard Blachford, carried on business as lacemen, in partnership, till the death of Thomas.

On taking the accounts a balance of 2,972*l.* 3*s.* 5*d.* appeared to be due from the partnership to Robert Pope Blachford, as administrator of Thomas; to secure which sum, and 466*l.* 13*s.* 4*d.* (agreed to be secured to Robert Pope Blachford, as Thomas's share of the debts due to the partnership) a joint and several bond, dated September 30th, 1787, was executed by the surviving partners, and by James Rees as surety, with condition to be void on payment of the said sums with interest, by instalments, upon the 31st of December, 1789, and the 31st of December, 1790.

In the beginning of September, 1790, Robert Pope Blachford died.

Upon the 27th of September, 1790, the whole of the money and interest secured by the bond remaining unpaid, James M'Kenzie, under the authority and on behalf of the executors of Robert Pope Blachford, came to an arrangement with Daniel and Richard Blachford, concerning the money due on the bond, and the interest, and, for the first instalment due on the bond, took their promissory notes, payable on the 21st of April, 21st of July, and 21st of October, 1791, and the 21st of January and 21st of April, 1792; and, for the second instalment to become due upon the bond, took three other promissory notes, payable on the 21st of July and 21st of October, 1792, and the 21st of January, 1793.

Daniel and Richard Blachford, at different times on and before the 18th of October, 1792, paid to the executors of Robert Pope Blachford,

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or to M'Kenzie, on their behalf, the first three of the first set of notes, and the interest due upon them; and about the 20th of October, 1792, by a new arrangement all the remaining notes were exchanged for four other notes, dated October 22nd, 1792, and payable on the 25th of May, 25th of June, 25th of September, and 25th of December, 1793.

About the 7th of December, 1792, a commission of bankruptcy issued against Daniel and Richard Blachford; and the executors of Robert Pope Blachford proved, under that commission, a debt of 2,327*l.* 14*s.* 11*d.*, by virtue of the bond and the four notes dated October 22nd, 1792.

Rees was captain of an East India ship, and left England in April, 1788; returned in August, 1789; sailed again in April, 1791, and returned in July, 1792. In August, 1792, he had in his hands the sum of 3,000*l.* received by him in India for Daniel and Richard Blachford; and no communication having taken place between him and the executors of Robert Pope Blachford, respecting their transactions with Daniel and Richard, he, in November, 1792, paid over that sum to the Blachfords.

After the bankruptcy the executors brought an action against Rees for 2,400*l.* as remaining due on the bond; upon which he filed a bill for an injunction.

Solicitor-General and Mr. *Hollist*, for the plaintiff.—*Skip* v. *Huey* (*a*), *Nisbet* v. *Smith* (*b*), and many early cases, support this bill. This plaintiff could have indemnified himself by the money he had in his hands in 1792. A surety is bound as such for the debt and risk described in the instrument, in case the principal does not pay. The creditor has no right to increase the risk without consent of the surety, and therefore cannot vary the original contract, for that varies the risk. If the holder of a bill of exchange gives time to the acceptor, the indorser is discharged, because he is simply a surety. The principle is the same upon policies of insurance, in cases of deviation, however slight (*c*).

(*a*) 3 Atk. 91.

(*b*) 2 Bro. Ch. 579; Ascherson *v.* Tredegar Dry Dock Co., (1909) 2 Ch. 401.

(*c*) See, as to contribution in respect of insurance, Bunyon, Fire Insurance (1906), p. 270; Porter Insurance (1908) p. 268; Seton (1901), p. 2149; Addison, Contracts (1903), p. 1090.

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Lord Chancellor Loughborough (a).—It is perfectly settled: and even where it is demonstrable that the alteration was perfectly immaterial, as in the case of an African ship that was to sail from Lancaster with so many men; in fact she took part of her men at Beaumaris.

Mr. *Graham*, for the defendants.—It is not received as a general principle, that the obligee in a bond is bound to call for the money on the very day; it seldom happens that the obligor thinks of paying at the day, or that the obligee puts the bond directly in suit. The rule, as to the indorser of a bill of exchange, arises from the course of trade, which requires it. A surety has a right, if the bond is not put in suit, to call upon the holder of it to enforce payment. The circumstance of his remedy in this Court marks the difference between the cases. Still more different is the case of insurance from the general course of trade, that, undertaking to indemnify against any loss in one particular voyage, must be strictly adhered to. Here is nothing like a fraudulent intention to throw the burthen on the plaintiff. It is too much to say he is to be discharged, because they did suspend the action a short time; and it is not too much to assume, either that the indulgence was with his concurrence, or that he was guilty of negligence, as he was in England a considerable part of the time, and might have called on them to put the bond in suit; and then he would have discovered, that they had bound themselves not to do so. In *Nisbet* v. *Smith* (b), no ulterior time was given against the express directions of the surety; upon which Lord *Thurlow* relied. *Heath* v. *Percival* (c) is a stronger case. There Percival might be considered only as surety in a bond, and the time of payment was varied.

Lord Chancellor Loughborough.—Percival never could be a surety, whether that case is right or wrong. He should have taken up his bond if he went out of the trade.

The form of the security forces these cases into equity; but, take it out of that form, and suppose, in this instance, that the plaintiff was a surety by a proper bond at law as surety, what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety; but if he could establish that at law, the principle at law is, that he has an interest in the condition; and if the period is extended, that totally defeats the condition, and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months, with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear principals, but establish the fact that he is surety; he is surety to a definite, not an indefinite, engagement.

(a) Afterwards Earl of Rosslyn.

(b) 2 Bro. Ch. 579; Ascherson *v.* Tredegar Dry Dock Co., (1909) 2 Ch. 40.

(c) 1 P. W. 682.

Here, upon the second instalment, the defendants have extended the time before that instalment became due; if the time is extended after it becomes due, that makes a difference at law, for then the bond has been once forfeited.

It is perfectly plain, from the nature of the engagement, that the plaintiff became security that the debt should be paid at two periods; one has elapsed. The obligee thinks fit totally to change the nature of the security and the credit; he takes notes, gives a farther time for payment, and repeats the same thing at the second instalment, which was not then due; and, doing this, he does this material injury to the surety; he has a right the day after the bond is due, to come here and insist upon its being put in suit; the obligee has suspended that till the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it. The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obligation in conscience and honesty; and, it is not too much to say, of that obligation in point of law.

I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built; but it is plain here, if the plaintiff had been informed of these transactions and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security. I do not ground much upon it, for the case would be the same if those circumstances had not come out clearly in evidence.

This produces no inconvenience to any one; for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. *It is the clearest and most evident equity, not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him* (*a*). *You must let him judge whether he will give that indulgence contrary to the nature of his engagement.*

The authorities fully warrant me in this, though I should have granted the injunction, even without that strong authority before Lord *Thurlow* (*b*), which is rather less favourable for the surety. There, the creditor being called upon, did put the bond in suit. If he had proceeded, the consequence would have been only that he would have had the person in custody; it would have been no payment, thinking, that, by leaving the debtor at large, and taking a judgment against him which affected all his property, he pursued a better mode; using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit and holding him in prison; but he did it without consulting the surety, and, therefore, Lord *Thurlow* held, and very rightly, that the surety was discharged.

The transaction in this case was much more mischievous; after circumstances of communication that shewed great embarrassment, great difficulty, and great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who,

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(*a*) Cited with approval by *Cotton*, L. J., in Holme *v.* Brunskill, 3 Q. B. D. at p. 505, but see the modification suggested by *Brett*, L. J., at p. 508. See also Bolton *v.* Salmon, (1891) 2 Ch. at p. 54.

(*b*) Nisbet *v.* Smith, 2 Bro. Ch. 579.

in the interval, had given up the fund, which, probably, was the inducement to him to be the security.

NOTES.

1. Discharge of surety by fraud, concealment, &c.
2. Revocation and determination of suretyship by death, &c., p. 579.
3. Discharge of surety by a departure from the terms of the contract, p. 581.
4. Discharge of surety by creditor giving time, p. 587.
   Release. Covenant not to sue, p. 594.
   How far a release, &c., of one surety by creditor will discharge others, p. 597.
5. Discharge of surety by the creditor taking another or additional security, &c., p. 598.
6. As to the effect on the surety of laches, failure to perfect the security, &c., on the part of the creditor, p. 599.
7. Relief of surety, p. 603.

1. Discharge of Surety by Fraud, Concealment, &c.

A contract of suretyship is not one requiring *uberrima fides* on the part of the creditor in the sense in which that expression is used in contracts of marine and fire insurance (*a*). The creditor is not, as the assured is, bound to communicate every material fact which would in the ordinary course of life affect the mind of the other party in entering into the contract (*b*). At the same time, if any material fact is either misrepresented to, or its existence fraudulently concealed from the surety, the contract is invalidated (*c*). That which is stated to the surety must fully represent the real transaction, and "whether a fact not disclosed is such that it is impliedly represented not to exist depends in every case on the nature of the transaction" (*d*). In *Phillips* v. *Foxall* (*e*), a case of a continuing

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(*a*) North British Insurance Co. *v.* Lloyd, 10 Exch. 523; see per *Romer*, L. J., in Seaton *v.* Heath, (1899) 1 Q. B. 782, 792.

(*b*) Hamilton *v.* Watson, 12 Cl. & F. p. 118; Pledge *v.* Buss, John. 663; Wythes *v.* Labouchere, 3 De G. & J. 593.

(*c*) Smith *v.* Bank of Scotland, 1 Dow. 272, 292; Pidcock *v.* Bishop, 3 B. & C. 605; Railton *v.* Mathews, 10 Cl. & F. 934, explained in North British Insurance Co. *v.* Lloyd, 10 Exch. 533; Lee *v.* Jones, 17 C. B. (N. S.) 482; Davies *v.* London & Prov., &c., Co., 8 C. D. 469; and see Stone *v.* Compton, 5 Bing. (N. C.) 142; Spaight *v.* Cowne, 1 H. & M. 359.

(*d*) See per *Blackburn*, J., in Lee *v.* Jones, supra, at p. 506; see Squire *v.* Whitton, 1 H. L. C. 333.

(*e*) L. R. 7 Q. B. 666; followed in Sanderson *v.* Aston, L. R. 8 Ex. 73. And see Burgess *v.* Eve, 13 Eq. 450;

guarantee for the honesty of a servant, the Court held that "a representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination;" (*a*) and accordingly held that since concealment of dishonest acts committed by the servant before the guarantee for his conduct was given would have invalidated the contract, that therefore concealment of dishonest acts done after the guarantee would discharge the surety from liability. The Court, however, pointed out that they intended their decision "to apply only to cases . . . where the master, having *the power of at once discharging the servant* for dishonesty, deliberately continues him in his service, after he becomes aware of the dishonesty and without the assent or knowledge of the surety." (*b*)

In *Pidcock* v. *Bishop* (*c*), it was agreed between the vendors and vendee of goods that the latter should pay, in addition to the price, 10*s*. per ton, to be applied in liquidation of an old debt due to one of the vendors. The payment was guaranteed by a third person, but the bargain between the parties was not communicated to him. It was held that the transaction was a fraud on the surety, and that the guarantee was consequently void. So in *Lee* v. *Jones* (*d*) a concealment by the creditor that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount of which the surety was ignorant, was held to be evidence to go to the jury of such fraud on the surety as would discharge him from liability.

A surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or omission against which the surety gave the guarantee (*e*).

Enright *v*. Falvey, 4 L. R. Ir. 397; Fearnley *v*. London, &c., Society, 6 L. R. Ir. 219; but cf. Peel *v*. Tatlock, 1 Bos. & P. 419.

(*a*) L. R. 7 Q. B. p. 674; see as to power of surety to determine, Offord *v*. Davies, 12 C. B. (N. S.) 748; *Re* Crace, (1902) 1 Ch. 733.

(*b*) Ibid., at p. 675; and see on this point Caxton *v*. Dew, 68 L. J. Q. B. 381; Lawder *v*. L., Ir. R. 7 C. L. 57; Byrne *v*. Murio, 8 L. R. Ir. 396; Mayor &c. of Durham *v*. Fowler, 22 Q. B. D. 394, at p. 423; and cf. Mayor &c. of Kingston-upon-Hull *v*. Harding, (1892) 2 Q. B. 494. See infra.

(*c*) 3 B. & C. 605. Cf. Willis *v*. W. 17 Si. 218.

(*d*) 17 C. B. (N. S.) 482; Blest *v*. Brown, 3 Giff. 450. See also Peel *v*. Tatlock, 1 Bos. & P. 419; Jackson *v*. Duchaire, 3 T. R. 551; Fishmongers' Co. *v*. Maltby, 1 Dow, 294; Espey *v*. Lake, 10 Ha. 260.

(*e*) Mayor &c. of Kingston-upon-Hull *v*. Harding, (1892) 2 Q. B. 494, 504.

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The mere *passive inactivity* (see p. 599, infra) of the person to whom the guarantee is given does not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to imply connivance and amount to fraud (*a*). If the person guaranteed has a power given to him, the non-exercise of which would amount to a dereliction of his duty to the surety, then the surety might be released (*b*).

And the creditor is not bound, without any inquiry from the surety, to acquaint him with every circumstance affecting the credit of the debtor, or of any matter, unconnected with the transaction, which may render it hazardous; for suretyship is not a contract *uberrimæ fidei* (*c*).

Where, however, a creditor during the negotiation for a suretyship has made a statement relating to a material fact, which he believes to be true, but which before the completion of the negotiation he discovers to be false, the sureties acting upon the faith thereof will be discharged if he do not correct that statement (*d*).

It appears to be material that the contract of suretyship was without consideration, for in such case "a very little said which ought not to have been said, and a very little not said which ought to have been said, would be sufficient to prevent the contract being valid" (*e*).

Everything, moreover, like pressure used by the intending creditor, may have a serious effect on the validity of the contract; the more so where it results in maintaining a false conclusion in the mind of the person pressed (*f*).

A surety also will be discharged where the consideration for the guarantee has failed (*g*).

It must be borne in mind that, though a creditor may not in every case be bound to inquire into the circumstances under which a third party becomes surety to him, he is so bound when the facts

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(*a*) Black *v.* Ottoman Bank, 6 L. T. 763; Mayor of Durham *v.* Fowler, 22 Q. B. D. 394.

(*b*) See Mayor &c. of Kingston-upon-Hull *v.* Harding, (1892) 2 Q. B. 494, 502.

(*c*) Wythes *v.* Labouchere, 3 De G. & J. 593; and see Hamilton *v.* Watson, 12 Cl. & Fin. p. 118; N. Brit. Ins. Co. *v.* Lloyd, 10 Exch. 523; Roper *v.* Cox, 10 L. R. Ir. 200.

(*d*) Davies *v.* London, &c., Insurance Co., 8 C. D. 469.

(*e*) Per *Fry*, J., in Davies *v.* London, &c., Insurance Co., 8 C. D. p. 475; and see Turner *v.* Harvey, Jac. 169, 178; Williams *v.* Bayley, L. R. 1 H. L. 200, 219.

(*f*) Davies *v.* London, &c., Insurance Co., 8 C. D. 475.

(*g*) Cooper *v.* Joel, 1 De G. F. & J. 240; and see and consider *Ex p.* Agra Bank, 9 Eq. 725.

known to him are such as to lead to a suspicion of fraud (*a*). "In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge" (*b*).

2. Revocation and Determination of Suretyship by Death, &c.

Where the liability of the surety does not arise until after default by the principal, the surety is discharged by the death of the principal before default (*c*). And it would appear that the death of the person or of a member of a firm, for whom the guarantee was given, puts an end to it (*d*) but not his bankruptcy or discharge in bankruptcy (*e*).

A continuing guarantee *for a possible pecuniary liability* "is not a mere mandate or authority revoked, *ipso facto*, by the death of the guarantor. It is a contract, and the question from what time, and on what notice it ceases to cover advances is a question of construction of the contract itself." Such guarantees are liable (even *semble* when given under seal (*f*)), in the absence of any provision to the contrary, to be withdrawn during the lifetime of the guarantor at any time before an advance is made (*g*).

In *Coulthart* v. *Clementson* (*h*), one of two guarantors of advances by a bank died. The bank guaranteed knew of his death, and that the deceased had left a will, but had no written notice of his death. It was held that the bank had notice of the death and of a will, and that as the will gave the executor no power to continue the guarantee, the bank had constructive notice that the guarantee was withdrawn (*i*).

A provision in the guarantee that, on the death of the guarantor a special notice of it shall be necessary to determine the guarantee, will, however, bind the guarantor's estate (*k*).

(*a*) Owen *v.* Homan, 4 H. L. Ca. 997; Hamilton *v.* Watson, 12 Cl. & Fin. 109; Pledge *v.* Buss, John. 663.

(*b*) 4 H. L. Ca. p. 1035.

(*c*) Sparrow *v.* Sowgate, W. Jones, 29; Addison Contracts (1903), 1020.

(*d*) Bodenham *v.* Purchas, 2 B. & Ald. 39; Holland *v.* Teed, 7 Ha. 50; and see Bank of Scotland *v.* Christie, 8 Cl. & F. 214.

(*e*) *Ex p.* Jacobs, L. R. 10 Ch. 211.

(*f*) Per *Joyce*, J., in *Re* Crace, (1902) 1 Ch., at p. 738; and see Burgess *v.* Eve, 13 Eq. 450.

(*g*) See per *Bowen*, J., in Coulthart *v.* Clementson, 5 Q. B. D. 42, 46; Bradbury *v.* Morgan, 31 L. J. Ex. 462; Lloyd's *v.* Harper, 16 C. D. 290; Offord *v.* Davies, 12 C. B. (N. S.) 748.

(*h*) 5 Q. B. D. 42.

(*i*) But see as to this constructive notice of the contents of the will, per *Romer*, J., in *Re* Silvester, (1895) 1 Ch. 573, 577; per *Joyce*, J., in *Re* Crace, (1902) 1 Ch. 733, 739.

(*k*) Per *Bowen*, J., 5 Q. B. D. 48.

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Thus, in *Re Silvester* (*a*), by a guarantee bond S and five others bound themselves jointly severally and respectively, their heirs, executors, and administrators, to pay a railway company 1,000*l.* The bond provided that they or any one of them, or their respective "representatives," might determine the liability by a month's notice in writing. S. died, and his executor gave notice to the company of his death, but no notice to determine the liability. It was held S.'s estate was bound for indebtedness incurred after his death.

But if, under the guarantor's will, the executor have the option of continuing the guarantee, then from the absence of any notice of withdrawal, the bank may, perhaps, in spite of notice of the death, properly assume that the guarantee is not to be determined (*b*).

A person, however, who becomes surety for the honesty of a servant during his employment cannot ordinarily, during the continuance of the service, discharge himself either at law or in equity, by merely giving notice that he will no longer be liable (*c*).

A continuing guarantee may, under certain circumstances, be withdrawn on paying all then due under it; for instance, if a master discovers that a person whose honesty has been guaranteed has been dishonest, he must inform the surety, who has then a right to withdraw (*d*). But a guarantee which is given in respect of a continuing relationship cannot be determined by the guarantor, and is not determined by his death, as long as the relationship continues (*e*).

The death of *one* of several co-sureties under a joint and several liability does not determine the future liability of the survivors (*f*).

But if the liability is joint only, it does (*g*) unless the survivors agree, by their conduct or otherwise, that it shall continue (*h*)

Where a guarantee terminated on the death of a guarantor, the creditor, in the absence of express or implied contract, was held not to be obliged to appropriate to an old over-draft instead of a new account any payments made by the debtor after the determination of the guarantee (*i*). For the mere fact of suretyship does not take away

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(*a*) (1895) 1 Ch. 573.

(*b*) Coulthart *v.* Clementson, supra.

(*c*) Calvert *v.* Gordon, 3 Man. & Ry. 124; Gordon *v.* Calvert, 4 Russ. 581; Hassell *v.* Long, 2 M. & S. 363, 370; Lloyd's *v.* Harper, 16 C. D. 290, guarantee for an underwriting member of Lloyd's; *Re* Crace, (1902) 2 Ch. 735.

(*d*) Burgess *v.* Eve, 13 Eq. 450; Phillips *v.* Foxall, L. R. 7 Q. B.; and see supra, pp. 577, 578.

(*e*) Lloyd's *v.* Harper, 16 C. D. 290; *Re* Crace, supra.

(*f*) Beckett & Co. *v.* Addyman, 9 Q. B. D. 783.

(*g*) Ashby *v.* Day, 54 L. T. 408; Offord *v.* Davies, 12 C. B. (N. S.) 748.

(*h*) Leaf *v.* Gibbs, 4 C. & P. 466; Browne *v.* Carr, 7 Bing. 508, 516.

(*i*) *Re* Sherry, 25 C. D. 692.

from the principal debtor and the creditor their powers of appropriating payments which are not subject to any particular contract with the surety (*a*).

Statutes of Limitation.—In a contract of guarantee time usually runs in favour of the guarantor from the day that action could be brought against the person guaranteed, but on the construction of a guarantee, time may run in the guarantor's favour from an earlier day (*b*).

3. Discharge of Surety by a Departure from the Terms of the Contract.

If a creditor does anything either inconsistent with the contract of suretyship, or prejudicial to the right of contribution between the co-sureties, the sureties will be released wholly or *pro tanto* (*c*).

Thus, if the contract between the principal debtor and the creditor departs from that which the surety stipulated for and contemplated when he entered into his obligation, the surety will be released. Thus, in *Bonser* v. *Cox* (*d*), John Cox agreed to become a surety for Richard Cox in a *joint and several bond* to Cox & Morrell, upon having a counter-bond from Cox and Davies to indemnify him. The bond to Cox & Morrell was executed by *John Cox only*, but Cox and Davies gave him the counter-bond. It was held that John Cox was released, in consequence of Richard Cox not having executed the bond. "It cannot, upon any principle on which this Court acts, be doubted that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different (*e*) from that which was contemplated by himself and all other parties. I do not think that it is material to inquire in what way the surety

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(*a*) Clayton's Case, 1 Mer. 585, 608; cf. "The Mecca," (1897) A. C. 286; Mutton *v.* Peat, (1900) 2 Ch. 79; Deeley *v.* Lloyds Bank, (1910) 1 Ch. 648. And see Bodenham *v.* Purchas, 2 B. & Ald. 39; Henniker *v.* Wigg, 4 Q. B. 795; Kirby *v.* Marlborough, 2 M. & S. 18; Williams *v.* Rawlinson, 3 Bing. 71; *Re* Browne's Estate, (1903) 1 Ir. R. 245; Addison Contracts, (1903) p. 152.

(*b*) Henton *v.* Paddison, 68 L. T. 405. See also Parr's Bank *v.* Yates, (1898) 2 Q. B. 460; Read *v.* Price, (1909) 2 K. B. 724; cf. *Re* Lacey, (1907) 1 Ch. 330; Pease *v.* Hirst, 10 B. & C. 122; Carter *v.* White, 25 C. D. 666.

(*c*) *Re* Wolmershausen, 62 L. T. 541; and see Mayhew *v.* Crickett, 2 Swans. 185.

(*d*) 4 B. 379; affirmed, see p. 385.

(*e*) See Mortgage, &c., Corporation *v.* Pound, 64 L. J. Q. B. 394.

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contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, 'I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be your surety upon any other terms' " (*a*).

So where a creditor prepared a deed, containing a joint and several covenant by two co-sureties, and sent it to be executed by one of such sureties, but did not procure the execution of it by the other surety and failed to inform the surety who had executed it of this fact, the executing surety was held discharged from all liability on the covenant. It was the duty of the creditor to inform the surety that the deed was not executed by his co-surety as originally proposed (*b*).

So where a person gave a promissory note as a surety, upon an agreement that the amount should be advanced to the principal debtor by *draft at three months' date*, and the creditor, without the concurrence of the surety, *paid the amount at once*, instead of giving the draft, it was held the agreement had been varied, and the surety was discharged (*c*). On the other hand, where a surety has executed a bond in the belief, derived from the form of the bond, that it would be executed by the principal debtor also, he will not be released on the ground that the principal debtor has never executed it, if the latter has executed an instrument on which the surety may sue him and become a specialty creditor of his (*d*).

Again, " If there is any agreement between the principals with reference to the contract guaranted, the surety ought to be consulted, and if there is any alteration which is not obviously either unsubstantial, or for *the benefit of the surety* (*e*), he is to be the sole judge whether he will remain liable " (*f*).

(*a*) Per *Langdale*, M. R., Bonser *v.* Cox, 4 B. p. 382. See also Whitcher *v.* Hall, 5 B. & C. 269; Bonar *v.* Macdonald, 3 H. L. C. 226; Rice *v.* Gordon, 11 B. 265; Watts *v.* Shuttleworth, 7 H. & N. 353; Blest *v.* Brown, 4 De G. F. & J. 367, 376; Montefiore *v.* Lloyd, 15 C. B. (N. S.) 203; Gardner *v.* Walsh, 5 E. & B. 83; Barry *v.* Moroney, 8 Ir. R. C. L. 554.

(*b*) Evans *v.* Bremridge, 2 K. & J. 174; followed in Fitzgerald *v.* M'Cowan, (1898) 2 Ir. R. 1 (as to the creditor's duty to see that the security is properly executed); and see Ellesmere Brewery Co. *v.* Cooper, (1896) 1 Q. B. 75.

(*c*) Bonser *v.* Cox, 6 B. 110, affirmed 6 B. 118.

(*d*) Cooper *v.* Evans, 4 Eq. 45; Mackintosh *v.* Wyatt, 3 Ha. 562.

(*e*) See per *Blackburn*, J, in Polak *v.* Everett, 1 Q. B. D. p. 675.

(*f*) Per *Chitty*, J., in Bolton *v.* Salmon, (1891) 2 Ch. p. 54, citing *Cotton*, L. J., in Holme *v.* Brunskill, 3 Q. B. D. p. 505.

In *Eyre* v. *Bartrop* (*a*), the plaintiff joined with his brother in the grant of a redeemable annuity, *as a surety* for the payment of the same. The annuity was secured by the demise of real property of the plaintiff's brother, and by a bond and judgment of the plaintiff and his brother. The brother afterwards, by deeds to which the plaintiff was not a party, and *without his concurrence*, entered into a *new arrangement* with the assignee of the annuity whereby it was agreed that the latter should not sue for the annuity for five years from the date of the deed, or until the death of the grantor's father (which should first happen), and that the annuity should be redeemable on different terms. It was held that the surety was wholly discharged, and not merely entitled to be exonerated from liability to the arrears of the annuity during the five years (*b*).

So a surety for rent to the landlord under a particular tenancy is discharged from his liability by the determination of the tenancy without his concurrence, and the creation of a new one; for he contracted no liability in respect of rent under a new tenancy between the same parties (*c*).

In *Holme* v. *Brunskill* (*d*), the plaintiff agreed to let a farm and a flock of sheep to G. B., who, together with two sureties, executed a bond to the plaintiff to secure at the determination of the tenancy the delivery, together with the farm and premises, of the like number, species, and quality, of good sheep as were delivered to G. B. On the withdrawal of an insufficient notice to quit, it was agreed that G. B. should surrender a field, and pay 10*l.* less rent. On giving up the farm, the flock was found to be reduced in number, and deteriorated in quality and value, and the plaintiff sued one of the sureties on the bond. It was held that a new tenancy was not created, either by the giving of the first notice and its withdrawal, or the surrender of the field and the reduction of the rent; but that the surety was discharged (*e*). "The plaintiff," said *Cotton*, L.J., "attempts

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(*a*) 3 Madd. 221.

(*b*) See Bonar *v.* Macdonald, 3 H. L. C. 226; Croydon Commercial, &c. *v.* Dickinson, 2 C. P. D. 46; Dowden *v.* Levis, 14 L. R. Ir. 307; Archer *v.* Hale, 4 Bing. 464; Evans *v.* Whyle, 5 Bing. 485; Bacon *v.* Chesney, 1 Stark. 192; Wright *v.* Sandars, 3 Jur. (N. S.) 504; Hollier *v.* Eyre, 9 Cl. & F. p. 57; Small *v.* Currie, 5 De G. M. & G. 141; cf. the judgments in Petty *v.* Cooke, L. R. 6 Q. B. p. 795.

(*c*) Tayleur *v.* Wildin, L. R. 3 Ex. 303, distinguished in Holme *v.* Brunskill, 3 Q. B. D. 495.

(*d*) Supra.

(*e*) *Cotton* and *Thesiger*, L. JJ.; *Brett* L. J., dissenting. *Brett*, L. J., thought that the question whether the new agreement had materially altered the relation between the parties, had been

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to substitute for the contract that the flock should be given up in good condition, *with the farm as then demised*, a contract that it should be delivered up in like condition, with a farm of different extent. In my opinion the surety ought to have been asked to decide whether he would assent to the variation. He never did so assent, and in my opinion was discharged from his liability."

If, by the act of the creditor, a security to the benefit of which the surety is entitled is wholly or partially lost, the surety is only discharged to the extent of the loss (*a*). But a surety was held not to be released where the advances were also secured by a mortgage, and the mortgagor, with the consent of the mortgagee, sold some of the property mortgaged in the due course of management and *in a manner contemplated by the mortgage deed* (*b*).

Not only does an alteration made without his consent release the surety from any *personal* liability, but it also releases any *property* pledged or mortgaged by him (*c*).

In *Re Ennis* (*d*), F. with two sureties, E. and B., gave a bond to secure payment of a loan. One of the provisions was that if E. or B., or either of them died, and if F. did not within a month procure a solvent person to enter into a further bond to the same effect the principal should become immediately payable. E. died, and F. B. and H. entered into a fresh bond to the same effect, but with a proviso that the giving of that bond should not release E.'s estate, or in any way alter or effect the creditor's rights under the first bond. B. and H. paid the money and applied to prove against E.'s estate in an action for administration then pending. The Court of Appeal, after some doubt, held that the new bond did not release the estate of E., and that his estate was liable to contribute one-third.

And the discharge of a surety may take place, even although the new arrangement may seem favourable to the surety. Thus in *Calvert* v. *The London Dock Company* (*e*), Streather, a contractor, undertook to perform certain works for a Company; and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion

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rightly left to the jury (who had answered in the negative). See also Polak *v.* Everett, 1 Q. B. D. 669; Baynton *v.* Morgan, 22 Q. B. D. 74.

(*a*) Pearl *v.* Deacon, 24 B. 186; *Re* Wolmershausen, 62 L. T. 541.

(*b*) Taylor *v.* Bank of N. S. Wales, 11 A. C. 596.

(*c*) See Bolton *v.* Salmon, (1891) 2 Ch. 48.

(*d*) (1893) 3 Ch. 238.

(*e*) 2 Keen, 638; Warre *v.* Calvert, 7 Ad. & E. 143; Watts *v.* Shuttleworth, 7 H. & N. 353.

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of the whole work. It was held that the sureties for the due performance of the contract were released by reason of payments exceeding three-fourths of the work done, having, without their consent, been made by the Company to the contractor before the completion of the whole work.

"Once concede the rule that where the creditor wilfully interferes with the rights of the surety, and alters the equitable rights which he had acquired, *alters them, even though it may be for the surety's benefit* (*a*) *without the surety's assent*, the surety is discharged, and it seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt" (*b*). And where the contract has been altered so as to *strengthen* the security without the surety's knowledge, the surety has been held released (*c*).

But where a surety enters into a bond for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them, without the surety's consent, has been held not to release the surety as to the other (*d*).

A surety to a debt secured by documents which he knew to be acceptances *only* with the drawer's name in blank, is not discharged by reason of their being allowed to remain incomplete until after the acceptor's death, as the drawer's name may be filled in at any time. And a surety is not discharged merely by the negligence of the creditor, *unless he can show that he has received some injury in consequence of the drawer's conduct* (*e*); and the surety for the payment of a bill not being a party, is not discharged, although he has received no notice of dishonour (*f*). In *Barber* v. *Mackrell* (*g*), the holder of two bills promised to renew them if M. guaranteed them. M. agreed

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(*a*) But see as to this, supra, p. 582, n. (*e*).

(*b*) Per *Blackburn*, J., in Polak *v.* Everett, 1 Q. B. D. p. 675; and see Wulff *v.* Jay, L. R. 7 Q. B. 756; General Steam, &c., Co. *v.* Rolt, 6 C. B. (N. S.) 550, 584; Bonser *v.* Cox, 6 B. 110.

(*c*) Gardner *v.* Walsh, 5 E. & B. 83.

(*d*) Harrison *v.* Seymour, L. R. 1 C. P. 518; Skillett *v.* Fletcher, L. R. 2 C. P. 469; Rex *v.* Herron, (1903) 2 Ir. R. 474.

(*e*) Carter *v.* White, 25 C. D. 666, 670; and see Black *v.* Ottoman Bank, 15 Moo. P. C. 472, 484; *Re* Duffy, 5 L. R. Ir. 92; Polak *v.* Everett, 1 Q. B. D. p. 675.

(*f*) Hitchcock *v.* Humfrey, 5 Man. & G. 559; Walton *v.* Mascall, 13 M. & W. 452.

(*g*) 68 L. T. 29.

to guarantee such bills if "renewed." The bills were not renewed in the strict sense, but were accepted by a different acceptor for the same aggregate amount. The Court of Appeal held that "renew" was not used by M. in the strict sense, and that his estate was bound.

It seems that a surety who becomes aware that the creditor is going to do something which, if done without his consent, might discharge him, is not bound to warn the creditor against doing it (*a*).

The principle in *Rees* v. *Berrington* is not confined to alterations in the situation of the surety by arrangements between *the creditor and principal debtor*. Thus in *Ellesmere &c. Co.* v. *Cooper* (*b*), four persons executed a joint and several bond as sureties. After three had executed it, the fourth made a material alteration in the bond. The obligee accepted the bond as altered. All four were held discharged. So where there is a bond of suretyship for the fidelity of an officer, and by the act of the parties to whom the bond has been given, or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond will be avoided (*c*). And a surety whose liability is defined by one Act of Parliament may be discharged by a change in his position under a subsequent Act (*d*).

If a guarantee is given for the good conduct of a person, the course of dealing may be of the essence of the contract, and then, if altered, the surety is discharged (*e*). But if the course of dealing is left to the option of the person to whom the guarantee is given, and he alters it, the surety cannot complain (*f*). And in the case of a guarantee for the fidelity of an officer (*g*), where neither the office nor its duties are substantially altered (*h*); or there has

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(*a*) Polak *v.* Everett, 1 Q. B. D., p. 673.

(*b*) (1896) 1 Q. B. 75; National Prov. Bank, &c. *v.* Brackenbury, 22 T. L. R. 797.

(*c*) Pybus *v.* Gibb, 6 Ell. & B. 902; and see Bartlett *v.* A.-G., Parker, 277; Arlington *v.* Merricke, 2 Saund. 403; The Guardians &c. *v.* Whillier, 6 Jur. (N. S.) 887; Malling Union *v.* Graham, L. R. 5 C. P. 201; Rex *v.* Herron, (1903) 2 Ir. R. 474.

(*d*) Finch *v.* Jukes, (1877) W. N. 211.

(*e*) Arlington *v.* Merricke, 2 Saund. 403; and see N. W. Ry. Co. *v.* Whinray, 10 Exch. 77; Kitson *v.* Julian, 4 E. & B. 854; and see Donegal C. C. *v.* Life & Health Assce. Asson., (1909) 2 Ir. R. 700.

(*f*) Addison Contracts (1903), pp. 1007, 8; Stewart *v.* M'Kean, 10 Exch. 675.

(*g*) Sanderson *v.* Aston, L. R. 8 Ex. 73.

(*h*) Skillett *v.* Fletcher, L. R. 2 C. P. 469.

been a mere alteration in the salary or mode of remuneration (*a*), the sureties will not be discharged.

And although the amount of the debt, for which a surety is guarantee, is ascertained under an Act passed subsequently to the contract entered into by the surety, he will, nevertheless, be liable for the amount so ascertained (*b*).

The bond by which the sureties are bound, may be drawn in language sufficiently extensive to continue their liability, notwithstanding there may be a material alteration of the duties of the person for whom they have become sureties (*c*).

Where, moreover, the creditor acts in his subsequent dealings with the principal debtor, with the concurrence of the surety, the latter cannot claim to be discharged upon the ground that his position is altered by those dealings (*d*).

Since the surety is entitled to have all the securities of the creditor (*e*), a creditor who takes out execution against the debtor becomes a trustee for all parties interested, and if, without the knowledge of the sureties, he withdraws the execution, he thereby discharges them (*f*). So where a creditor, by neglecting the necessary statutory formalities, lost the benefit of an execution under a warrant of attorney, the surety was held to be thereby discharged (*g*).

4. Discharge of Surety by Creditor giving Time (*h*).

"It has been established for a very long time, beginning with *Rees* v. *Berrington* to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by doing so he deprives the surety of part of the

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(*a*) Frank *v.* Edwards, 8 Exch. 214; see also Davey *v.* Phelps, 2 Man. & G. 300; but see Toames Co-operative Society *v.* Foley, (1910) 2 Ir. R. 277.

(*b*) Webster *v.* Petre, 4 Ex. D. 127.

(*c*) See Oswald *v.* Mayor of Berwick-upon-Tweed, 5 H. L. Cas. 856; Mayor of Dartmouth *v.* Silly, 7 Ell. & Bl. 97.

(*d*) Woodcock *v.* Oxford &c. Ry. Co., 1 Drew. 521, 530; and see Hollier *v.* Eyre, 9 Cl. & Fin. 1, 52.

(*e*) See Dering *v.* Winchelsea, ante p. 557 et seq.

(*f*) Mayhew *v.* Crickett, 2 Swans. 185, 190; Smith *v.* Knox, 3 Esp. 47; Williams *v.* Price, 1 S. & S. 581; English *v.* Darley, 2 Bos. & P. 61; Forbes *v.* Jackson, 19 C. D. 621.

(*g*) Watson *v.* Allcock, 4 De. G. M. & G. 242.

(*h*) The question whether an agreement by a surety to give time to the principal debtor discharges a co-surety was raised, in Greenwood *v.* Francis, (1899) 1 Q. B. 312; cf. cases cited note (*b*), p. 592, infra.

right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or for an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless * * * it is established that this discharges the surety altogether. * * * Whether that was a good or just principle originally is a matter which it is far too late to think about now * * * nothing but the Legislature can interfere to alter it" (*a*).

"At the present day there is no doubt as to the law with respect to the release of sureties. It is clear that when the creditor enters into a binding contract with the principal debtor to give him time without the assent of the sureties, and without reserving his remedy against the sureties, such giving of time discharges the surety" (*b*).

The principle, however, has been adversely commented upon by many Judges and will not be extended (*c*).

Although passiveness (see p. 599), or mere delay in not suing the debtor when the debt becomes due, will not discharge the surety, yet if the creditor, as in the principal case, enters in a *binding contract* (*d*), *with the principal debtor* (*e*), the effect of which will be *to give further time* to the debtor, without consulting the surety; the surety will be thereupon discharged wholly, or it would seem if time be given only in respect of part of the debt, *pro tanto* (*f*), and it is immaterial that the further time is given in consequence of the inability of the debtor to pay, or that no injury could thereby accrue to the surety (*g*). In *Samuell* v. *Howarth* (*h*), A. guaranteed the payment of goods to be supplied by B. to C. during a fixed period. C. accepted bills for the amount of the goods delivered, and B.

(*a*) Per *Blackburn*, J., in Polak *v.* Everett, 1 Q. B. D. pp. 673, 674, and see Petty *v.* Cooke, L. R. 6 Q. B. p. 795; see the principle stated and affirmed Oakeley *v.* Pasheller, 10 Bli. (N. S.) 548, 590; Oriental Financial Corp. *v.* Overend, Gurney, & Co. L. R. 7 H. L. p. 360; Rouse *v.* Bradford B. Co. (1894) A. C. p. 590.

(*b*) Per *North*, J., Clarke *v.* Birley, 41 C. D. pp. 433—4.

(*c*) See Oriental Financial Corp. *v.* Overend, L. R. 7 Ch. p. 147 (n).; Hulme *v.* Coles, 2 Si. 12; Petty *v.* Cooke, L. R. 6 Q. B. p. 795; Swire *v.* Redman, 1 Q. B. D. 536; Holme *v.* Brunskill, 3 Q. B. D. p. 505.

(*d*) Per *Herschell*, C., Rouse *v.* Bradford B. Co., (1894) A. C., p. 594.

(*e*) Clarke *v.* Birley, 41 C. D. 422.

(*f*) Dowden *v.* Lewis, 14 L. R. Ir. 307; cf. *Re* Wolmershausen, 62 L. T. 541.

(*g*) See the principal case and Samuell *v.* Howarth, 3 Mer. 272, and see the remarks of *Blackburn*, J., thereon in Petty *v.* Cooke, L. R. 6 Q. B., p. 795, cited infra, p. 592, and in Polak *v.* Everett, 1 Q. B. D., p. 674.

(*h*) 3 Mer. 272, per *Eldon*, L. C.

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permitted him to renew them when payable, without any communication to A. on the subject. It was held that, although no period of credit was specified, it could not be taken as a guarantee for an unlimited period, but as one to be restrained by the usual course of trade; and that A. was discharged from his guarantee by virtue of this rule. The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of *positive contract* between the creditor and the principal,—not where the creditor is merely inactive. * * * *It has been truly stated, that the renewal of these bills might have been for the benefit of the surety;* but the law has said, that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right—*it is against the faith of his contract* (see infra, p. 592)—to give time to the principal, even though manifestly for the benefit of the surety without the consent of the surety (*a*).

In *Rouse* v. *Bradford Banking Co.* (*b*), *A. L. Smith*, L.J., states the main reason for the rule thus: "The main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and that when he has paid it off he is at once entitled in the creditor's name, to sue the principal debtor; and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent" (*c*).

A surety is not discharged by the mere *laches* of the creditor, as instanced by his not proceeding to recover the debt, until barred by the Statute of Limitations, for this reason, that the surety may at any time pay off the debt, and sue the debtor in the name of the creditor, or call upon him to sue (*d*). But if the surety had required the securities to be enforced, and the creditor had refused, the surety might have been discharged (*e*).

(*a*) See the remarks of *Blackburn*, J. on this case, cited infra, p. 592.

(*b*) (1894) 2 Ch. p. 75.

(*c*) See Skip *v.* Huey, 3 Atk. 91; Nisbet *v.* Smith, 2 Bro. Ch. 579; Bank of Ireland *v.* Beresford, 6 Dow. 233; Clarke *v.* Henty, 3 Y. & C. Ex. 187; Hawkshaw *v.* Parkins, 2 Swans. 539; Burke's Case, 2 Bos. & P. 62; Davies *v.* Stainbank, 6 De G. M. & G. 679; Bailey *v.* Edwards, 4 B. & Sm. 761; Ewin *v.* Lancaster, 13 W. R. 857; Bingham *v.* Corbitt, 34 L. J. Q B. 37; Wilson *v.* Lloyd, 16 Eq. 60.

(*d*) Per *Cotton*, L.J., in Carter *v.* White, 25 C. D. 666, at p. 670, cited supra, p. 585, note (*e*).

(*e*) Carter *v.* White, ubi supra, p. 670.

Where the holders of bills, at the *request* of the drawees, refrain from presenting the bills, and thus give them time, the drawer will be released (*a*).

Where a contract is divisible, as for instance, where successive payments are to be made at fixed periods, if the creditor gives time as to one of such payments, he will release the surety with regard to that payment only, but not with regard to subsequent payments (*b*).

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract, and although after notice of the retirement, the retiring partner is in a sense a surety, he will not be discharged from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract (*c*).

If one of two principal debtors, by an arrangement not made known to the creditor, has become merely a surety, the creditor does not, by giving time to the other debtor, release the one who has become a surety (*d*). But if he is informed that one debtor is a surety, and gives time without the surety's knowledge or consent then the surety is discharged (*e*).

In *Rouse* v. *Bradford Banking Co.* (*f*), W. R., one of the partners in a firm, ceased to be a member. By the deed of dissolution, the debts of the firm were to be paid by the new partnership, and the new firm covenanted with W. R. to indemnify him against those debts. Amongst the debts was an overdraft of upwards of 50,000*l.* due to the defendant bank, in which W. R. was a shareholder. The new firm failed, after this debt had been reduced below 50,000*l.* W. R. brought an action to establish his claim to his shares in the bank free from any lien. The defendant bank claimed by counterclaim a lien on these shares as a security for the balance of the 50,000*l.* The plaintiff W. R. contended that after the dissolution, the terms of which the bank had notice, a transaction was entered

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(*a*) Latham *v.* Chartered Bank of India, 17 Eq. 205. See Yates *v.* Evans, 61 L. J. Q. B. 446; cf. Kirkwood *v.* Carroll, (1903) 1 K. B. 531.

(*b*) Croydon Gas Co. *v.* Dickinson, 2 C. P. D. 46.

(*c*) Oakford *v.* The European, &c., Shipping Co., 1 Hem. & M. 182, cf. Taylor *v.* Bank of N. S. Wales, 11 A. C. 596.

(*d*) Swire *v.* Redman, 1 Q. B. D. 536.

(*e*) Pooley *v.* Harradine, 7 E. & B. 431; Greenhough *v.* M'Clelland, 2 E. & E. 424, 429; Oakeley *v.* Pasheller, 10 Bli. (N. S.) 548, 590; Oriental, &c., Corp. *v.* Overend, Gurney, & Co., L. R. 7 H. L., p. 360; Maingay *v.* Lewis, 5 Ir. R. C. L. 229.

(*f*) (1894) A. C. 586.

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into between the new firm and the banking company, whereby the new firm was allowed for a limited period to increase the overdraft to 53,000*l.*; and, secondly, that there was a novation. *Kekewich*, J., held time had been given and the surety was released, The Court of Appeal dismissed the action and declared the bank entitled to a lien. The House of Lords affirmed the judgment of the Court of Appeal, but on different grounds, holding, on the facts, that time had not been given.

Where the guarantee is not expressly limited in point of time, it may be an implied term that the giving of bills is allowed, but it is doubtful whether their period is to be that which is usual according to the custom of the trade, or that which is in accordance with the course of dealings between the parties (*a*).

Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, that will in effect be giving time to the debtor, since equity would restrain proceedings on the bond until the expiration of time for which the creditor had received interest (*b*).

In *Bolton* v. *Buckenham* (*c*), B., as surety, covenanted in a mortgage deed in 1857, for payment of the debt in 1858. By a deed in 1884, to which B. was not a party, the mortgagee and mortgagor agreed to consolidate various mortgages, including the one in 1857, and a fresh date was fixed for payment of all the moneys. B. was held discharged.

In *Munster, &c., Bank* v. *France* (*d*), the defendant surety accepted a bill payable three months after date, which the principal debtor indorsed to his creditor the plaintiff Bank. Before the bill matured, the plaintiff, without the knowledge of defendant, took a mortgage from the debtor as collateral security for the debts, with a covenant for payment three months from date of mortgage. The defendant was held discharged.

An agreement with the principal debtor to give him further time in order to discharge a surety must be one that is *binding upon* the creditor. A mere voluntary promise to give further time which cannot be enforced, as it makes no alteration in the rights or

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(*a*) Compare Combe *v.* Woolf, 8 Bing. 156; with Simpson *v.* Manley, 2 C. & J. 12; and see Holl *v.* Hadley, 5 Bing. 54; Allan *v.* Kenning, 9 Bing. 618; Howell *v.* Jones, 1 Cr. M. & R. 97.

(*b*) Blake *v.* White, 1 Y. & C. Ex. 420.

(*c*) (1891) 1 Q. B. 278.

(*d*) 24 L. R. Ir. 82 (C. A.)

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position of the parties, will not have that effect (*a*); and although the creditor enter into a *binding* contract to give further time to the debtor, yet if it be with a third party, for instance, a co-surety, and not with the debtor, the surety will not be thereby discharged (*b*).

Nor will an agreement to give time have that effect, if it is *conditional* upon the performance of an act which the debtor neglects to perform (*c*).

A surety will not be discharged by the creditor giving time, if the remedies of the surety are not diminished or affected, and especially if they are accelerated. Thus, in *Hulme* v. *Coles* (*d*), a creditor took from the debtor a cognovit in an action he had brought against him, with a stay of execution until a day earlier than that on which judgment could have been obtained. It was held, that the surety was not discharged, because by the arrangement the remedy was accelerated.

Upon the same principle, the acceptance of money from the debtor by the creditor, who thought at the time that it was a valid payment, will not discharge the surety upon its turning out to be a fraudulent preference

Thus in *Petty* v. *Cooke* (*e*), the payee of a promissory note, made by principal and surety, accepted the amount thereof from the principal, in good faith. The principal afterwards entered into a composition deed for the benefit of his creditors. The trustees under the deed avoided the payment as a fraudulent preference, and the payee handed over the amount to them. In an action by the payee against the surety, it was held that the payment did not operate as satisfaction of the debt; and that the acceptance of the money by the payees was not an act *done against the faith of the contract* (see supra, pp. 588, 589), with the surety so as to discharge the surety. "I think it impossible to read the principle laid down by Lord *Eldon* in *Samuell* v. *Howarth* (*f*), without thinking that it is

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(*a*) Philpot *v.* Briant, 4 Bing, 717; Brickwood *v.* Anniss, 5 Taunt. 614; Tucker *v.* Laing, 2 K. & J. 745; Clarke *v.* Wilson, 3 M. & W. 208; Heath *v.* Key, 1 Y. & J. 434; Blake *v.* White, 1 Y. & C. Ex. p. 425; Moss *v.* Hall, 5 Exch. 46; Strong *v.* Foster, 17 C. B. 201; Bell *v.* Banks, 3 M. & G. 258; and Rouse *v.* Bradford Bkg. Co., (1894) A. C., p. 594.

(*b*) Clarke *v.* Birley, 41 C. D. 422; Frazer *v.* Jordan, 8 Ell. & Bl. 303.

(*c*) Badnal *v.* Samuell, 3 Price, 521; Vernon *v.* Turley, 1 M. & W. 316.

(*d*) 2 Si. 12; and see Prendergast *v.* Devey, 6 Madd. 124 (Madd. & G. 124); Stevenson *v.* Roche, 9 B. & C. 707; Price *v.* Edmunds, 10 B. & C. 578; Whitfield *v.* Hodges, 1 M. & W. 679; Jay *v.* Warren, 1 C. & P. 532.

(*e*) L. R. 6 Q. B. 790.

(*f*) 3 Mer. 272.

based upon highly technical reasoning, however accurate it may be.

"It is clear, that a creditor who gives time to the principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by Courts of Equity. The ground, however, on which this doctrine is based, is that by giving time to the principal debtor, the creditor does an act which is against good faith, and injurious to the surety; that doctrine cannot apply to the present case, for the creditor accepted the money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety; *he therefore did no act injurious to the surety*, and the surety is not discharged. I think *Pritchard* v. *Hitchcock* (*a*) is precisely in point" (*b*).

The surety will not be discharged, if time be given to the principal debtor *by his consent or subsequent approval* (*c*).

A subsequent promise by a surety to pay the debt, after he is aware that the principal creditor has given further time to the principal debtor, will revive the liability from which he was discharged by the act of the principal creditor (*d*).

It seems, moreover, where the creditor has obtained a decree against the surety, establishing his right against the estate of the surety, that no subsequent dealings giving time to the debtor will have the effect of releasing the surety, for the creditor, having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and any *subsequent* dealing with the principal debtor does not operate to discharge the surety from a liability under which he is, *no longer as surety*, but under the decree (*e*).

Time given, but rights against surety reserved.—"As to giving time, the authorities, which are almost innumerable, have settled that

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(*a*) 6 M. & G. 151.

(*b*) Per *Blackburn*, J., in Petty *v.* Cooke, L. R. 6 Q. B. p. 795, and see also, Newington *v.* Levy, L. R. 5 C. P. 607, 612, approved in Hall *v.* Levy, L. R. 10 C. P. p. 158.

(*c*) Tyson *v.* Cox, T. & R. 395; Clark *v.* Devlin, 3 Bos. & P. 363; Cowper *v.* Smith, 4 M. & W. 519; Duffy *v.* Orr, 5 Bli. (N. S.) 620; The Union Bank of Manchester *v.* Beech, 13 W. R. 922.

(*d*) Mayhew *v.* Crickett, 2 Swans. 185, 192, and cases cited in the note; cf. Phillips *v.* Foxall, L. R. 7 Q. B. 676, 677.

(*e*) Jenkins *v.* Robertson, 2 Drew. 351.

upon any giving of time to a principal debtor, if there be *a reservation of rights* against the surety, the surety is not discharged" (*a*), this is explained by Lord *Eldon*, C., on the ground that "the principal cannot raise the objection upon his right to time as against the surety, as there is the contract of the principal, arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal" * * * but" *if the contract for reserve against the surety prevents his remedy against the principal, that contract for reserve will not do*" (*b*); and the question whether or not the surety has been informed of (*c*) or consents to (*d*) the arrangement is immaterial. A necessary consequence of such a reservation is a continuance of the surety's right to be indemnified by the principal debtor, and this right will not be abandoned, unless a contract to abandon it be proved (*e*). A contract with a stranger, or even with a co-surety (*f*), which does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge (*g*). Parol evidence is, it seems, admissible to prove a reservation of the creditor's rights against the surety (*h*). But if time be given by deed, the reservation of the right to go against the surety should appear there also, as parol evidence is not admissible to vary a written instrument (*i*).

Release, covenant not to sue.—A release, with a reservation of rights against sureties, operates as a *covenant not to sue* between the creditor and the debtor and does not release the sureties (*k*). And language importing an absolute release may be construed as a

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(*a*) *Page-Wood*, V.-C., in Webb *v.* Hewitt, 3 K. & J. 438 at p. 442.

(*b*) In Boultbee *v.* Stubbs, 18 V. at p. 26; and see *Ex p.* Gifford, 6 V. 805; Nichols *v.* Norris, 3 B. & Ad. 41; Smith *v.* Winter, 4 M. & W. 454; *Ex p.* Carstairs, Buck, 560; Owen *v.* Homan, 4 H. L. Cas. 1037, 1038, and see the passage cited in Rouse *v.* Bradford Bkg. Co., (1894) A. C. p. 591.

(*c*) Bateson *v.* Gosling, L. R. 7 C. P. p. 13; *Re* Whitehouse, 37 C. D. p. 694.

(*d*) Webb *v.* Hewitt, 3 K. & J. 438; Boaler *v.* Mayor, 19 C. B. (N. S.) 76; Commercial Bank of Tasmania *v.* Jones, (1893) A. C. 313.

(*e*) Close *v.* C., 4 De G. M. & G. 176.

(*f*) Clarke *v.* Birley, 41 C. D. 422.

(*g*) Addison, Contracts (1903), p. 1015, citing Moss *v.* Hall, 5 Exch. 46; Bingham *v.* Corbitt, 34 L. J. Q. B. 37.

(*h*) Wyke *v.* Rogers, 1 De G. M. & G. 408; Norman *v.* Bolt, 1 Cal. & E. 77; cf. Mercantile Bank of Sydney *v.* Taylor, (1893) A. C. 317.

(*i*) *Ex p.* Glendinning, Buck, 517.

(*k*) Green *v.* Wynn, L. R. 4 Ch. 204, stated infra, p. 596; Bateson *v.* Gosling, L. R. 7 C. P. 9; *Re* Whitehouse, 37 C. D. 683, p. 694; Henton *v.* Paddison, 68 L. T. 405; and see infra, pp. 595—6.

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covenant not to sue the principal debtor, when that intention appears, leaving the debtor open to any claim of relief at the instance of his sureties (*a*). But if the release is absolute and in writing it cannot be modified by evidence of verbal negotiations prior to the release (*b*); and where there is an absolute release, the remedy against the surety is gone, for the debt is satisfied (*c*). In the *Commercial Bank of Tasmania* v. *Jones* (*d*), a creditor released his principal debtor and accepted a third party in his stead, and the surety for the former debtor agreed that he would give a guarantee for the latter, and, until he did so, would continue his former guarantee, but he died without giving the new one. It was held that the remedy against the surety was gone, because the novation operated as a release of the original debt and consequently of the surety, and he had given no other guarantee.

And although the release of, or the composition with, the principal debtor is done by mistake, or for the benefit of the surety, unless there be a stipulation to the contrary (*e*), the surety will be discharged thereby (*f*); and it seems, that one partner in a firm may release or compound with the creditor so as to bind the firm, and consequently discharge the surety (*g*).

If the surety has, previously to the release paid part of the debt, and given security for the remainder, the general rule will not apply, but the creditor will, in the absence of evidence to the contrary, retain his right against the surety for the remainder (*h*).

An unqualified reservation of remedies against the surety in a covenant not to sue is to be construed as allowing the surety to retain all his remedies over against the principal debtor, for the covenant not to sue is allowed to operate only so far as the rights of

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(*a*) Per Lord *Morris*, Commercial Bank of Tasmania *v.* Jones, (1893) A. C. 313, at p. 316; cf. Boultbee *v.* Stubbs, 18 V. 20; *Ex p.* Harvey, 4 De G. M. & G. 881; Atkins *v.* Revell, 1 De G. F. & J. 360.

(*b*) Mercantile Bank of Sydney *v.* Taylor, (1893) A. C. 317.

(*c*) See Nicholson *v.* Rivell, 4 Ad. & E. 675; Kearsley *v.* Cole, 16 M. & W. p. 136; Webb *v.* Hewitt, 3 K. & J. 438; Mayhew *v.* Boyes, 103 L. T. 1.

(*d*) (1893) A. C. 313; dist. in Perry *v.* Nat. Prov. Bank, (1910) 1 Ch. 464.

(*e*) Davidson *v.* McGregor, 8 M. & W. 755; Kearsley *v.* Cole, 16 M. & W. 128; The Union Bank of Manchester *v.* Beech, 3 H. & C. 672; Cowper *v.* Smith, 4 M. & W. 519.

(*f*) *Ex p.* Smith, 3 Bro. Ch. 1; *Ex p.* Wilson, 11 V. 410; English *v.* Darley, 2 Bos. & P. 61; Lewis *v.* Jones, 4 B. & C. 506; Cragoe *v.* Jones, L. R. 8 Ex. 81; cf. Commercial Bank of Australia *v.* John Wilson & Co., (1893) A. C. 181.

(*g*) Hawkshaw *v.* Parkins, 2 Swans. 539; Lindley, Partnership (1905), p. 162.

(*h*) Hall *v.* Hutchons, 3 My. & K. 428; Reade *v.* Lowndes, 23 B. 361; Defries *v.* Smith, 10 W. R. 189.

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the surety may not be affected; the surety therefore may pay the creditor and sue the principal for the amount. Thus in *Green* v. *Wynn* (*a*), the debtor by a mortgage deed covenanted to pay the principal and interest, and a surety covenanted to pay the interest in default. The debtor, afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt. It was held that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor, and recover the amount from the debtor. So where a deed of arrangement under the Bankruptcy Acts 1861 and 1869 containing a release of the debtor, subject to a proviso reserving the rights of creditors holding securities was held to operate as a covenant not to sue, and not as an extinguishment of the debt, so as to bar the remedy against the surety (*b*). But where the principal debtor is released, a reservation of rights against a surety, which is inconsistent with the transaction, is of no avail (*c*). A joint judgment debt is subject to the same rules as to release as any other joint obligation. So a release of one judgment debtor extinguishes the liability of the other, whilst a covenant not to sue one will not affect the liability of the other (*d*).

If a surety, though innocent himself through the fraud of another, obtains a release from the creditor, unless there be consideration moving from him, the creditor may have the release set aside (*e*).

Where a principal debtor is discharged by operation of law, as for instance, in an ordinary bankruptcy, even though obtained with the assistance of the creditor, the surety is not released (*f*). The surety can pay and prove for the amount.

(*a*) L. R. 4 Ch. 204.

(*b*) Bateson *v.* Gosling, L. R. 7 C. P. 9; see also Price *v.* Barker, 4 Ell. & Bl. 780; Muir *v.* Crawford, L. R. 2 H. L. Sc. 456.

(*c*) Webb *v.* Hewitt, 3 K. & J. 438; Keyes *v* Elkins, 5 B. & S. 240; Hooper *v.* Marshall, L. R. 5 C. P. 4.

(*d*) *Re* E. W. A., (1901) 2 K. B. 642; cf. *Ex p.* Good, 5 C. D. 46.

(*e*) Scholefield *v.* Templer, 4 De G. & J. 429.

(*f*) Bankruptcy Act, 1883, s. 30 (4); Wace, Bankruptcy (1904), p. 94; Browne *v.* Carr, 7 Bing, 508; Provincial Bank *v.* Cussen, 18 L. R. Ir. 382. As to the Bankruptcy Act of 1869, see Ellis *v.* Wilmot, L. R. 10 Ex. 10, 15; Megrath *v.* Gray, L. R. 9 C. P. 216; *Ex p.* Jacobs, L. R. 10 Ch. 211.

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How far a release, &c., of one surety by the creditor will discharge others.—A release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others (*a*), unless the contract with the sureties was several (*b*).

Where more than one person become sureties *severally and independently*, the creditor merely by releasing one does not release the other sureties, unless they can show that they have thereby been deprived of their remedies for contribution. In order to support their claim to be released they must show that they had a right to contribution, and that that right has been taken away or injuriously affected (*c*).

A composition made with a surety does not have that effect, for since a creditor, who has given a discharge to one surety *for the proportion which he was liable to contribute* towards the payment of the general debt, has no right to proceed against the other sureties for more than their proportion of it, no injury is done to them by the discharge of their co-surety (*d*). "If the creditor discharges one of the co-parceners, he cannot proceed for the whole debt against the others, at most they are only bound for their proportions" (*e*). So where a creditor made a compromise with one of several sureties, by which he precluded himself from receiving a dividend, the co-sureties were held discharged to the extent of the dividend which he might have received (*f*). And a release of one surety may be so qualified by the reservation of remedies against the co-sureties that it will be construed as a covenant not to sue, and it will thus be prevented from operating as a discharge of a co-surety (*g*). But where the terms of the release are absolute and in writing, verbal negotiations, prior to the release, will not be admitted for the purpose of showing that it was intended to reserve rights against the co-sureties (*h*).

A mere receipt given to one of the debtors will not amount to a

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(*a*) Cheetham *v.* Ward, 1 B. & P. 630; Nicholson *v.* Revill, 4 A. & E. 675; Rex *v.* Bayley, 1 C. & P. 435; Cocks *v.* Nash, 4 Mo. & Sc. 162.

(*b*) Ward *v.* National Bank of N. Z., 8 A. C. 755.

(*c*) Ward *v.* National Bank of New Zealand, 8 A. C. 755, 765, 766; and see and cf. Craythorne *v.* Swinburne, 14 V. 169.

(*d*) *Ex p.* Gifford, 6 V. 805.

(*e*) Per Lord *Redesdale*, in Stirling *v.* Forrester, 3 Bli. 591.

(*f*) *Re* Wolmershausen, 62 L. T. 541.

(*g*) Thompson *v.* Lack, 3 C. B. 540, 552; Price *v.* Barker, 4 Ell. & B. 760; and see Solly *v.* Forbes, 2 Brod. & B. 38; Payler *v.* Homersham, 4 M. & S. 423; North *v.* Wakefield, 13 Q. B. 536; *Re* E. W. A., (1901) 2 K. B. 642.

(*h*) Mercantile Bank of Sydney *v.* Taylor, (1893) A. C. 317.

release so as to release another joint debtor, if it appears from the surrounding circumstances that it was not intended to be so given (*a*).

Discharge of surety by the creditor agreeing with the principal debtor to give time to the surety himself.—If the holder of a security agrees with the principal debtor to give time to the *surety*, he discharges the surety. For the position of the surety is thereby changed, because, it is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal (*b*).

5. Discharge of Surety by the Creditor taking another or additional Security, &c.

Where the creditor takes a second security *in satisfaction* of the first (*c*), or a different security (*d*), the surety will be discharged. But not unless it be taken in lieu of the original security. Thus, where, on B. being hired as a clerk to A. & Co., not for any definite period, he with C. and D. joined in a bond to secure his duly accounting for his receipts. C. died, and his executrix gave a written notice to A. & Co. that she would no longer remain surety. A. & Co. thereupon required and obtained from B. the bond of another surety. D. died, and also the new surety, and, four years and a half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice. It was held that, as there was nothing to show that the obligees acquiesced in the wish of the executrix to be released, and no ground on which the Court could say that, when the second bond was executed, there was an intention to give up the first; and, as it was reasonable to require a further security, and the executrix of C. would be answerable only to the extent of the assets, she was not released (*e*).

(*a*) *Ex p.* Good, 5 C. D. 46; distinguished in *Re* E. W. A., (1901) 2 K. B. 642; and see North *v.* Wakefield, 13 Q. B. 536, 541; Watters *v.* Smith, 2 B. & Ad. 889.

(*b*) See per Lord *Hatherley* in Oriental Financial Corp. *v.* Overend &c., L. R. 7 Ch. 142, 152; affirmed, L. R. 7 H. L. 348.

(*c*) Clarke *v.* Henty, 3 Y. & C. Ex. 187. See also Boaler *v.* Mayor, 19 C. B. (N. S.) 76.

(*d*) Tatum *v.* Evans, 54 L. T. 336.

(*e*) Gordon *v.* Calvert, 4 Russ. 581; 2 Si. 253; cf. *Re* Crace, (1902) 1 Ch. 733; and see Bank of Ireland *v.* Beresford, 6 Dow, 233; Hodgson *v.* Nugent, 5 T. R. 277; Melvill *v.*

But the taking of a new promissory note from the principal does not discharge the surety (*a*); nor does the taking of *additional* security, unless it is given upon a contract to give time, when it will do so unless the surety has consented (*b*); and the surrender of the security in bankruptcy does not discharge the surety, because the law of suretyship must be *subject to a privilege given to the creditor by the law* (*c*).

In *The Commercial Bank of Australia* v. *John Wilson & Co.* (*d*), a creditor whose debt was guaranteed by several sureties including W., agreed with three of such sureties that they should deposit 3,000*l.* with the creditor on a suspense account, with power to the creditor to appropriate that sum in discharge *pro tanto* of the debt. It was held that, as such deposit did not operate as payment until appropriation, the creditor, not having appropriated, could prove for the whole amount in W's bankruptcy.

6. As to the Effect on the Surety of Laches, Failure to Perfect the Security, &c., on the Part of the Creditor.

Laches, or inaction on the part of the creditor will not, save as hereafter stated, *release* the surety, but the amount recoverable from him by the creditor will be reduced by the amount so lost (*e*). In *Eyre* v. *Everett* (*f*), although the creditor had neglected to sue the obligor on a bond for five years, the surety was not released. "The surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, *if all that he rests upon* is the *passive* conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing" (*g*).

Glendining, 7 Taunt. 126; Lawes *v.* Maughan, 1 C. & E. 340.

(*a*) Wyke *v.* Rogers, 1 De G. M. & G. 408.

(*b*) Twopenny *v.* Young, 3 B. & C. 208; Overend & Co. *v.* Oriental, &c., Corp., L. R. 7 H. L. p. 361; cf. Munster, &c., Bank *v.* France, 24 L. R. Ir. 82.

(*c*) Rainbow *v.* Juggins, 5 Q. B. D. 422; cf. Provincial Bank *v.* Cussen, 18 L. R. Ir. 382.

(*d*) (1893) A. C. 181.

(*e*) Polak *v.* Everett, 1 Q. B. D. p. 676.

(*f*) 2 Russ. 381.

(*g*) Per Lord *Eldon*, C. at p. 384; see also Shepherd *v.* Beecher, 2 P. W. 288; Wright *v.* Simpson, 6 V. 734; Perfect *v.* Musgrave, 6 Price, 111; Orme *v.* Young, Holt, 84; Langdale *v.* Parry, 2 Dowl. & Ry. 337; Price *v.* Kirkham, 3 H. & C. 437; London Assce. Co. *v.* Buckle, 4 Moo. P. C. 153; Goring *v.* Edmonds, 6 Bing. 94; Dawson *v.* Lawes, 23 L. J. Ch. 434; Mayor of Durham *v.* Fowler, 22 Q. B. D. 394.

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A surety for a debt secured by a bill of exchange, to which he is not a party, accepted by the debtor, will not be discharged by its not being presented for payment, or by notice of its dishonour not being given to the surety, inasmuch as the rule as to any notice of dishonour applies only to *parties* to bills of exchange, not to all persons who are interested in them (*a*).

But if by the contract of suretyship there be a duty cast upon the principal to exercise any power for the benefit of the surety, his default in the exercise of it may release the surety (*b*); or if by the inaction of the creditor a material stipulation in the contract is not observed; as if there be a stipulation that the creditor on default is to sue the debtor without delay (*c*). In *Mountague* v. *Tidcombe* (*d*), a man put out his son an apprentice, giving a bond to his master for his fidelity, taking, at the same time, a covenant from his master that he would, at least once a month, see his apprentice make up his cash. Upon the apprentice embezzling cash, the master brought an action on the bond; it was held, on a bill being filed by the father to be relieved against it, that the bond and covenant ought to be taken as one agreement; that the father would be liable, provided the accounts were taken monthly, but for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began.

As a surety, even a mere indorser of a bill of exchange (*e*) is entitled, on payment of the debt, to all the securities in the hands of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship (*f*); if the creditor, who has had, or ought to have had them in his possession or power, loses them, or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice (*g*), the surety *to the extent of such security* will be relieved (*h*). Thus, the omission

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(*a*) Carter *v.* White, 25 C. D. 666, 671; Hitchcock *v.* Humfrey, 5 Man. & G. 559; Black *v.* Ottoman Bank, 15 Moo. P. C. p. 484; *Re* Wolmershausen, 62 L. T. 541.

(*b*) See per *Esher*, M. R., in Mayor of Kingston-upon-Hull *v.* Harding, (1892) 2 Q. B. pp. 502, 503.

(*c*) Bank of Ireland *v.* Beresford, 6 Dow. 233; Holl *v.* Hadley, 2 A. & E. 758.

(*d*) 2 Vern. 518.

(*e*) Duncan, Fox & Co. *v.* North and South Wales Bank, 6 A. C. 1.

(*f*) See Dering *v.* Winchelsea, ante; Forbes *v.* Jackson, 19 C. D. 615.

(*g*) Strange *v.* Fooks, 4 Gif. 408.

(*h*) Capel *v.* Butler, 2 S. & S. 457; *Ex p.* Mure, 2 Cox, 63; Law *v.* The East India Co., 4 V. 824; Williams *v.* Price, 1 S. & S. 581; Philips *v.* Astling, 2 Taunt. 206; *Re* Wolmershausen, 62 L. T. 541; Rainbow *v.* Juggins, 5 Q. B. D. 422; cf. Taylor *v.* Bank N. S. Wales, 11 A. C. 596.

of acts which were necessary to perfect an assignment or transfer may relieve the surety — as the omission to comply with statutory formalities (*a*), to register an assignment of a ship (*b*), to insure works according to contract (*c*), to register a bill of sale given as a security, and to enter into possession on default in payment of interest, thereby enabling the trustee in bankruptcy to sell the property (*d*): so, too, may negligence on the part of the creditor, as failing to present a bill of exchange for payment at maturity (*e*), or in taking notes of a bank and drafts on its London agents, shortly before it stopped payment when cash might have been obtained (*f*), in mismanaging the sale of a collateral security, which ought to have produced enough to pay the debt (*g*).

So a surety will be released if the creditor cannot, on payment by his surety, give him the securities, in exactly the same condition as they formerly stood in his hands, and this may, of course, extend even to discharging the surety entirely from his liability. Thus, in *Pledge* v. *Buss* (*h*), a creditor holding a mortgage for a debt for which the plaintiff was surety, after the bankruptcy of the principal debtor, without notice to the surety, released the assignees and the bankrupt's estate in consideration of the conveyance to him of the equity of redemption. It was held that the surety was discharged, and that it was not enough for the creditor to allow in account the dividends released, and to give a new charge on the mortgaged premises.

If the creditor appropriates any security for the debt to another purpose, the surety will, to the extent of the value of the security, be discharged. Thus in *Pearl* v. *Deacon* (*i*), the plaintiff was surety upon a promissory note to the defendants for a sum lent by them to their tenant, and the defendants also took a mortgage of the tenant's furniture for the same debt. They afterwards, under a distress, took the same furniture for arrears of rent. It was held that as regarded the plaintiff the produce of the furniture was first applicable to the

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(*a*) Watson *v.* Allcock, 4 De G. M. & G. 242.

(*b*) Capel *v.* Butler, 2 S. & S. 457, and see Straton *v.* Rastall, 2 T. R. 366.

(*c*) Watts *v.* Shuttleworth, 7 H. & N. 353.

(*d*) Wulff *v.* Jay, L. R. 7 Q. B. 756.

(*e*) Latham *v.* Chartered Bank of India, 17 Eq. 205.

(*f*) Lichfield Union *v.* Greene, 1 H. & N. 884.

(*g*) Mutual Loan Association *v.* Sudlow, 5 C. B. (N. S.) 449.

(*h*) Johns. 663, and see Campbell *v.* Rothwell, 47 L. J. Q. B. 144; *Re* Wolmershausen, 62 L. T. 541.

(*i*) 24 B. 186, affirmed 1 De G. & J. 461.

promissory note, and as against him, could not be applied in payment of the rent (*a*).

But where the transaction must be taken to have been contemplated by the contract, the surety is not discharged (*b*).

Thus, in *Rainbow* v. *Juggins* (*c*) the defendant was surety to the plaintiff, for P., who had deposited with the plaintiff a policy of insurance on his life as collateral security: P. became bankrupt and the plaintiff surrendered the policy, which had previously lapsed through failure in payment of the premiums, and proved for the whole debt. It was held that the defendant remained liable, for (1) the contract of suretyship must be taken to have been made subject to the law of bankruptcy, which allowed the surrender, and (2) because the policy was in fact of no *legal* value.

In *Mayor, &c. of Kingston-upon-Hull* v. *Harding* (*d*), the defendants guaranteed the plaintiffs that contractors should well and truly execute certain work. The plaintiffs had a right by the contract to superintend the work, also a right to retain part of the payment until a certificate was given by their engineer. The work was badly done, but its defects were fraudulently concealed from the engineer. He gave his certificate and the money was paid. It was held that the mere non-exercise by the plaintiffs of their right of superintendence did not discharge the defendants, nor were they discharged by the giving of the certificate or the payment of the retention money, inasmuch as the mere giving of the certificate was not shown to have altered the position of the defendants for the worse, and both that and the payment had been procured by a dishonest execution of work against which the defendants had guaranteed the plaintiffs.

The creditor may lawfully assign (*e*) both the debt and the securities, and the assignee thereupon acquires the right of the creditor against the surety, but subject to the obligation to preserve the securities (*f*).

A surety will not be discharged where a security becomes worthless, unless it became so by the act of the creditor (*g*).

(*a*) See also Kinnaird *v.* Webster, 10 C. D. 139, 144; Campbell *v.* Rothwell, 47 L. J. Q. B. 144; Duncan Fox & Co. *v.* N. & S. Wales Bank, 6 A. C. p. 11; *Re* Sherry, 25 C. D. 702.

(*b*) Coates *v.* C., 33 B. 249, 252; Petty *v.* Cooke, L. R. 6 Q. B. 790; Taylor *v.* Bank N. S. Wales, 11 A. C. 596.

(*c*) 5 Q. B. D. 422.

(*d*) (1892) 2 Q. B. 494.

(*e*) See Judicature Act, 1873, s. 25, sub-s. 6, and notes in Annual Practice (1912), ii. 621 *et seq.*

(*f*) Wheatley *v.* Bastow, 7 De G. M. & G. 261. But see Strange *v.* Fooks, 4 Gif. 408, the decree in which is given, Seton (1901), p. 2144.

(*g*) Hardwick *v.* Wright, 35 B. 133; Rainbow *v.* Juggins, 5 Q. B. D. 422.

There is an equity that a security given by co-sureties must not be wasted, but a fair dealing by the creditor with the surety's security under which the creditor sets off the surety's share of the debt due to him against the proceeds of the security does not preclude a resort to the other sureties for their respective shares of the debt (*a*).

It seems that a surety of a bond for the due performance of duties by a person answerable to the Crown, will not be discharged through the *laches* of the officers of the Crown in neglecting to re-register the bond in Ireland, so as to discharge the lands of the principal from liability under it, inasmuch as *laches* cannot be attributed to the Crown (*b*).

7. Relief of Surety.

Since the Judicature Act (*c*), the distinctions which used to exist between the relief given at law and in equity have disappeared.

Where the debt for which a person is surety has become due (*d*), he may compel the principal to discharge him from his liability (*e*). It is not necessary for the surety to wait until he has sustained actual loss. "Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable . . . this Court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him" (*f*). This right is not confined to cases where the creditor has a right to sue the debtor and refuses to exercise that right (*g*).

In *Wooldridge* v. *Norris* (*h*), a surety on a bond to secure a debt, was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who had no funds

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(*a*) Margretts *v.* Gregory, 10 W. R. 630.

(*b*) The Queen *v.* Fay, 4 L. R. Ir. 606, but see per *May*, C. J., p. 631.

(*c*) See Judicature Act, 1873, s. 25, sub-s. 11. Annual Practice (1912), ii. p. 632.

(*d*) See and cf. Dale and Perry *v.* Lilley, 2 Bro. Ch. 582 (n.); Hughes-Hallett *v.* Indian Mammoth Gold Mines, 22 C. D. 561.

(*e*) Lindley, Partnership (1905), 7th ed., p. 410, cited in Wolmershausen *v.* Gullick, (1893) 2 Ch., p. 527 (from 5th ed.; Ascherson *v.* Tredegar Dry Dock &c. Co., (1909) 2 Ch. 401.

(*f*) Per the Lord Keeper in Ranelaugh *v.* Hayes, 1 Vern. 189; Nisbet *v.* Smith, 2 Bro. Ch. 579; Wooldridge *v.* Norris, infra; see Hobbs *v.* Wayet, 36 C. D., p. 259; Matthews *v.* Saurin, 31 L. R. Ir. 181.

(*g*) See Matthews *v.* Saurin, supra; Ascherson *v.* Tredegar Dry Dock Co., supra; disapproving of limitation suggested in Padwick *v.* Hawkes, 9 Ha. 627, 628.

(*h*) 6 Eq. 410.

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in hand, and were unable under the will to raise the money by sale of the testator's estate, except under a decree of the Court. Held that the surety, though he had not paid anything, was entitled to a decree against the executors for administration, payment of the debt, and indemnity (*a*).

If judgment has been obtained by the creditor against a surety, or if his claim has been established against him, the surety may commence an action against his co-sureties and, if he makes the creditor a defendant thereto, may obtain an order upon the co-surety to pay his proportion to the creditor; if the creditor is not a defendant, he may obtain a prospective order directing the co-surety, upon payment by him, the plaintiff, of his share, to indemnify him against further liability (*b*).

In *Burgess* v. *Eve* (*c*), *Malins*, V.-C., expressed an opinion that a guarantor of fidelity might file a bill for delivery up of his guarantee, after notice that the person whose fidelity he had guaranteed was not to be trusted.

If the principal debtor has a set off against the creditor, arising out of the same transaction, the surety may plead it in an action against him by the creditor (*d*).

The surety has a right at any time to apply to the creditor and pay him off, and then on giving a proper indemnity for costs to sue the principal in the creditor's name (*e*). Or, it would seem, on taking an assignment of the debt, under sect. 25, sub-s. 6, of the Judicature Act, 1873, he might sue in his own name.

A judgment or award against a principal does not in the absence of agreement bind the surety unless he is a party, and the principal on being sued cannot bring him in on a third party notice (*f*). But the surety when sued may call on the principal to indemnify him (*g*). And where one of two or more co-sureties is being sued alone for the debt, *semble*, he may apply for leave to serve his co-sureties with notice (*h*).

(*a*) See also Green *v.* Wynn, L. R. 4 Ch. p. 207; Hobbs *v.* Wayet, supra.

(*b*) Wolmershausen *v.* Gullick, (1893) 2 Ch. 514.

(*c*) 13 Eq. p. 459.

(*d*) Bechervaise *v.* Lewis, L. R. 7 C. P. 372.

(*e*) Swire *v.* Redman, 1 Q. B. D. p. 541.

(*f*) R. S. C., O. XVI., r. 48; Annual Practice (1912), i., p. 263.

(*g*) *Re* Kitchin, 17 C. D. 668, 670; and see Wolmershausen *v.* Gullick, (1893) 2 Ch. 514; cf. Dering *v.* Winchelsea, ante, p. 539.

(*h*) R. S. C., O. XVI., r. 48, and see Seton (1901), p. 2142.

TRUSTEES.

ROBINSON *v.* PETT.

1734. 3 P. W. 132 (*a*).

No Allowance to an Executor or Trustee for his Care and Trouble.

> The Court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains; neither will it alter the case, that the executor renounces and yet is assisting in the executorship; nor even though it appears that the executor has deserved more, and benefited the trust, to the prejudice of his own affairs.

The question was whether an executor who had renounced, but had yet been assisting in the trust, according to the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance.

On a bill brought by the plaintiffs, the grandchildren, against the executors, for an account of the personal estate, the defendant Pett was allowed his 100*l.* legacy; but he likewise insisted to have 400*l.* more for his extraordinary pains, trouble, and expense of time in and about the affairs of the testator. * * *

This cause was first heard before the M. R., Sir *Joseph Jekyll*, who declared it to be a rule so settled, *that a trustee or executor in trust should not have any allowance for his care and trouble, unless there were some particular words in the will for that purpose* (*b*), that he could not break into it, and that there was the less occasion to do so in the present case, as the testator had here given the defendant an express legacy of 100*l.* for his care and trouble. * * *

From this decree there was an appeal to the Lord Chancellor. * * *

(*a*) Page 249 in 6th edition.

(*b*) See Ellison *v.* Airey, 1 Ves. Sen. 115; Willis *v.* Kibble, 1 B. 560.

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Lord Chancellor Talbot.—It is an established rule, *that a trustee, executor, or administrator, shall have no allowance for his care and trouble;* the reason of which seems to be, *for that, on these pretences, if allowed, the trust estate might be loaded, and rendered of little value* (*a*); besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not.

The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept the executorship; otherwise, if both the executors had renounced, and the ordinary had thereupon granted administration (*b*). And if this were to make any difference, it would be an art practised by executors to get themselves out of this rule, which I take to be a reasonable one, and to have long prevailed. But further, in the present case, the testator has by his will expressly directed what should be the defendant's recompense for his trouble, in case of his refusing the executorship; viz., that he still should have the 100*l.* legacy, to which I can make no addition. However, it being a hard case, let the defendant take back the deposit (*c*).

(*a*) See Moore *v.* Frowd, 3 My. & C. 50, where Lord *Cottenham* approves of this reason.

(*b*) Where there are two executors, and one renounces, he is still at liberty to accept the executorship. *Secus* where both renounce and administration is granted; though in this matter the common lawyers differ from the civilians; the latter holding that a renunciation once made, though only by one of them, is peremptory. See Howes *v.* Lord Petre, Salk. 321; The King *v.* Simpson, 3 Burr. 1463. As to the necessity of an executor intending to act before he can claim a legacy, see Reed *v.* Devaynes, 2 Cox, 285, 3 Bro. Ch. 95; Stackpoole *v.* Howell, 13 V. 417; Dix *v.* Reed, 1 S. & S. 237; Calvert *v.* Sebbon, 4 B. 222; Wildes *v.* Davies, 1 Sm. & G. 485; Hanbury *v.* Spooner, 5 B. 630 and cases therein cited; Compton *v.* Bloxham, 2 Coll. 201; Hollingsworth *v.* Grasett, 15 Si. 52; Cockerell *v.* Barber, 2 Russ. 585; Angerman *v.* Ford, 29 B. 349; Lewis *v.* Mathews, 8 Eq. 277. But he may claim a legacy if not given to him *quâ* executor. Jewis *v.* Lawrence, 8 Eq. 345; Bubb *v.* Yelverton, 13 Eq. 131; *Re* Reeve's Trusts, 4 C. D. 841.

(*c*) Reg. Lib. B. 1732, fol. 322. 1733, fol. 333, by which it appears the M.R. directed generally, that all parties should have just allowances and on appeal by the defendant Pett, this decree was affirmed, but the particular gravamen is not stated.

NOTES.

1. Generally.
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    - Agents, employment of, p. 608.
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3. Exceptions to the general rule, p. 620.
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4. Accidental profit, Escheat and Executors' Act, 1830, p. 623.

1. Generally.

The rule that a trustee, executor, or administrator shall have no allowance for his care and trouble proceeds upon the principle that a trustee shall not profit by his trust. "The reason of the rule," observes Lord *Cottenham*, "is well stated in *Robinson* v. *Pett*. The reason seems to be that on these pretences, if allowed, the trust estate might be loaded and rendered of little value" (*a*).

It is more generally put on the ground that a trustee may not put himself in a position in which his interest and duty are in conflict (*b*), and it is extended to all persons in a fiduciary position, though they may not be strictly "trustees."

In *Bray* v. *Ford* (*c*), a governor of a college who was a solicitor was held not to be justified in charging the college profit costs for his professional services. *Herschell*, C., said, "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality.

(*a*) Moore *v.* Frowd, 3 My. & C. 50; and see New *v.* Jones, 1 Hall & T. 632 (n.); Hamilton *v.* Wright, 9 Cl. & Fin. 111; *Re* Imperial Land Co. of Marseilles, 4 C. D. 566, 580.

(*b*) See Burge *v.* Brutton, 2 Ha. 373; *Re* Corsellis, 34 C. D. 675. See statement of the principle per *Cotton*, L. J., at p. 681. See also Keech *v.* Sandford, post.

(*c*) (1896) A. C. 44.

I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has therefore been deemed expedient to lay down this positive rule."

"But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger even though the trustee were paid for his services."

The principle has, however, no application to remuneration paid to the trustee by a third person for work done by him independently of his position as trustee (*a*).

2. Persons in a Fiduciary Position shall make no Profit by their Trust.

Agents, Employment of.—Although trustees and executors will not, in the absence of direction (see p. 620), be allowed any remuneration for their own trouble and loss of time, they may in special cases employ agents whose expenses will be allowed out of the estate. Thus a trustee, upon making out a proper case, may employ a bailiff to manage an estate and receive the rents (*b*), even although a recompense may have been given to him by the creator of the trust for his trouble (*c*). (See note "Delegation of Trusts," p. 639.)

So an executor may, when it is reasonable (*d*), employ a solicitor in the management of the testator's affairs, and that although he be himself a solicitor (*e*); and he may employ an accountant if the nature of the accounts require it (*f*), or an agent to collect debts at a commission.

Allowances.—So trustees and executors will be allowed all costs, charges, and expenses properly incurred by them in the execution of

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(*a*) *Re* Lewis, 103 L. T. 495; *Re* Dover Coalfields, &c., Ltd., (1908) 1 Ch. 65.

(*b*) Bonithon *v.* Hockmore, 1 Vern. 316; Stewart *v.* Hoare, 2 Bro. Ch. 663.

(*c*) Wilkinson *v.* W., 2 S. & S. 237; *Re* Westbrooke, 2 Ph. 631.

(*d*) Harbin *v.* Darby, 28 B. 325.

(*e*) Macnamara *v.* Jones, Dick. 587; Stanes *v.* Parker, 9 B. 389.

(*f*) Henderson *v.* M'Iver, 3 Madd. 275; New *v.* Jones, 1 Hall & T. 632 (n.); 1 M. & G. 668 (n.); Weiss *v.* Dill, 3 My. & K. 26; and see Hopkinson *v.* Roe, 1 B. 180; Day *v.* Croft, 2 B. 488.

their trust (*a*), whether they be provided for in the instrument creating the trusts or not (*b*), even though remuneration for their trouble has been allowed them by the author of the trusts (*c*), and even although in the case of trustees they have been wrongfully appointed, provided they acted *bonâ fide* (*d*). Thus they will be allowed the expenses of travelling properly incurred (*e*), fees for counsel (*f*), the costs of a solicitor for his trouble and attendance in transacting and conducting the affairs of the testator (*g*), costs of a law suit, not being confined, when defendants, to their costs as between party and party paid to them by the plaintiff (*h*): and although an executor or trustee as defendant may be ordered to pay costs to the plaintiff he will be entitled (unless he has forfeited his right by *laches* or misconduct) to recover from the trust estate not only the costs thus incurred, but also the costs which he has paid to his own solicitor (*i*).

Professional Charges, &c.—Although the trustees or executors may by the direction of the author of the trusts have carried on a trade, they will be allowed nothing as a compensation for their personal trouble or loss of time (*k*) save under very special circumstances (*l*).

An executor and surviving partner carrying on the business of his deceased partner is not entitled, without express stipulation, to any allowance for his time and labour (*m*). So an executor or trustee

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(*a*) See the Form, Seton (1901), pp. 1167-68, and cf. *Re* Beddoe, (1893) 1 Ch. 547.

(*b*) Hide *v.* Haywood, 2 Atk. 126; Worrall *v.* Harford, 8 V. 8; Dawson *v.* Clarke, 18 V. 254; A.-G. *v.* Mayor of Norwich, 2 My. & C. 424; Morison *v.* M., 7 De G. M. & G. 214.

(*c*) Wilkinson *v.* W., 2 S. & S. 237, and see Webb *v.* Earl of Shaftesbury, 7 V. 480, 6 R. R. 154.

(*d*) Travis *v.* Illingworth (1868), W. N. p. 206.

(*e*) *Ex p.* Lovegrove, 3 D. & C. 763.

(*f*) Cary, 14; Poole *v.* Pass, 1 B. 600.

(*g*) Macnamara *v.* Jones, Dick. 587.

(*h*) Amand *v.* Bradburne, 2 Ch. Ca. 138; Fearns *v.* Young, 10 V. 184; *Re* Price, 31 C. D. 485.

(*i*) Per Lord *Kingsdown* in Lovat *v.* Fraser, L. R. 1 H. L. Sc. 37; and see Courtney *v.* Rumley, 6 Ir. R. Eq. 99. See as to costs of improper litigation, Brown *v.* Burdett, 40 C. D. 244; *Re* Scowby, (1897) 1 Ch. 741; Lewin on Trusts, 12th edit., pp. 790 et seq., and as to cost of administration proceedings necessitated by trustees' gross and indefensible neglect to deliver accounts, *Re* Skinner, (1904) 1 Ch. 289. And see generally as to a trustee's costs, R. S. C. (1883), O. LXV., r. 1; Annual Practice (1912), Vol. I., pp. 1138 et seq.

(*k*) Brocksopp *v.* Barnes, 5 Madd. 90; Barrett *v.* Hartley, 2 Eq. 789.

(*l*) Forster *v.* Ridley, 4 De G. J. & S. 452.

(*m*) Burden *v.* B., 1 V. & B. 170; 12 R. R. 210; Stocken *v.* Dawson, 6 B. 371.

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will not, except under an authority contained in the instrument creating the trust (*a*), or a contract with his *cestui que trust* (see infra, p. 621) be entitled to make a profit out of his trust by his professional business.

Thus a broker (*b*) or a factor acting as executor is not entitled to make any profit (*c*), nor is a commission agent (*d*), nor is an executor and trustee acting as auctioneer in the sale of the trust property (*e*), nor can a solicitor or his firm charge his *cestui que trust* save for expenses and costs out of pocket (*f*).

This rule was applied to the case of an assignee of a bankrupt who had acted as solicitor to the fiat (*g*), and will be applied, although the business was done by a trustee's partner who himself was not a trustee (*h*), and if a trustee being a solicitor take a security for professional charges connected with the trust it may be set aside even against a purchaser for value if with notice (*i*).

Only such proportion of a town agent's costs will be allowed as he is entitled to (*k*), and not the proportion belonging to the country solicitor, or by agreement to be paid to him (*l*).

It seems, however, that where by an agreement between solicitors in partnership, one of them, being a trustee, is not to participate in the profits or to derive any benefit from business done for the trust, he may employ his partner as solicitor to the trust, and pay him the ordinary charges (*m*), and under peculiar circumstances an enquiry may be directed to give some ascertained remuneration or compensation to a trustee for his loss of time and trouble (*n*).

Many cases arose before the Mortgagees' Legal Costs Act, 1895 (*o*),

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(*a*) Douglas *v.* Archbutt, 2 De G. & J. 148.

(*b*) Arnold *v.* Garner, 2 Ph. 231.

(*c*) Scattergood *v.* Harrison, Mos. 128.

(*d*) Sheriff *v.* Axe, 4 Russ. 33.

(*e*) Kirkman *v.* Booth, 11 B. 273.

(*f*) See *Re* Barber, 31 C. D. 665, 34 C. D. 77; *Re* Pooley, 40 C. D. 1; New *v.* Jones, 1 Hall & T. 632 (n.); Bainbrigge *v.* Blair, 8 B. 588; Todd *v.* Wilson, 9 B. 486; Pollard *v.* Doyle, 1 Dr. & Sm. 319; Collins *v.* Carey, 2 B. 129. See *Re* Corsellis, 34 C. D. 678. Annual Practice (1912), Vol. ii., p. 535.

(*g*) *Ex p.* Newton, 3 De G. & Sm. 584.

(*h*) Christophers *v.* White, 10 B. 532.

(*i*) Gomley *v.* Wood, 3 Jo. & Lat. 678.

(*k*) Burge *v.* Brutton, 2 Ha. 373.

(*l*) *Re* Corsellis, 33 C. D. 160, 34 C. D. 675.

(*m*) Clack *v.* Carlon, 30 L. J. Ch. 639; 7 Jur. (N. S.) 441. And see *Re* Doody, (1893) 1 Ch. 130.

(*n*) Marshall *v.* Holloway, 2 Swans. 432; Bainbrigge *v.* Blair, 8 B. 595; *Re* Freeman's Settlement Trusts, 37 C. D. 148; and see Lewin, Trusts, 12th edit. 785.

(*o*) 58 & 59 Vict. c. 25; and see Annual Practice (1912), Vol. ii., pp. 534, 535.

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with respect to the right of a solicitor-mortgagee to charge profit costs whether with or without any agreement for charges in the mortgage (*a*).

Although a solicitor made party to a cause as trustee, who either acts for himself or employs his partner to do so, will be allowed his costs out of pocket only (*b*), it was held by Lord *Cottenham* in *Cradock* v. *Piper* (*c*), affirming *Shadwell*, V.-C. (*d*), that the circumstance of a solicitor being a trustee will not prevent him from receiving his usual costs, where he acts as solicitor in a suit for any of the *cestuis que trust*, or where he acts for himself and his co-trustees jointly, provided the costs are not increased by his being one of the parties for whom such joint appearance is made.

Cradock v. *Piper* has been disapproved of (*e*), but in the recent case of *Re Corsellis* (*f*), the Court of Appeal held that it has been acted on so long that it must be considered a binding authority applicable whether the proceedings against the trustee are hostile or friendly, such as an application in Chambers for maintenance of an infant. Where, however, the solicitor trustee or his firm act for the receiver appointed in an action for the administration of the trust, the solicitor trustee must account for any profit costs received by himself or his firm for so acting (*g*). But it does not apply to the case of a solicitor trustee who acts for himself and co-trustee in the administration of the trust estate out of Court (*h*).

Where a solicitor trustee is a defendant as trustee, and is held entitled to his costs, the course of the Court is to direct them to be taxed as between solicitor and client (*i*).

Where an action is brought against a solicitor in his private capacity, not as trustee, and he defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary (*k*).

(*a*) See note to Howard *v.* Harris, ante, pp. 28, 30, and Maxwell *v.* Tipping, (1903) 1 Ir. R. 498.

(*b*) Lyon *v.* Baker, 5 De G. & Sm. 622; Pollard *v.* Doyle, 1 Dr. & Sm. 319.

(*c*) 1 Hall & T. 617 and 628, 1 Mac. & G. 664.

(*d*) 17 Si. 41. And see Fraser *v.* Palmer, 4 Y. & C. Ex. 517.

(*e*) Bainbrigge *v.* Blair, 8 B. 588, and Manson *v.* Baillie, 2 Macq. 80.

(*f*) 34 C. D. 675, and see *Re* Barber, 31 C. D. 665, 34 C. D. 77; *Re* Pooley, 40 C. D. 1.

(*g*) *Re* Corsellis, supra.

(*h*) Lincoln *v.* Windsor, 9 Ha. 158; Broughton *v.* B., 2 Sm. & Gif. 422, 5 De G. M. & G. 160; cf. *Re* Doody, (1893) 1 Ch. 129.

(*i*) York *v.* Brown, 1 Coll. 260.

(*k*) The London Scottish Benefit Society *v.* Chorley, 13 Q. B. D. 872, affirming S. C. 12 Q. B. D. 452.

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In *Re Sharpe* (*a*), after taxation and payment of costs in an administration action, part of these costs was handed by the solicitors to one of the executors, who was a solicitor, in pursuance of an agreement between him and the solicitors. *North*, J., although he held that they could not be recovered in a summons in the administration, expressed the opinion that there could be no answer to a separate action for them and gave leave to take proceedings.

In *Vipont* v. *Butler* (*b*), on similar facts, *Chitty*, J., held that if the solicitor had been solicitor on the record he would have been entitled to the profit costs on the rule in *Cradock* v. *Piper* (*c*), but that as he was not solicitor on the record he was not entitled, as this was a profit obtained from his office of trustee.

A solicitor trustee is not obliged to account for any profits which he may have made professionally by his charges against a mortgagor upon the security of whose property he advanced moneys belonging to the trust (*d*).

The case of *Re Corsellis* (*e*) is a good illustration of the rule and of exceptions to it.

A general release where the *cestui que trust* has been assisted by an independent solicitor may prevent a *cestui que trust* from insisting upon his right to have a settled account opened against a solicitor trustee, although he may have charged for professional services (*f*). *Secus*, if he had not such assistance (*g*).

Commission to Agents and Sub-Agents.—An agent for sale or purchase cannot take a commission from the other party (*h*), and if when employed to purchase he sells his own goods to his principal and makes a profit, his principal will be entitled to it (*i*). His partner will also be liable if he have notice of the agency (*k*). A sub-agent who is aware that his principal is only an agent stands in

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(*a*) (1891) 2 Ch. 360.

(*b*) (1893) W. N. 64.

(*c*) 1 Mac. & G. 664, ante.

(*d*) Whitney *v.* Smith, L. R. 4 Ch. 513.

(*e*) 34 C. D. 675.

(*f*) Stanes *v.* Parker, 9 B. 385; *Re* Sherwood, 3 B. 338, 341.

(*g*) Todd *v.* Wilson, 9 B. 486, and see Barrett *v.* Hartley, 2 Eq. 789.

(*h*) Williamson *v.* Barbour, 9 C. D. 529; Boston Deep Sea Co. *v.* Ansell, 39 C. D. 339; Lister *v.* Stubbs, 45 C. D. 1; Archer's case, (1892) 1 Ch. 332; Hippisley *v.* Knee Brothers, (1905) 1 K. B. 1; Nitedals *v.* Bruster, (1906) 2 Ch. 671.

(*i*) See note to Fox *v.* Mackreth, post, and see Turnbull *v.* Garden, 38 L. J. Ch. 331, 334; Kimber *v.* Barber, L. R. 8 Ch. 56; Morison *v.* Thompson, L. R. 9 Q. B. 480; Massey *v.* Davies, 2 V. 317, 2 R. R. 218; Norreys *v.* Hodgson, 13 T. L. R. 421.

(*k*) Ibid.

a fiduciary relation to the ultimate principal, and must account to him for any commission received from a third person (*a*).

Subject to the exceptions mentioned infra, p. 620, agents are not permitted to receive a commission *without the knowledge of their principals*, in cases of contract (*b*); see as to the common case of a solicitor receiving commission on premiums paid on policies (*c*); of the purchase of shares (*d*), or of a ship (*e*); and as to directors (*f*). A member of an official commission or committee employed by the public may not make a profit by means of his membership, as, for instance, by taking out a patent founded on the results of their official investigation conducted at the public cost (*g*).

A general order of the Court of Madras authorised the registrar of the Court to institute proceedings in certain cases on behalf of infants, and it appeared that the registrar was entitled to receive fees upon proceedings in such suits, as well as a commission upon the amount of moneys paid into Court; the Judicial Committee of the Privy Council held that such general order was void, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest (*h*).

In *Attorney-General* v. *Edmunds* (*i*), it was held by *Giffard*, L. J., that the clerk of patents was liable to account for any profit made on the purchase of stamps purchased with public moneys, but not on the purchase of stamps made with his own money. So in *Shallcross* v. *Oldham* (*k*), where the master of a ship having authority to employ the vessel or freight to the best advantage, but not to purchase a cargo on the owner's account, being unable to procure

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(*a*) Powell & Thomas *v.* Evan Jones & Co., (1905) 1 K. B. 11.

(*b*) Harrington *v.* Victoria Graving Dock, 3 Q. B. D. 549, and referred to in Reg. *v.* Justices of Gt. Yarmouth, 8 Q. B. D. see p. 528; Lister *v.* Stubbs, 45 C. D. 1; Erlanger *v.* The New Sombrero Phosphate Co., 3 A. C. 1218; Bagnall *v.* Carlton, 6 C. D. 371; Salomon *v.* Salomon & Co., (1897) A. C. 22; Lagunas Nitrate, &c. *v.* Lagunas Syndicate, (1899) 2 Ch. 392.

(*c*) Copp *v.* Lynch, L. J. N. of C., 1882, p. 179; Norreys *v.* Hodgson, supra.

(*d*) *Re* Stapleford Colliery Co., 49 L. J. Ch. 253; and see *Re* Stapleford Colliery Co. (Barrow's Case), 14 C. D. 432; 49 L. J. Ch. 498.

(*e*) Morison *v.* Thompson, L. R. 9 Q. B. 480.

(*f*) Emma Silver Mining Co. *v.* Grant, 11 C. D. 918; Gluckstein *v.* Barnes, (1900) A. C. 240; Burland *v.* Earle, (1902) A. C. 83.

(*g*) Patterson *v.* Gas Light & Coke Co., 2 C. D. 812; 3 A. C. 239.

(*h*) Kerakoose *v.* Serle, 4 Moo. P. C. 459.

(*i*) 6 Eq. 381.

(*k*) 2 John. & H. 609; and see Gardner *v.* M'Cutcheon, 4 B. 534.

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remunerative freight loaded the ship with a cargo of his own; *Wood*, V.-C. held that he was liable to account to the owners for all profit made by the sale of the cargo, and not merely for the proper freight.

In the absence of agreement express or implied, a part owner or partner in ships who acts as ship's husband is not entitled to charge the usual commission (*a*). But an exception has been allowed when the managing owner of a ship acts as broker to the ship, according to the custom of shipowners or otherwise (*b*).

In *Waters* v. *Earl of Shaftesbury* (*c*), the agent of a landowner contracted with the Land Drainage Company, under their Act (*d*), to execute the drainage works as agent and surveyor of the company (the landowner finding money for the purpose, and being paid an agreed amount by the company): it was held that notwithstanding the apparent terms of the contract it might be shown that the agent was not the real contractor, and was not entitled to any profit on the contract.

It is not illegal for a member of the legislature who is also a landowner to make an agreement with respect to opposing a bill in Parliament (*e*). But a member of a body not of a governing or legislative character may not make a bargain for his own advantage, contrary to his duty (*f*).

Profits made in Trade, &c.—If a trustee or executor improperly keeps in his possession trust money which ought to have been invested or paid over to the person entitled to it, although it be not shown that he made a profit by so doing and although it be not claimed (*g*), he will be charged interest at a rate which may be varied at the discretion of the Court (*h*). But it is to be observed that even if he has not retained or made profit out of, but merely wrongly applied trust funds, he is charged with interest (*i*).

In general a trustee or executor is not charged with more than

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(*a*) Miller *v.* Mackay, 31 B. 77.

(*b*) Smith *v.* Lay, 3 K. & J. 105.

(*c*) L. R. 2 Ch. 231.

(*d*) 12 & 13 Vict. c. 91.

(*e*) Lord Howden *v.* Simpson, 1 Ry. Cas. 347; S. C. 10 Ad. & E. 793 and 807, S. C. 9 Cl. & Fin. 61. See also Lord Petre *v.* The Eastern Counties Ry., 1 Ry. Cas. 462. See, however, Vauxhall Bridge Co. *v.* Earl Spencer, 2 Madd. 356, Jac. 64; Earl of Shrewsbury *v.* North Staffordshire Ry., 1 Eq. 593; Lindsey *v.* G. N. Ry., 10 Ha. 664; Hawkes *v.* E. Co. Ry. Co., 5 H. L. Cas. 331; 1 De G. M. & G. 737; 3 De G. & Sm. 743.

(*f*) Bowes *v.* City of Toronto, 11 Moo., P. C. 463; Bray *v.* Ford, (1896) A. C. 44.

(*g*) Pearse *v.* Green, 1 J. & W. 135; Johnson *v.* Prendergast, 28 B. 480; Blogg *v.* Johnson, L. R. 2 Ch. 229.

(*h*) Tebbs *v.* Carpenter, 1 Madd. 290, 306; Blogg *v.* Johnson, L. R. 2 Ch. 228.

(*i*) *Re* Hulkes, 33 C. D. 552; *Re* Sharpe, (1892) 1 Ch. 169.

4*l.* per cent. upon the balances in his hands (*a*). But if it can be made to appear that he has actually made a greater rate of interest than 4*l.* per cent. he will be compelled to account according to the rate made (*b*). Where, however, he has employed the moneys in his trade, or has been guilty of misconduct, he is chargeable at the option of the *cestui que trust* either with the profits made or with 5*l.* per cent. compound interest (*c*).

If a trustee or executor employ the trust funds in a trade or adventure of his own, whether he keeps them separate from or mixes them with his own private moneys, and notwithstanding the difficulties which in the latter case may arise in taking the accounts, the *cestui que trust* may insist upon having at his option the profits made by or interest on the amount of the trust funds so employed (*d*).

Should serious difficulty arise in tracing and apportioning the profits derived by a trustee or executor from the employment of trust funds together with his own, in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits ; and it seems the Court would allow interest at 5*l.* per cent. per annum, with yearly rests, that is, with compound interest (*e*), and the same interest will be charged if the trustee or executor who is a trader pays the trust fund into his own account at his bankers (*f*), unless he can show that he has not had the benefit thereof in his trade (*g*).

As the business of a solicitor is not a trade in which compound interest is made on the money employed therein, compound interest

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(*a*) Court *v.* Robarts, 6 Cl. & Fin. 65 ; A.-G. *v.* Alford, 4 De G. M. & G. 843 ; Penny *v.* Avison, 3 Jur. (N. S.) 62 ; Stafford *v.* Fiddon, 23 B. 586 ; Johnson *v.* Prendergast, 28 B. 480 ; *Re* Emmet's Estate, 17 C. D. 142.

(*b*) Forbes *v.* Ross, 2 Cox, 116 ; *Re* Emmet's Estate, 17 C. D. 142, and see cases cited note (*d*), infra ; *Re* Davis, (1902) 2 Ch. 314.

(*c*) *Re* Davis, (1902) 2 Ch. 314 ; Burdick *v.* Garrick, L. R. 5 Ch. 233.

(*d*) Docker *v.* Somes, 2 My. & K. 655 ; see also Piety *v.* Stace, 4 V. 620 ; Palmer *v.* Mitchell, 2 My. & K. 672 (n.) ; Wedderburn *v.* W., 2 Keen, 41 ; 4 My. & C. 41 ; 22 B. 84, 100, 124 ; Fosbrooke *v.* Balguy, 1 My. & K. 226 ; Willett *v.* Blanford, 1 Ha. 253 ; Portlock *v.* Gardner, 1 Ha. 603 ; Parker *v.* Bloxam, 20 B. 295 ; Townend *v.* T., 1 Gif. 201 ; Cummins *v.* C., 8 Ir. R. Eq. 723 ; Robinson *v.* R., 1 De G. M. & G. 257 ; *Re* Davis, (1902) 2 Ch. 314 ; and see Seton (1901), Vol. ii. pp. 1165, 1166.

(*e*) Jones *v.* Foxall, 15 B. 392 ; Heighington *v.* Grant, 5 My. & C. 258, 2 Ph. 600 ; Walrond *v.* W., 29 B. 586 ; Saltmarsh *v.* Barrett (No. 2), 31 B. 349.

(*f*) Williams *v.* Powell, 15 B. 461, 468 ; Sutton *v.* Sharp, 1 Russ. 146 ; Rocke *v.* Hart, 11 V. 61 ; *sed vide* Browne *v.* Southouse, 3 Bro. Ch. 107.

(*g*) Williams *v.* Powell, 15 B. 461 469.

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will not be charged on trust moneys paid by a solicitor into the account of his firm, but only interest at 5*l.* per cent. (*a*).

Where, however, a testator directs an accumulation to be made, and the executors keep the money in their hands, contrary to the express direction of the will, they will be charged with compound interest (*b*).

If a person is merely a constructive trustee, from having employed the money of another in trade or business, and does not expressly fill any fiduciary character, although he must account for the profits of the money he employed, he will, if there is a profit, have an allowance made to him for his loss of time, skill, and trouble (*c*), *secus*, if no profit (*d*).

Partnership.—Partners stand in a fiduciary relation to each other (*e*), and where on the termination of a partnership, as by bankruptcy (*f*), death (*g*), or effluxion of time (*h*), the continuing or surviving partner, instead of winding up the business, retains the assets of his former partner, he will be decreed to account for the profits derived from them (*i*), but proper allowances will be made to him out of the profits for his management of the business (*k*). If no profits have been made, the surviving partner will not be entitled to any allowance (*l*), neither will he be so entitled if he is also the executor of the deceased (*m*). When the articles of partnership contain a clear absolute contract for the purchase of the share of the deceased partner by the surviving partner, who is appointed executor

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(*a*) Burdick *v.* Garrick, L. R. 5 Ch. 233.

(*b*) Raphael *v.* Boehm, 11 V. 92, 13 V. 407, 590; Knott *v.* Cottee, 16 B. 77; *Re* Barclay, (1899) 1 Ch. 674, in which 3 per cent was charged, but see *Re* Davy, (1908) 1 Ch. 61 (C. A.), from which it appears that 4 per cent. is chargeable.

(*c*) Brown *v.* Litton, 1 P. W. 140, 10 Mod. 20; see also Brown *v.* De Tastet, Jac. 284; Burden *v.* B., 1 V. & B. 170; Yates *v.* Finn, 13 C. D. 839.

(*d*) *Re* Aldridge, (1894) 2 Ch. 97.

(*e*) Bentley *v.* Craven, 18 B. 75; Parsons *v.* Hayward, 31 B. 199; Knox *v.* Gye, L. R. 5 H. L. 656, per Lord *Hatherley*, C., Lord *Westbury*, contra; Friend *v.* Young, (1897) 2 Ch. 421, but see Partnership Act, 1890, s. 43.

(*f*) Crawshay *v.* Collins, 15 V. 218, 10 R. R. 61; 1 J. & W. 267.

(*g*) Brown *v.* De Tastet, Jac. 284, 23 R. R. 59; Wedderburn *v.* W., 2 Keen, 722, 4 My. & C. 41; Flockton *v.* Bunning, L. R. 8 Ch. 323 (n.).

(*h*) Crawshay *v.* Collins, 15 V. 227.

(*i*) See Partnership Act, 1890, s. 42 (1).

(*k*) Featherstonehaugh *v.* Fenwick, 17 V. 298; Cooke *v.* Collingridge, Jac. 607; Brown *v.* De Tastet, Jac. 284; 23 R. R. 59; Mellersh *v.* Keen, 27 B. 242; Vyse *v.* Foster, L. R. 7 H. L. 318, 329; Harris *v.* Sleep, (1897) 2 Ch. 80; Smith *v.* Nelson, 92 L. T. 313.

(*l*) *Re* Aldridge, (1894) 2 Ch. 97.

(*m*) Burden *v.* B., 1 V. & B. 170; 12 R. R. 210; Stocken *v.* Dawson, 6 B. 371.

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by the deceased, then that contract, provided it is carried into effect in all material particulars, determines conclusively the rights and liabilities of the surviving partner (*a*). In that case, accordingly, the surviving partner, although he is an executor, is under no liability to account, but if a surviving partner has merely an option to purchase, then, unless that option is strictly exercised, his liability to account is unaffected (*b*).

Where profits made after the decease of a partner are in no way attributable to the assets of the deceased, then, though no account has been taken as on the death of the deceased partner, there will be no liability to account (*c*).

It frequently happens that, though the articles of partnership contain no provisions for the acquisition of the share of a deceased partner by the survivors, and though the will of the deceased contains no provision authorising his executors or trustees to leave his share of the partnership assets in the partnership, yet the executor or trustee either leaves the deceased's share in the hands of the surviving partners, or leaves in their hands capital forming part of the deceased's estate. The liability of the executor or trustee in cases of this character is clear; whether he is or is not a member of the firm, he will be liable to account for the assets or capital, together with, at the option of the beneficiaries, either the share of the profits attributable to the assets or capital of the deceased, or interest thereon, at 5 per cent. compound interest (*d*). He is not, however, liable to account for all the profits made by the firm with the assets or moneys (*e*). The law as to the position of the partners is not so clear. If an executor or trustee without authority lends trust money to third persons who are partners, and who receive it, then, though they may know that it is trust money and that the loan was made without authority, still the partners are only liable for interest and are not accountable to the *cestuis que trust* for profits (*f*). Where, however, an executor or

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(*a*) Vyse *v.* Foster, L. R. 8 Ch. 309; L. R. 7 H. L., per *Cairns*, C., at p. 329; Hordern *v.* H., (1910) A. C. 465; Dinham *v.* Bradford, L. R. 5 Ch. 519.

(*b*) Vyse *v.* Foster, L. R. 7 H. L. p. 329.

(*c*) Simpson *v.* Chapman, 4 De G. M. & G. 154; Wedderburn *v.* W., 2 Keen 722; 4 My. & Cr. 41; Featherstone *v.* Turner, 25 B. 382.

(*d*) Jones *v.* Foxall, 15 B. 388; Vyse *v.* Foster, L. R. 8 Ch. 333, 334; and see Smith *v.* Nelson, 92 L. T. 313.

(*e*) Vyse *v.* Foster, supra.

(*f*) Stroud *v.* Gwyer, 28 B. 130 approved in Vyse *v.* Foster, L. R. 8 Ch. per *James*, L. J., at p. 334. See also Macdonald *v.* Richardson, 1 Gif. 81; Townend *v.* T., 1 Gif. 210; and cf. Simpson *v.* Chapman, 4 De G. M. & G. 154; Butler *v.* B., 7 C. D. 116; *Re* Gurney, (1893) 1 Ch. 590.

trustee, X., joins with other persons, Y. and Z., in employing trust moneys or properties in carrying on business in partnership, then if Y. and Z. have notice of the breach of trust involved in that employment of the assets or capital, they will be liable, as constructive trustees, to account with X., the executor or trustee to the beneficiaries or *cestuis que trust* for the profits (*a*). On the other hand, if they had no notice of the trusts they would be under no liability to the *cestuis que trust* or beneficiaries.

If one of the partners has notice of the breach of trust, but the others have not, then unless it be within a partner's implied authority in a business of the character carried on, that he should so act as to make himself a constructive trustee, the other partners will not be liable (*b*).

Miscellaneous Cases.—A person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of a lease, or by selling to or purchasing from his *cestui que trust* (*c*). And the principle is applicable to receivers (*d*) and committees of lunatics' estates (*e*). And as to the disability of a solicitor remaining after the relation has ceased see note (*f*).

A compromise by executors of a debt due from one of themselves will only be allowed if beneficial to the estate (*g*).

A trustee may not make a profit by selling the office of trustee (*h*), and will not be allowed to have the sporting over the trust estate, nor to appoint gamekeepers to preserve the game for his own

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(*a*) Flockton *v.* Bunning, L. R. 8 Ch. 323 (n.), in which the distinction between a loan to a partnership and employment of moneys in a partnership drawn in Travis *v.* Milne, 9 Ha. 141, is explained by *Selwyn*, L. J., at p. 326.

(*b*) See Partnership Act, 1890, s. 11, and Marsh *v.* Keating, 2 Cl. & F. 250, 289; 37 R. R. 75, 106. See this case commented upon in Lindley on Partnership, 7th Edit., p. 193; discussed Jacobs *v.* Morris, (1902) 1 Ch. 816 (C. A.); and see Blyth *v.* Fladgate, (1891) 1 Ch. 337; Rhodes *v.* Moules, (1895) 1 Ch. 236; Cleather *v.* Twisden, 28 C. D. 340; Mara *v.* Browne, (1896) 1 Ch. 199; Tendring Hundred Waterworks Co. *v.* Jones, (1903) 2 Ch. 615.

(*c*) See Keech *v.* Sandford, and Fox *v.* Mackreth, post; and see Chandler *v.* Bradley, (1897) 1 Ch. 315. *Re* Handman & Wilcox, (1902) 1 Ch. 599, as to fiduciary position of a tenant for life in leasing under the S. L. A. 1882, sect. 6 (2).

(*d*) *Re* Ormsby, 1 Ball & B. 189.

(*e*) Anon., 10 V. 103.

(*f*) Luddy's Trustee *v.* Peard, 33 C. D. 500, see p. 517, and Carter *v.* Palmer, 8 Cl. & Fin. 657.

(*g*) De Cordova *v.* De C., 4 A. C. 692. But see *Re* Houghton, (1904) 1 Ch. 622; Trustee Act, 1893, sect. 21.

(*h*) Sugden *v.* Crosland, 3 Sm. & G. 192.

amusement (*a*). So trustees of an advowson must exercise the right of presentation upon the nomination of the heir at law or *cestui que trust* (*b*).

The directors of a company do not, however, stand in any fiduciary relation to strangers who deal with the company on this ground. In *Bath* v. *Standard Land Co.* (*c*), where the defendant company undertook for a remuneration to manage the estates of the plaintiff, it was held that the company could properly charge the plaintiff with sums paid to directors who acted, respectively, as solicitor, estate agent, and auctioneer in the management of the estate, at a personal profit to themselves (*d*).

Chairmen, directors, secretaries, and promoters of companies stand in a fiduciary relation towards the company (*e*).

In *Mayor, &c. of Salford* v. *Lever* (*f*), it was decided that, where an agent, bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies; he may recover from the agent the amount of the bribe received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether he sues the agent or the third person first.

Trustees who are bankers cannot, in their capacity of trustees, borrow money from themselves as bankers at compound interest, although they habitually lend money on those terms to other customers (*g*).

Where trustees hold shares belonging to the trust, and they are appointed directors of the company in respect of such holding, and there is no provision in the will enabling them to retain

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(*a*) Webb *v.* Earl of Shaftesbury, 7 V. 488; Hutchinson *v.* Morritt, 3 Y. & C. Ex. 547.

(*b*) Sherrard *v.* Harborough, Amb. 165; Hawkins *v.* Chappel, 1 Atk. 621; Martin *v.* M., 12 Si. 579.

(*c*) (1911) 1 Ch. 618 (C. A.), disapproving Kavanagh *v.* Workingman's Benefit, &c., (1896) 1 Ir. R. 56.

(*d*) Cf. *Re* Dover Coalfield, &c., Ltd., (1908) 1 Ch. 65; *Re* Lewis, 103 L. T. 495.

(*e*) See notes to Fox *v.* Mackreth, post. See, *e.g.*, Benson *v.* Heathorn, 1 Y. & C. Ch. 326; Great Luxemburg Ry. Co. *v.* Magnay, 25 B. 586; Imperial Mercantile Credit Assn. *v.* Coleman, L. R. 6 H. L. 189; James *v.* Eve, L. R. 6 H. L. 325, 349; *Re* Imperial Land Co. of Marseilles, 4 C. D. 566; Erlanger *v.* New Sombrero Phosphate Co., 3 A. C. 1218; Gluckstein *v.* Barnes, (1900) A. C. 240.

(*f*) (1891) 1 Q. B. 168.

(*g*) Crosskill *v.* Bower, 32 B. 86.

their remuneration as such directors for their own benefit, they must account for such remuneration to the trust, and the remuneration is to be treated as capital and will go to the remaindermen as an accretion to their shares (*a*).

3. Exceptions to the General Rule (*b*).

By General Law.—There have been some exceptions to the above rule in respect of allowing commissions to trustees and guardians managing the estates of West Indian proprietors (*c*), and to a trustee not acting, but ready and willing to act when called upon by his co-trustee under the Jamaica Act, 24 Geo. 2, c. 19, s. 8 (*d*), and see as to the rights of mortgagees, *Leith* v. *Irvine* (*e*), and as to consignees and mortgagees of West Indian produce, *Chambers* v. *Davidson* (*f*).

So, an executor appointed in the East Indies was formerly entitled in passing his accounts in the Courts of Equity in this country to the commission of 5*l.* per cent. upon the receipts or payments according to the practice in the East Indies (*g*).

But an Indian executor would not have been entitled to commission if he had a legacy for his trouble (*h*); but he would be permitted to renounce the legacy in order to claim the commission, unless he allowed a long time to elapse before so renouncing (*i*).

But no commission will now be allowed to an Indian executor unless expressly given to him by the testator (*k*).

A small indirect benefit to a trustee from the application of trust property has been held not sufficient to make the transaction improper (*l*).

By Provision in Will, &c.—The testator or settlor may authorise the trustee to make professional charges (*m*); or for business not of

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(*a*) *Re* Francis, 74 L. J. Ch. 198; cf. *Re* Dover Coalfield, &c., Ltd., (1908) 1 Ch. 65; *Re* Lewis, 103 L. T. 495.

(*b*) See also (nn.) "Employment of Agents," "Allowances," p. 608, supra.

(*c*) Chambers *v.* Goldwin, 5 V. 834, 9 V. 254, 257, 267, 273; Denton *v.* Davy, 1 Moo., P. C. 15 and see Henekell *v.* Daly, Ib. 51.

(*d*) Grant *v.* Campbell, 1 Moo., P. C. 43.

(*e*) 1 My. & K. 277.

(*f*) L. R. 1 P. C. 296.

(*g*) Chatham *v.* Lord Audley, 4 V. 72.

(*h*) Freeman *v.* Fairlie, 3 Mer. 24.

(*i*) Ibid. 24, 28.

(*k*) See note to Matthews *v.* Bagshaw, 14 B. 126.

(*l*) See Butler *v.* B., 5 C. D. 554, 7 C. D. 116; Chillingworth *v.* Chambers, (1896) 1 Ch. 685; Stroud *v.* Gwyer, 28 B. 130; Vyse *v.* Foster, L. R. 8 Ch. 309, L. R. 7 H. L. 318; Hordern *v.* H., (1910) A. C. 465.

(*m*) See *Re* Bedingfield, 57 L. T. 332; *Re* Barber, 31 C. D. 665; *Re* Pooley, 40 C. D. 1, and pp. 621, 622, infra.

a strictly professional nature (*a*). Where, however, the solicitor trustee witnesses the will, the direction that he may charge will be void under the Wills Act (*b*).

So a testator may, as was admitted by *Jekyll*, M. R., in the principal case, direct generally compensation to be made to an executor or trustee, for his care and trouble; or he may himself fix it at a particular sum or a salary (*c*). And where the testator gave such a direction but did not fix the amount, a reference has been directed to settle a proper allowance (*d*).

An annuity given to an executor for his trouble until a general settlement of the testator's affairs does not cease upon the mere institution of a suit (*e*), it not being shewn that the trouble of the executors has ceased. A trustee's annuity ceases upon the determination of all active duties by the payment of the whole of the trust fund to a person absolutely entitled, without a devolution of the office of trustee upon any other person (*f*).

If an executor do not act, even if he be rendered incapable of so doing by act of God, he is not entitled to a legacy given to him for his trouble in the executorship (*g*).

By Agreement.—Trustees or executors may at the time of accepting the trusts, contract with their *cestui que trust* to receive some compensation, or to make professional charges for acting (*h*), but such contract, unless perfectly fair and without any undue pressure, would not be enforced (*i*).

And even if a trustee makes a valid contract with his *cestui que trust* for compensation for the trouble incident to the trust, it will not be allowed if the trustee, in consequence of his death or otherwise, fail to complete his contract (*k*).

Nor will a contract by a trustee with his *cestui que trust* for professional charges be enforced unless, in distinct terms, it takes

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(*a*) *Re* Ames, 25 C. D. 72; cf. *Re* Fish, (1893) 2 Ch. 413; Clarkson *v.* Robinson, (1900) 2 Ch. 722. *Re* Chalinder & Herington, (1907) 1 Ch. 58.

(*b*) Cf. *Re* Barber, *Re* Pooley, *Re* Fish, supra.

(*c*) Webb *v.* Earl of Shaftesbury, 7 V. 480, 6 R. R. 154.

(*d*) Ellison *v.* Airey, 1 Ves. Sen. 115; Willis *v.* Kibble, 1 B. 559; Jackson *v.* Hamilton, 3 Jo. & Lat. 702.

(*e*) Baker *v.* Martin, 8 Si. 25.

(*f*) Hull *v.* Christian, 17 Eq. 546.

(*g*) Hanbury *v.* Spooner, 5 B. 630; *Re* Hawkin's Trusts, 33 B. 570; Slaney *v.* Watney, 2 Eq. 418.

(*h*) *Re* Sherwood, 3 B. 338; Barrett *v.* Hartley, 12 Jur. (N. S.) 426; *Re* Wyche, 11 B. 209.

(*i*) Ayliffe *v.* Murray, 2 Atk. 58.

(*k*) Gould *v.* Fleetwood, Mich. 1732, at the Rolls, 3 P. W. 251 (n.) (*a*), 2 Eq. C. Abr. 453, pl. 8.

the trustee out of the general rule (*a*), or, by clear implication, he be authorised to make professional charges (*b*).

As a rule, a power to charge will only give a solicitor executor charges for strictly professional work (*c*), or such charges and remuneration as if he, not being himself a trustee or executor, were employed by the trustee or executor (*d*). But the direction may be sufficient to include costs and charges for other business (*e*), and even profits made on sales by the trustees selling as traders to themselves as trustees (*f*). Powers of this nature ought only to be inserted in instruments upon express instructions given for the purpose by the client himself, and then it ought to be seen that he understands their effect (*g*).

In *Re Bennett* (*h*), there was a legacy of 200*l.* and wide power to charge; the Court of Appeal allowed not only professional charges, but remuneration for what was not properly solicitor's work.

A trustee may contract with the Court that he will not undertake the trust without proper compensation; and a reference will be made to chambers to ascertain and settle what would be a reasonable allowance both for his past and future services (*i*).

By the Bankruptcy Act, 1883 (*k*):

Sect. 73 (1). "Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself."

(2) "Where the trustee is a solicitor, he may contract that the remuneration for his services as trustee shall include all professional charges."

(*a*) Moore *v.* Frowd, 3 My. & C. 45, see also Matthison *v.* Clarke, 3 Dr. 3; Broughton *v.* B., 5 De G. M. & G. 160.

(*b*) Douglas *v.* Archbutt, 2 De G. & J. 148.

(*c*) Harbin *v.* Darby, 28 B. 325.

(*d*) *Re* Chapple, 27 C. D. 584, 51 L. T. 748.

(*e*) *Re* Ames, 25 C. D. 72; and see Clarkson *v.* Robinson, (1900) 2 Ch. 722; *Re* Chalinder & Herington, (1907) 1 Ch. 58; *Re* Bennett, (1893) 2 Ch. 413.

(*f*) *Re* Sykes, (1909) 2 Ch. 241.

(*g*) See per *Kay*, J., in *Re* Chapple, 27 C. D. 587; and per *Farwell*, L. J., in *Re* Sykes, (1909) 2 Ch. 241, at p. 250.

(*h*) (1893) 2 Ch. 413.

(*i*) Marshall *v.* Holloway, 2 Swans. 432; Brocksopp *v.* Barnes, 5 Madd. 90; Morison *v.* M., 4 My. & C. 215; Newport *v.* Bury, 23 B. 30, and see *Re* Bignell, (1892) 1 Ch. 59. As to a broker a mortgagee selling by order and being allowed commission, see Arnold *v.* Garner, 2 Ph. 231.

(*k*) 46 & 47 Vict. c. 52, s. 73. See Wace, Bankruptcy (1904), pp. 293, 294.

Trustee Receiver.—In *Re Bignell* (*a*), it was held by the Court of Appeal that, although the Court does not usually appoint a trustee to be receiver except on the terms of his having no remuneration, there is no inflexible rule that he shall not receive remuneration, and that the fact of the judgment not mentioning remuneration did not amount to a decision that there should not be any; that the Judge therefore had a discretion, and that no ground was shown to induce the Court of Appeal to interfere with his exercise of it (*b*).

As to remuneration for extra work done by a receiver and manager who is not strictly a trustee and has undertaken to act without salary, see *Harris* v. *Sleep* (*c*).

4. Accidental Profit, Escheat, and Executors' Act, 1830.

A trustee might formerly from accidental circumstances profit by his trust, as where the *cestui que trust* died without heirs before the Intestates Act, 1884; for in that case the lord could not claim by escheat, and, subject to the right of creditors, the trustee might retain possession by virtue of his legal title because no other person could show a title against him in equity (*d*). And the same was the case where, before the Intestates' Estates Act, 1884, land was devised to trustees upon trust to convert into money for purposes which either failed or never took effect, and the testator died without heirs (*e*).

In case of the attainder of the *cestui que trust* for felony, it seems to have been the opinion of Lord Keeper *Henley* and Sir *Thos. Clarke*, M. R., that if he were pardoned by the Crown, he might enforce the trust (*f*). Lord *Mansfield*, however, observed that he could find no clear and certain rule to go by; and yet he thought

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(*a*) (1892) 1 Ch. 59. See per Lord *Eldon*, Sykes *v.* Hastings, 11 V. 364.

(*b*) In the following cases a trustee has been appointed at a salary: Marshall *v.* Holloway, 2 Swans. 432; Morison *v.* M., 4 My. & C. 215, 224; Newport *v.* Bury, 23 B. 30; Sutton *v.* Jones, 15 V. 584; Nicholson *v.* Tutin, 3 K. & J. 159; Sykes *v.* Hastings, 11 V. 363; *Re* Freeman's T., 37 C. D. 149.

(*c*) (1897) 2 Ch. 80 (C. A.).

(*d*) Burgess *v.* Wheate, 1 Eden, 177; A.-G. *v.* Sands, Hard. 496; Tudor's L. C. Real Property, p. 219, 4th ed., Davall *v.* New River Co., 3 De G. & Sm. 394; Cox *v.* Parker, 22 B. 168. Cf. *Re* Lashmar, (1891) 1 Ch. 258.

(*e*) Taylor *v.* Haygarth, 14 Si. 8; distinguished in *Re* Bond, (1901) 1 Ch. 15; Walker *v.* Denne, 2 V. 185; Cradock *v.* Owen, 2 Sm. & Gif. 241.

(*f*) See 1 Eden, 210, 255.

Robinson v. Pett.

equity would follow the law throughout (*a*). It seems, however, doubtful whether the heir of a person executed for felony could sue the trustee (*b*). But see now 33 & 34 Vict. c. 23 (*c*), abolishing the forfeiture of lands and goods for treason and felony.

The heir of the trustee could not come into equity as plaintiff to assert his right on a failure of heirs of the *cestui que trust* (*d*). But the Court of King's Bench has by mandamus compelled the lord to admit the heir of a trustee, although he had a mere legal title (*e*).

Under the law before 1 Will. 4, c. 40, if there were nothing in a will to exclude the executors from beneficial interest, they were at law entitled to hold the residue for their own benefit (*f*). But in equity it was always a question of intention (*g*); and the recital in that statute shows that equity followed the law "unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distribution if the testator had died intestate" (*h*).

The statute 1 Will. 4, c. 40, in terms appears only to make the executor a trustee for the next of kin, and expressly to save his rights if there are no next of kin, but where there are next of kin it throws on the executor claiming to take beneficially "the necessity of showing that the testator intended something more than a trust, and indeed something to the contrary," and that the testator intended the executor to take beneficially (*i*).

The statute has made no alteration in the law except where deceased has left next of kin (*k*). If there are none, and no

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(*a*) 1 Eden, 236.

(*b*) See Br. Ab., tit. "Feff. al Us.," 34.

(*c*) See Lely's Statutes, vol. 3, "Criminal Law," p. 127.

(*d*) See 1 Eden, 212; Williams *v.* Lonsdale, 3 V. 752, 4 R. R. 149; Gallard *v.* Hawkins, 27 C. D. 298. Intestates' Estates Act, 1884, s. 4.

(*e*) The King *v.* Coggan, 6 East, 431; S. C. 2 Smith, 417; King *v.* Wilson, 10 B. & C. 80.

(*f*) See A.-G. *v.* Hooker, 2 P. W. 340; Urquhart *v.* King, 7 V. 225.

(*g*) Middleton *v.* Spicer, 1 Bro. Ch. 201; Cradock *v.* Owen, 2 Sm. & G. 241; Russell *v.* Clowes, 2 Coll. 648; Dacre *v.* Patrickson, 1 Dr. & Sm. 182; Kilford *v.* Blaney, 31 C. D. 56; Chester *v.* C., 12 Eq. 444. *Re* Glukman, (1908) 1 Ch. 552 (C. A.), in H. of L. sub nom. A.-G. *v.* Jefferys, (1908) A. C. 411; Williams, Executors (1905), p. 1218 (n).

(*h*) Williams *v.* Arkle, L. R. 7 H. L. 606, see p. 629. And see Stewart *v.* S., 15 C. D. 539, where *Jessel*, M. R., considers the effect of the statute; A.-G. *v.* Jefferys, (1908) A. C. 411.

(*i*) Per Lord *Hatherley*, Williams *v.* Arkle, p. 630.

(*k*) Taylor *v.* Haygarth, 14 Si. 8; Johnston *v.* Hamilton, 11 Jur. 777; *Re* Bacon's Will, 31 C. D. p. 463; Chester *v.* C., 12 Eq. 444.

intention to exclude the executor beneficially is shown on the will, he will be entitled as against the Crown (*a*). The Act applies only in cases where there is a bare appointment of executors, whereby *virtute officii* they would have taken beneficially under the old law (*b*). Where there is an express bequest of residue to the executor the statute does not apply (*c*).

The Intestates' Estates Act, 1884 (*d*), sect. 4, provides that when a person dies without heir and intestate as to any real estate, legal or equitable, the law of escheat shall apply to an equitable interest, as if it were a legal interest, and by sect. 7, intestacy within the Act is extended to a devise failing as to any beneficial interest (*e*). But power is given to Her Majesty to waive the right of the Crown in certain instances (sect. 6).

In *Re Wood* (*f*) a testatrix died without an heir, having devised a house of which she was legally seised in fee simple to her executors, upon trust for sale and out of the proceeds to pay her debts, funeral expenses and legacies. There was no gift of residue. *Held* that the balance after paying debts, expenses, and legacies did not belong to the executors for their own benefit, but escheated to the Crown.

As aliens could not, before the Naturalization Act, 1870 (*g*), hold lands as against the Crown, it was contended, but unsuccessfully, that trustees to whom lands were devised in trust for an alien, were entitled to hold the lands discharged from the trust. See *Barrow* v. *Wadkin* (*h*), where *Romilly*, M.R., held that the trust ought to be executed for the Crown (*i*).

An alien, although he could not hold land, was entitled to the proceeds of lands devised to trustees to sell for his benefit (*k*).

These questions will not now often arise, inasmuch as by the Naturalization Act, 1870 (*l*), (which is not, however, retrospective)

(*a*) *Re* Glukman, (1908) 1 Ch. 552, (C. A.), in H. of L., sub nom. A.-G. *v.* Jefferys, (1908) A. C. 411, and Russell *v.* Clowes, 2 Coll. 648; Read *v.* Stedman, 26 B. 495; Dacre *v.* Patrickson, 1 Dr. & Sm. 182. See Williams, Executors (1905), p. 1219 (n.).

(*b*) *Re* Roby, (1908) 1 Ch. 71; but see and cf. Love *v.* Gaze, 8 B. 472.

(*c*) Williams *v.* Arkle, L. R. 7 H. L. 606.

(*d*) 47 & 48 Vict. c. 71, s. 4. See Challis Real Property, 3rd ed., pp. 37 et seq.

(*e*) *Re* Wood, (1896) 2 Ch. 596.

(*f*) (1896) 2 Ch. 596.

(*g*) 33 & 34 Vict. c. 14.

(*h*) 24 B. 1; 3 Jur. (N. S.) 679; 5 W. R. 695.

(*i*) See also Sharp *v.* St. Sauveur, L. R. 7 Ch. 343; overruling Rittson *v.* Stordy, 3 Sm. & G. 230.

(*k*) Du Hourmelin *v.* Sheldon, 1 B. 79, 4 My. & C. 525.

(*l*) 33 & 34 Vict. c. 14, Lely, Statutes, "Alien," 7. See also the Naturalization aliens may take, acquire, hold, and dispose of property of every description like British-born subjects.

For a recent instance of permissible accidental profit, see *Re Bagnall's Trusts, Flynn* v. *Dalgleish* (a). In this case, a policy without participation in profits was held by a trustee as security for the repayment of moneys properly lent to a tenant for life under the trusts of a settlement. The trustee by the payment of an additional annual premium converted the policy into one with participation in profits, and was held entitled to the profits or bonus which ultimately became payable. It is to be observed that the policy itself was not in settlement; the policy was merely security for the moneys lent out of the settled fund.

Oaths Act, 1870, The Naturalization Act, 1872, Lely, Statutes (1894), "Alien," pp. 7—16.

(a) (1901) 1 Ir. R. 255.

TOWNLEY *v.* SHERBORNE.

1634. Bridg. Rep. 35 (*a*).

Liability for a Co-Trustee.

How far a person is liable for the acts and receipts of a co-trustee.

Upon hearing and debating of the matter, as well on the 15th as the 18th of June last, the Court being assisted with Mr. Justice *Hutton* and Mr. Justice *Jones*, upon the plaintiff's bill of review, for the reviewing and reversal of a decree made in a cause, wherein Richard Mountford, deceased, executor of Thomas Challoner, was plaintiff, against the now plaintiff, and Thomas Forster, Esquire, concerning the sum of 1,700*l.*, raised out of the rents and profits of certain lands and tenements in Linsted, Ardingley, and Worth, in the county of Sussex, in trust for the said Thomas Challoner, during his minority, and which the now plaintiff, by the decree of this Court, was to pay, in case the said Forster should fail to pay the same.

* * * * *

Argument for Plaintiff (*b*).—That the plaintiff was decreed to pay 1,700*l.* as raised out of the profits of the infant T. Challoner's lands, settled upon an account made up by the said T. Forster with the said infant after he came of age, to which account the plaintiff was neither party nor privy, nor ever consented, nor ought to be bound thereby. That the plaintiff is made liable to the payment of all the profits raised out of the said infant's estate, whereas he never received any profits. That although he gave some acquittances, yet the same were only for the three first half-years, and were but to balance an account, the moneys dispersed amounting to as much as the receipts. That there being three other trustees with him he ought not to be charged with more than he himself received,

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(*a*) S. C. Cro. Car. 312.

(*b*) Abridged from the report.

Townley v. Sherborne.

especially as the other parties trustees and who received the profits were, or were reputed to be, men of ability and responsible.

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And it appeared by the confession of the now plaintiff, and by his answer to the former bill, and by the acquittances now produced, that the now plaintiff joined with the said Thomas Forster in giving acquittances for the three first half-years' rents; but it did not appear that he ever received any after, or gave any more acquittances; but it doth appear by the proofs, that the said Thomas Challoner the uncle, who had the assignment from Lovell, did receive the rents of the tenants, and paid the same over to the said Thomas Forster; and that, when the infant came of age, he called the same Thomas Forster and Thomas the uncle to an account; and that they did account; and that the said Thomas Forster did then deliver him a book of account, which the defendant now produced in Court; by which it did appear that for the three first half-years the rents were received by the said Thomas the uncle, and by him paid to the now plaintiff and the said Thomas Forster, for the use of the infant; but for all the subsequent time the same were received by the said Thomas Challoner the uncle, and by him paid to the said Thomas Forster alone, who (as was not now denied) was at the time of such receipts generally taken to be of great ability, and responsible, as it also appeared by the proofs; that the said infant, after he came of age, had declared the said Thomas Forster to be his debtor, and did by his will, read in Court, give the said sum of 1,700*l.* to the said Mountford as a debt owing by the said Thomas Forster solely, not mentioning the now plaintiff. Upon all which this Court was fully satisfied that the now plaintiff received no penny of profits after the three first half-years; but whether he ought to be charged with all that the said Thomas Forster received, being a co-trustee with him, in respect the said Thomas Forster is now declined in his estate (as is conceived) this Court somewhat doubted.

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Whereupon his Lordship, after long and mature deliberation on the case, and serious advice with all the said Judges, did this day, in open Court, declare the resolution of his Lordship and the said Judges: That where lands or leases were conveyed to two or more upon trust, and one of them receives all, or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court to answer for the receipts of him so dying or decayed, unless some purchase, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by. And, it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale or perception of the profits; and if such of these friends, who carry themselves without fraud, should be chargeable out of their own estates for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust.

And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall, by law, charge him only, and not his co-executor; and, in that case *equitas sequitur legem*, there having been many precedents resolved in this Court, that one executor shall not answer nor be charged for the act or default of his companion.

And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, *it falling out many times that some of the trustees live far from the lands*, and are put in trust out of other respects than to be troubled with the receipt of the profits (*a*).

But his Lordship and the said Judges were of opinion, that if two trustees were, and one of them, without warrant of the party that trusteth him, or of a Court of equity, assigneth his estate, and the assignee doth receive the profits, and becometh non-solvent, he that made the assignment shall answer it for him, but the other original trustee shall answer for no more than what he receiveth himself, because the assign cometh not in by him, or his assent or appointment. And that in case, if the original trustee, that did not make the assignment, receive the whole profits and become non-solvent, neither the assignor nor the assignee shall be answerable for them.

And if an obligation be made to two in trust, and one of them

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(*a*) See Williams *v.* Nixon, 2 B. 472.

release the whole debt, as by law he may, this shall not charge his companion for any part. And albeit, in all presumption, this case hath often happened, yet no precedent hath been produced to his Lordship or the Judges, that in any such case the co-trustee hath been charged for the act or fault of his companion. And, therefore, it is to be presumed that the current and clear opinion hath gone, that he is not to be charged (it having not, till of late, been brought in question) in a case that, by all likelihood, hath frequently happened.

But his Lordship and the said Judges did resolve that if, upon the proofs or circumstances, the Court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he may be charged, though he received nothing.

And his Lordship and the said Judges did declare, that in this particular case they did not find any material proof against Mr. Townley, to make his case worse than the general case aforesaid, but rather better (except only for the three half-years' rent, which he joined in acquittance with Mr. Forster); for the receipt of the profits alone by Mr. Forster is no breach of trust in Mr. Townley; and Mr. Challoner, when he came of full age, took Mr. Forster for his debtor.

And therefore it was ordered and decreed, that so much of the said decree as chargeth Mr. Townley with any more of the profits than the three half-years, for which he joined in acquittance, shall be reversed; but as for those three half-years' profits, if the same were not disbursed or employed for the use of Mr. Challoner, then for so much thereof as hath not been so disbursed or employed, the said complainant Mr. Townley ought to be answerable, and the defendant may call the plaintiff before Mr. Page, one of the Masters of this Court, to audit the account touching these three half-years, if any difference be thereabouts. And lastly, it is ordered that the recognisances given on the plaintiff's part, to perform the order of this Court, be discharged.

BRICE *v.* STOKES.

1805. 11 V. 319; 8 R. R. 164.

Liability of Trustee for the Receipts of his Co-trustee.

A trustee charged, though he did not receive the money, where he joined in the receipt: the sale unnecessary; and permitted his co-trustee to keep and deal with the money contrary to the trust.

But not charged in respect of the interest of one of the *cestuis que trust*, having notice of the breach of trust, and acquiescing.

Distinction between trustees and executors, in favour of the former, where one who has not received the money has joined in the receipt, approved.

By the decree in this cause an account was directed of the money arising by sale of part of the testator's estates, come to the hands of Henry Mooring, John Fielder, and John Sparrow, the trustees, or their executors, &c.; and an inquiry, in what manner the purchase-money was paid, the receipts signed, and in what manner and by whom the interest was paid during the lives of Mooring and Fielder, and in whose hands the principal remained.

The Master's report stated the will of John Taylor, devising and bequeathing to his executors, Sparrow, Mooring, and Fielder, their heirs, executors, &c., all his freehold and leasehold estates, upon trust to pay the rents and profits to the testator's niece, Elizabeth Sparrow, while unmarried, and after her marriage, upon trust for her, her heirs, executors, &c.; and he gave full power to his said trustees and executors, and the survivors, &c., to sell and dispose of all or any part of the said estates; and directed the moneys arising from such sale or sales to be put out by his said trustees, or the survivors, &c., upon government or real security; and such moneys and the interest, and proceeds thereof, in the meantime, to be applied upon the trusts before directed as to the estates, and the rents, &c.; and he declared that the trustees, and the survivor, &c., should have full power and authority to make such settlement of all or such of the estates as

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should be unsold, and the money produced by the sale, as the said trustees should judge fit, on the marriage of Elizabeth Sparrow, to the use of her and her issue, and under such restrictions as his said trustees, or the survivors of them, should think fit and proper; and he directed, that his said trustees and executors should not be answerable or accountable for any loss which might happen of all or any part of his real and personal estate, so as such loss be not through their wilful neglect or default; and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults only.

The report also stated the marriage of Elizabeth Sparrow with Thomas Brice, the plaintiff, in 1783, upon which occasion a settlement was made to the separate use of Mrs. Brice for life, with remainders to her husband surviving her, for his life, and to the issue. She died leaving no issue in September, 1784. That settlement also contained a power, similar to that in the will, to the trustees to sell, with the consent of Mrs. Brice, if living, the receipt of the trustees or the survivor to be a discharge to the purchaser, and forthwith, and with all convenient speed, to invest the money in their names, upon government or real securities, &c.; with a declaration, that the trustees, their heirs, &c., should not be chargeable with, or accountable for, any more of the said trust moneys and premises, than he or they should actually receive, nor with or for any loss which should happen, of the same moneys and premises, or any part thereof, so as such loss happened without his or their wilful default; nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults.

The report further stated that, by indentures dated the 27th of November, 1784, it was witnessed, that Mooring and Fielder, in consideration of the sum of 1,260*l.* to them paid (with the approbation of Thomas Brice) by Robert Lillington, conveyed part of the freehold estate to him and his heirs; for which sum of 1,260*l.*, the said consideration-money, Mooring and Fielder respectively signed a receipt on the back of the deed. No part of that sum was laid out; but some money, by way of interest on part of it, was paid by Fielder

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to Brice. Fielder died insolvent, in April, 1794, and Mooring died in October following.

The Master certified, that, though the evidence appeared exceedingly contradictory, yet, as the receipt for the 1,260*l.*, the consideration-money, written on the back of the conveyance, was signed both by Mooring and Fielder, and witnessed by four witnesses as to the signatures by them, it must be presumed that they received such consideration-money; therefore the defendant Stokes, as executor of Mooring, and Braxton, the surviving administrator with the will annexed of Fielder, ought to be charged with the consideration-money and interest.

Exceptions were taken by the defendant Stokes to the Master's report, for charging the defendant, as executor of Mooring with the sum of 1,260*l.*, as having been received by him with Fielder, and interest.

The examination of the plaintiff Brice stated, that he was ignorant of the treaty for the sale, except that, for the purchaser's satisfaction he joined in the conveyance. Mooring resided at Christchurch, twelve miles from Lymington, where the plaintiff and Fielder resided, the latter being an attorney. The plaintiff never received any money from Mooring, but received various sums from Fielder, by way of interest for part of the trust estate. On account of Mooring's residing at a distance, the plaintiff never applied to him for any interest during the life of Fielder, but always applied to Fielder, who lived near him.

The evidence as to the fact of the payment was contradictory. Mooring's widow stated, that she was present at the execution of the conveyance, but did not see the money paid to any one. Fielder told Mooring it was necessary for him to execute the conveyance and sign the receipt, to which Mooring objected, alleging, that Fielder never consulted him in the management of the trust: but Fielder pressed him, saying, it was only matter of form, for he should receive the purchase-money, and place it in the stocks for the benefit of the children; and at length Mooring, after much hesitation, executed.

There was also evidence, that among Mooring's papers was found an account, in the handwriting of Fielder, showing that the whole of the money was received by Fielder, and the greater part invested in securities; and that, by an account discovered among Fielder's papers, it appeared that he received the money, deducted 400*l.* for legacies, retaining 860*l.*, for which he paid interest to the plaintiff.

Mr. *Romilly* and Mr. *Hart*, in support of the exceptions * * * It was indispensably necessary for the trustee to join for conformity. The distinction between the cases of an executor and a trustee, though much discussed, has never been overruled. As it is not necessary for the executor to join, his act in joining makes him liable; but as it is necessary for a trustee to join, the mere circumstance that he joins in the receipt, in order to make a title, is not sufficient to charge him, unless you go farther, and show that he actually received the money.

Mr. *Richards* and Mr. *Bell*, for the report.—This is not the ordinary case, but the case of a trustee voluntarily joining in this sale, for the mere purpose of converting real estate into personal, the personal estate being equal to all the charges, and no purpose to be answered. * * * There is no evidence that can weigh against the signature of the receipt. The paper writing by Fielder charges him, admitting that he received the money; but it does not discharge Mooring. To counteract the evidence from the receipt, he must produce the most satisfactory evidence that he joined for conformity only, and is, therefore, within the indulgence allowed to trustees * * *

Lord Chancellor Eldon.—It does not appear for what purpose this sale was made, except for the mere purpose of converting real estate into personal. If the sale was made for a purpose not authorised by the settlement, Brice, the husband, being an executing party, could not complain of that sale. The money must, upon this evidence, be taken to have been paid to Fielder.

At law, where trustees join in a receipt, primâ facie, all are to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all, was in fact received by one, and the other joined only for conformity.

In the case of executors, it has been said, and well said, to be otherwise (*a*). *An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and therefore answerable for the application, as far as it is connected with the particular transaction in which he joins.* Upon considering the cases paring down the rule of late, I repeat what I have said upon a former occasion (*b*), that it is much safer for executors to abide by a general rule of that sort than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds.

In this case it was absolutely necessary that all the trustees should join in the receipt; for the law empowering the sale is the settlement, which, in principle and terms, requires that the purchaser should not be discharged but upon the joint receipt of all. The money was not, in a strict sense, received by both trustees; for the weight of evidence is, that Mooring let Fielder, a professional man, circumvent him a little in taking into his own hands the money, probably upon some confidence that he would lay it out either in the funds, or such other security as it might be invested in, consistently with the settlement, viz., a good real security. It is a clear fact now, that it remained with Fielder until his death in 1794.

Two questions arise: 1st, whether Brice the husband can complain with respect to his interest in the produce of this sale as against Mooring? 2ndly, whether those who are to take after him can complain?

It is clear, upon settled cases, that, if there are two trustees, and a transaction takes place, in which the fund is taken out of the state in which it ought to have remained, and is not placed in the state in which it ought to be, but is kept in hands that ought not to retain it, if any particular *cestui que trust* has acted in authorising that as much as the trustee who has not the money in his hands, and continues to permit it to be so treated, in a question between

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(*a*) Chambers *v.* Minchin, 7 V. 198, 6 R. R. 111.

(*b*) See Shipbrook *v.* Hinchinbrook, 11 V. 252, 16 V. 477, 8 R. R. 138; Langford *v.* Gascoyne, 11 V. 333, 8 R. R. 170.

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that *cestui que trust* and that trustee, the latter cannot be called upon by the former. There is very satisfactory evidence that Brice must be considered as having for ten years permitted this money to remain with Fielder alone, and therefore cannot complain, as against Mooring, that it was not laid out by Fielder with Mooring. Upon the evidence, Brice received the interest from Fielder alone, having no communication with Mooring until shortly before or after the death of Fielder, and made no demand upon Mooring. He ought to be taken upon the account to know, that, as late as 1786, this was cash in the hands of Fielder, charged in account as one of the executors having that money. There is not one item in respect of which he debits himself, that does not expressly name the security upon which the money was out, except the sum of 860*l.*; and then it is no longer interest at 4*l.* per cent. but 5*l.* per cent., charging himself with a larger interest, after he received it, than he gave credit for before he received it. Afterwards, from 1787, he proceeds dealing with Fielder only, receiving the interest of that particular sum until 1794. The result of the evidence is, that, with Brice's permission, this money was suffered to remain with Fielder upon his personal security: that if Mooring knew as much as Brice, so Brice knew as much as Mooring, and cannot complain that this was a misapplication, permitting it with respect to his own interest.

Mooring also placed so much confidence in Fielder, that though the money got into the hands of Fielder alone, it is very difficult to say, as against those who come after Brice, that Mooring is not to be answerable. This is a sale under a power, but without necessity. This is an act that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine that it was necessary. There was no necessity in respect of which the other should join. But, though a trustee is safe, if he does no more than authorise the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that, for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, was right, after the knowledge of the trustee that it had got into a course of abuse. Of that, it seems, Mooring was distinctly informed, the paper connected with the marriage settlement stating upon the face of it a breach of trust. Though not very intelligible, it shows that an account of the securities taken by Fielder for 1,260*l.* was put into the hands of Mooring. That gave him information that Fielder was lending some of the money upon notes, some upon bonds; and, as soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it.

The conclusion is, that Brice cannot call upon Mooring as to the interest; but as to the principal, Mooring is answerable, but he is not to be charged with more than was actually misapplied (*a*).

NOTES.

1. General rules as to duties of trustees.
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2. Persons in the position of trustees quoad liability, p. 643.
   Agents, solicitors: when constructive trustees, p. 645.
3. As to getting in outstanding property, &c., p. 647.
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5. Investment of trust property, p. 668.
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9. Remedies against trustees barred by concurrence, acquiescence, or *laches*, p. 681.
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11. Relief of trustees under the Judicial Trustees Act, 1896, p. 693.
12. Statutes of Limitation and breaches of trust, p. 696.

1. General Rules as to Duties of Trustees.

The confidence reposed in a trustee is of a strictly personal character, and the duties connected with the trust must, subject as

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(*a*) See Shipbrook *v.* Hinchinbrook, 11 V. 252, 16 V. 477, 8 R. R. 138; Langford *v.* Gascoyne, 11 V. 333, 8 R. R. 170.

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hereinafter appears, be performed by him personally (*a*). If he allows or appoints his co-trustees or others to act for him, and by or through their acts or defaults any loss arises to the trust estate, then he will incur liability, unless he can show that he has acted within the modifications and limitations adopted by the Courts (*b*), or that his case is within the statutes (*c*) which contain important provisions for the relief of trustees.

As to the general management of trust affairs, Lord *Blackburn* in *Speight* v. *Gaunt* (*d*), says "the authorities cited by the Master of the Rolls (*e*) I think show that as a general rule a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing his own."

Lord *Herschell* lays down the same principle in *Rae* v. *Meek* (*f*), saying he thinks this established by *Knox* v. *Mackinnon* (*g*) and *Whiteley* v. *Learoyd* (*h*).

Lindley, J., in *Whiteley* v. *Learoyd* (*i*), defines the duty a little more strictly. He says: "The duty of a trustee is not to take such care only as a prudent man would take if he had himself only to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide."

And the trust business must be conducted in accordance with the terms of the trust (*k*). "His (the trustee's) discretion is never an absolute one; it is always limited by the duty, the dominant duty, the guiding duty, of recovering, securing, and applying the trust

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(*a*) Godefroi, Trusts, (1907) 284.

(*b*) See judgment, *Jessel* M.R., Speight *v.* Gaunt, infra, adopted *Re* Brogden, 38 C. D. p. 555; and compare, as to the liabilities of persons in a fiduciary position, though not strictly trustees, O'Brien *v.* Mitchelstown &c. Society, (1903) 1 Ir. R. 282.

(*c*) The Trustee Act, 1888, 51 & 52 Vict. c. 59, ss. 1 & 8; The Trustee Act, 1893, 56 & 57 Vict. c. 53; The Trustee Act, 1893, Amendment Act, 1894, 57 Vict. c. 10; The Judicial Trustees Act, 1896, 59 & 60 Vict. c. 35, s. 3. And see Notes 5 and 11, infra.

(*d*) 9 A. C. 1—19.

(*e*) These are *Ex p.* Belchier, Amb. 218; Bacon *v.* B., 5 V. 331, followed in *Re* De Clifford, (1900) 1 Ch. 707; Joy *v.* Campbell, 1 Sch. & L. 328, 341; Clough *v.* Bond, 3 My & C. 490, 491.

(*f*) 14 A. C. p. 569; cf. Shepherd *v.* Harris, (1905) 2 Ch. 310.

(*g*) 13 A. C. 753.

(*h*) 33 C. D. 355.

(*i*) Supra.

(*k*) Per *North*, J., in *Re* Brogden, 38 C. D. 546, 554, where the cases are considered.

fund. And no trustee can claim any right of discretion which does not agree with that paramount obligation" (*a*).

North, J., in *Re Brogden* (*b*), put the case of a trustee "investing in securities unauthorised by the trust," which would clearly not be excused by the rule, see infra, p. 650. He then proceeds, "A trustee who neglects to call in a sum of money which ought to be called in at once, under the terms of the trust, will be liable for any loss which may arise from his omitting to do so, however safe and prudent it might have been to leave such money outstanding if it had been his own." With regard to this, other cases take a distinction between investing in and retaining an unauthorised security and do not treat the limitation of discretion as amounting to an absolute prohibition in the case of retaining (*c*).

Delegation of Trusts (see "Custody," &c., infra, p. 659).—1. As a general rule, a trustee may not delegate his trust, unless there is a moral necessity, arising from the usages of mankind, to employ an agent. This exception includes *what is usual in the regular course of business in administering the property* (*d*).

2. But even if delegation be lawful, yet if there is unreasonable delay in requiring an account from the co-trustee, co-executor, or agent to whom the trust is delegated, liability will arise.

3. To authorise delegation to an agent, a proper selection must be made, *e.g.*, trustees must not employ a professional man to do work for which his professional practice does not qualify him, for instance, a solicitor must not be employed to select a valuer (*e*).

Delegation of trusts as here used includes not only the entrusting of property to another, but also the case of a trustee acting on the opinion of another without exercising his own judgment (*f*).

In *Speight* v. *Gaunt* (*g*), a broker, employed by a trustee to buy securities of municipal corporations, gave the trustee a bought note

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(*a*) *Fry*, L.J., *Re* Brogden, 38 C. D., p. 546. As to the limit of discretion in executors see Hiddingh *v.* De Villiers Denyssen, 12 A. C. 624, p. 651, infra.

(*b*) Supra, p. 554 of report.

(*c*) See infra, pp. 652, 653, and Buxton *v.* B.; Marsden *v.* Kent, there cited.

(*d*) *Ex p.* Belchier, Amb. 218; Speight *v.* Gaunt, 9 A. C. 1-19, infra; *Re* Gasquoine, (1894) 1 Ch. 470; *Re* Weall, infra, p. 660; Lowe *v.* Shields, (1902) 1 Ir. R. 320; O'Brien *v.* Mitchelstown &c. Society, (1903) 1 Ir. R. 282.

(*e*) Fry *v.* Tapson, 28 C. D. 268; *Re* Weall, 42 C. D. 674; Jobson *v.* Palmer, (1893) 1 Ch. 71; Whiteley *v.* Learoyd, 12 A. C. 727.

(*f*) Cf. Wynne *v.* Tempest, 13 T. L. R. 360.

(*g*) 22 C. D. 737, 9 A. C. 1.

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which purported to be subject to the rules of the London Stock Exchange, and obtained on Feb. 24 the purchase money from the trustee, on the representation that it was payable on the next day (Feb. 25), which was settling day on the London Stock Exchange. The broker never purchased the securities, misappropriated the money, and became insolvent on the 28th or 29th of March. There was some evidence that the form of the note would have suggested suspicion to experts, but it was held not sufficient to cause suspicion in an ordinary man of business; there was also evidence to show that some of the securities were only to be obtained from the corporations direct (*a*).

Selborne, C., in that case, p. 5, after referring to the statutory indemnity in Lord Cranworth's Act, proceeds, "Neither the statute, however, nor the doctrine of *Ex p. Belchier* (*b*), authorises a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys to strangers, in any case in which (to use Lord *Hardwicke's* words) there is no 'moral necessity from the usage of mankind' for the employment of such an agency. The cases of *Rowland* v. *Witherden* (*c*), *Bostock* v. *Floyer* (*d*), and many others, show that trustees, bound to invest trust moneys in authorised securities, are *primâ facie* answerable for the proper care and custody of such moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance for many purposes connected with the trust, they may properly have recourse."

Selborne, C., subsequently deals with the question of delay, namely whether the trustee was liable for his omission to take any active measure between the 24th of February and the 28th or 29th of March to obtain from Cooke (the broker) the transfers or documents of title which he ought to have received. He does not decide that there was not undue delay involving wilful default, but rests his judgment on the ground that Cooke was during the whole of that interval irretrievably insolvent, so that nothing could by any diligence have been recovered from him. This is going on the principle, recognised in other cases, that a trustee is not to be held liable for want of diligence if the diligence would have done no good (*e*).

(*a*) The trustee was held not to be liable by *Selborne*, C., and Lord *Blackburn*, affirming the C. A., *dubitante* Lord *Watson*.

(*b*) Amb. 218.

(*c*) 3 Mac. & G. 568, 574.

(*d*) 35 B. 603, 606; 1 Eq. 26.

(*e*) See the cases cited by *North*, J., in *Re* Brogden, 38 C. D., pp. 557, 558; *Re* Greenwood, 105 L. T. 509.

There is another very important point in Lord *Selborne's* judgment. He expressed the opinion (p. 11) that "the case was different from what it would have been if Cooke (the broker) had entered into contracts with the several corporations for direct loans to them by the respondent, and had reported to the respondent that he had done so. The agency of a broker, as such, is not required to enter into a contract of that kind." * * * "There would be no moral necessity or sufficient practical reason, from the usage of mankind or otherwise, for payment of the money to the agent." * * * "I think it right not to withhold the expression of my opinion, that such a case would fall within the principle of *Rowland* v. *Witherden* (*a*), and *Bostock* v. *Floyer* (*b*), rather than that of *Ex parte Belchier* (*c*). On this subject I find myself in agreement with *Bowen*, L. J., nor do I infer, from the judgments of *Lindley*, L. J., and Sir *George Jessel* that either of them thought otherwise." The rule in *Speight* v. *Gaunt* applies to a case where a co-trustee is employed and paid as broker under a clause in the will creating the trust (*d*).

In *Re Gasquoine* (*e*), two executors, *bonâ fide* and without cause for suspicion, and in accordance with the usual course of business, and in order to realise the estate, entrusted to a third executor, who was a stockbroker, certain registered bonds for sale by him as a stockbroker; they also enabled him to unregister the bonds so as to be *in his absolute control*. The unregistering of such bonds was in accordance with the usual practice, but another mode of realisation might have been adopted which, though very unusual, would have been safer. The co-executors did not require an account from time to time, but the stockbroker co-executor from time to time paid moneys into the joint account as proceeds of sale, and they had consequently no suspicion. It was held by the Court of Appeal that the co-executors were not liable on either of these grounds for the default of the stockbroker co-executor in misappropriating part of the proceeds of sale.

Lindley, L. J., in delivering judgment, said: "In *Clough* v. *Bond* (*f*) Lord *Cottenham* says: 'It will be found to be the result of all the best authorities upon the subject that, although a personal representative, acting strictly within the line of his duty, and exercising

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(*a*) 3 Mac. & G. 568.

(*b*) 1 Eq. 26, 35 B. 603.

(*c*) Amb. 218.

(*d*) Shepherd *v.* Harris, (1905) 2 Ch 310.

(*e*) (1894) 1 Ch. 470.

(*f*) 3 My. & C. 490. See also Williams on Executors, 10th edit. vol. 2, pp. 1462 et seq.

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reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*a*); or if he leave money due upon personal security, which, though good at the time, afterwards fails (*b*). And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorised fund. Thus he is not liable upon a proper investment in the Three per Cents. for loss occasioned by the fluctuations of that fund (*c*), but he is for the fluctuations of any unauthorised fund (*d*). So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. *Necessity, which includes the regular course of business in administering the property*, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator" (*e*).

On the question of delay, *Lindley*, L. J., said, "But considering that James was a person trusted by the testator, and whom they had no reason to suspect, and that the whole of these transactions took place well within a twelvemonth after the testator's death, I do not think they were guilty of any such negligence as can make them liable for the loss."

(*a*) Phillips *v.* P., Freem. Ch. Ca. 11.

(*b*) Powell *v.* Evans, 5 V. 839; Tebbs *v.* Carpenter, 1 Madd. 290, 16 R. R. 224.

(*c*) Peat *v.* Crane, Dick. 499 (n.).

(*d*) Hancom *v.* Allen, Dick. 498; Howe *v.* Lord Dartmouth, 7 V. 137, see p. 150; 6 R. R. 96; ante, vol. 1.

(*e*) Langford *v.* Gascoyne, 11 V. 333, 8 R. R. 170; Lord Shipbrook *v.* Lord Hinchinbrook, 11 V. 252, 16 ib. 477, 8 R. R. 138; Underwood *v.* Stevens, 1 Mer. 712; and see Hanbury *v.* Kirkland, 3 Si. 265; Lowe *v.* Shields, (1902) 1 Ir. R. 320.

Kay, L. J., in the same case, said: "Lord *Cottenham* in *Clough* v. *Bond* says that, if an act is one which is required by the regular course of business, it is not an unnecessary act" (*a*). Having regard to the cases above cited, it is considered that the dicta of Lord *Romilly* in *Hopgood* v. *Parkin* (*b*) and *Sutton* v. *Wilders* (*c*), to the effect that even where a trustee was justified in employing an agent, and made a proper selection, he would be liable for that agent's dishonesty or negligence, are no longer law.

As to when the delegate of a trust becomes a constructive trustee, see p. 645.

2. Persons in the Position of Trustees quoad Liability.

The liability of the trustees for breach of trust arises though the trust be created by the voluntary gift of the trustees themselves (*d*): though they get no benefit from the breach (*e*): and in some cases notwithstanding sect. 7 of the Statute of Frauds, though the trust be of land and created without writing (*f*): or if a person acts as trustee though not legally appointed, so becoming a trustee *de son tort* (*g*): and as to persons acting as agents of trustees, becoming constructive trustees see infra, p. 645. So an executor *de son tort* becomes liable as executor to the extent of the assets he receives (*h*), but a person who has gone into possession of chattels real as executor *de son tort*, and has remained in possession for twelve years, may, in the absence of circumstances raising an inference of an express trust, plead the Statute of Limitations (*i*).

(*a*) See also Speight *v.* Gaunt, 9 A. C. 1.

(*b*) 11 Eq. 77, 78; infra, p. 659.

(*c*) 12 Eq. 373; infra, p. 660.

(*d*) Drosier *v.* Brereton, 15 B. 221.

(*e*) Wells *v.* W., (1877) W. N. 2; Charitable Corporation *v.* Sutton, 2 Atk. 400.

(*f*) Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196.

(*g*) Rackham *v.* Siddall, 16 Si. 297, 1 Mac. & G. 607; Derbishire *v.* Home, 3 De G. M. & G. 80; Hope *v.* Liddell, 21 B. 183; Pearce *v.* P., 22 B. 248; Life Association of Scotland *v.* Siddal, 3 De G. F. & J. 58; Aveline *v.* Melhuish, 2 De G. J. & S. 288; Hennessey *v.* Bray, 33 B. 96; *Ex. p.* Norris, L. R. 4 Ch. 280; Yardley *v.* Holland, 20 Eq. 428; Quinton *v.* Frith, 2 Ir. R. Eq. 396; Smith *v.* S., 10 Ir. R. Eq. 273; Stone *v.* S., L. R. 5 Ch. 74; *Re* Biss, (1903) 2 Ch. 40.

(*h*) Williams on Exors., 10th edit., pp. 183 et seq. And as to appointing a receiver, Nothard *v.* Procter, 1 C. D. 6; Blackett *v.* B., 19 W. R. 559; Steer *v.* S., 2 Dr. & Sm. 311; Dowdeswell *v.* D., 9 C. D. 294; Parkin *v.* Seddons, 16 Eq. 34; *Re* Goods of Moore, (1892) P. 145.

(*i*) Doyle *v.* Foley, (1903) 2 Ir. R. 95.

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Proof of a will implies acceptance of all the trusts thereby vested in the executors as trustees (*a*); an executor of an executor under a former will cannot renounce the executorship of that will: *Brooke* v. *Haymes* (*b*). Now under the Conveyancing Act, 1881, s. 30, trust estates of a testator vest in his personal representative, copyholds being excepted by sect. 88 of the Copyhold Act, 1894 (*c*). An executor cannot renounce after he has in any way acted or intermeddled with the estate. In *Re Stevens* (*d*), it was held that a letter to an insurance company asking for payment of a policy part of the estate and signed by three persons named as executors was such an intermeddling as prevented either of them from renouncing. In the same case it was held that delay in proving and recovering the money, which caused a loss of interest, was not sufficient to charge executors with wilful default as the capital was recovered.

Liability also may be incurred, if, before accepting a trust it is not ascertained that the title to the property is clear, for it has been held that persons so accepting cannot dispute the title of the *cestui que trust* though it be doubtful (*e*); though they are not bound to hand over the property after notice of the superior title of another (*f*).

It is the duty of a trustee when he accepts a trust to make himself acquainted with the trust property and its state, and to get it in if improperly invested, and if he performs his duty in this respect he is not liable for breaches by former trustees (*g*).

To be liable as trustee, a person must be affected with notice that there is a trust (*h*), and in *Hallows* v. *Lloyd* (*i*) it was held

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(*a*) Mucklow *v.* Fuller, Jac. 198; Booth *v.* B., 1 B. 195; Styles *v.* Guy 1 Mac. & G. 431.

(*b*) 6 Eq. 25.

(*c*) And see Conveyancing Act, 1911, s. 8, as to survivorship of trusts and powers.

(*d*) (1897) 1 Ch. 422.

(*e*) Shields *v.* Atkins, 3 Atk. 560; Pomfret *v.* Windsor, 2 Ves. Sen. 476; Kennedy *v.* Daly, 1 Sch. & L. 381; A.-G. *v.* Munro, 2 De G. & Sm. 163; Stone *v.* Godfrey, 5 De G. M. & G. 76; Langley *v.* Fisher, 9 B. 90; Newsome *v.* Flowers, 30 B. 461; Frith *v.* Cartland, 2 Hem. & M. 417; Tennant *v.* Trenchard, L. R. 4 Ch. 537; Neligan *v.* Roche, 7 Ir. R. Eq. 332.

(*f*) Neale *v.* Davies, 5 De G. M. & G. 258.

(*g*) Townley *v.* Bird, 2 Con. & Law. 405; James *v.* Frearson 1 Y. & C. Ch. 370; *Ex p.* Graves, 25 L. J. Bank, 53, 2 Jur. (N. S.) 651; Taylor *v.* Millington, 4 Jur. (N. S.) 204; Youde *v.* Cloud, 18 Eq. 634; *Re* Chapman, (1896) 2 Ch. 763.

(*h*) Youde *v.* Cloud, 18 Eq. 634, 642; see and cf. *Re* Champion, (1893) 1 Ch. 101.

(*i*) 39 C. D. 686, but see and cf. *Re* Wasdale, (1899) 1 Ch. 163, as to the priority of incumbrancers in such a case; and see Vol. I., ante, pp. 128 and 129.

that new trustees are not fixed with notice through retiring trustees of incumbrances affecting the trust estate of which no notice appears among the trust documents, and the existence of which, though known to the retiring trustees, is not disclosed to the new trustees.

But a trustee will be liable though he does not know who are his *cestuis que trust* (*a*): or if he receives rent for an unknown heir (*b*): or if, in honest mistake as to the meaning of the trust instrument under which he is acting, he pays moneys to the persons who are not entitled, and this though he acts under professional advice (*c*).

Agents, Solicitors, when Constructive Trustees.—If a trustee employs an agent, as for instance a solicitor, so long as the acts done by the person so employed are confined to mere agency on behalf of the trustee, the agent cannot be made accountable for the trustee's breaches of trust (*d*). So bankers are not liable as constructive in respect of trust moneys received and paid out by them for trustees, unless they are privy to a misapplication of those moneys (*e*). But where the agent obtains possession of the trust funds, and his acts are not in strict conformity with his duty as agent, he ceases to be a mere agent, and will be liable as a trustee (*f*).

In *Barnes* v. *Addy* (*g*), a solicitor advised against the appointment of a sole trustee, but prepared a deed of appointment and an indemnity for the trustee. Another solicitor acted for the beneficiaries. Neither had knowledge of a fraudulent design. The funds were misappropriated. It was held that neither solicitor was liable, and *Selborne*, C., said that "responsibility [of a trustee] may no doubt be

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(*a*) *Ex p.* Norris, L. R. 4 Ch. 280.

(*b*) Lyell *v.* Kennedy, 14 A. C. 437.

(*c*) See, *e.g.*, Doyle *v.* Blake, 2 Sch. & Lef. 243; Boulton *v.* Beard, 3 De G. M. & G. 608; National Trustees Co., &c. *v.* General Finance Co., &c., (1905) A. C. 373; *Re* Hulkes, 33 C. D. 552, not following Saltmarsh *v.* Barrett, 31 B. 349.

(*d*) Per *Stuart*, V.-C., in Morgan *v.* Stephens, 3 Gif. p. 235. And see Myler *v.* Fitzpatrick, 6 Madd. 360; Keane *v.* Robarts, 4 Madd. 332; Maw *v.* Pearson, 28 B. 196; Marshall *v.* Sladden, 7 Ha. 428.

(*e*) Gray *v.* Johnston, L. R. 3 H. L. 1; Keane *v.* Robarts, 4 Madd. 332; and see as to the banker's rights when the account is overdrawn, Thomson *v.* Clydesdale Bank, Ltd., (1893) A. C. 282; Coleman *v.* Bucks & Oxon Bank, (1897) 2 Ch. 243; but see Pannell *v.* Hurley, 2 Coll. 241; Bodenham *v.* Hoskyns, 2 De G. M. & G. 903; Bridgman *v.* Gill, 24 B. 302; and see infra, p. 663.

(*f*) Morgan *v.* Stephens, 3 Gif. 226; A.-G. *v.* Leicester Corporation, 7 B. 176; Hardy *v.* Caley, 33 B. 365; Portlock *v.* Gardner, 1 Ha. 606; Lee *v.* Sankey, 15 Eq. 204, 211; Archer *v.* Lavender, 9 Ir. R. Eq. 220; M'Ardle *v.* Gaughran, (1903) 1 Ir. R. 106.

(*g*) L. R. 9 Ch. 244.

extended in equity to others who are not properly trustees if they are found making themselves trustees *de son tort* or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers—transactions of which a Court of Equity may disapprove—*unless these agents receive and become chargeable for part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design of the trustees.*"

This passage has been frequently adopted, see note (*a*). The cases are too numerous to be discussed here, but the result appears to be that if an agent or solicitor joins with a trustee in committing a fraud he is liable as a principal, on the general principle stated by *Westbury*, C., in *Cullen* v. *Thompson* (*b*) ; but that apart from any question of fraud or liability for negligence, "he is not liable as constructive trustee" because he acts in what is called an honest breach of trust as agent or solicitor for the trustee "unless he has the trust property vested in him, or so far under his control that he can require it should be vested in him" (*c*).

Nor does the fact that one member of a firm of solicitors takes the trust money make any other member a constructive trustee, unless it be part of the recognised business of the firm to take money on similar terms (*d*). In *Blyth* v. *Fladgate* (*e*), both members of the firm were held liable, but the property in question was in "the custody of the firm, and sold by the order of the firm, and the proceeds were paid to the credit of the firm." The cases in note (*f*) where the agent or solicitor was held liable may be explained on similar grounds.

Where a solicitor advises a breach of trust for his own benefit he

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(*a*) Per *Smith*, L.J., Mara *v.* Browne, (1896) 1 Ch. 209; per *Baggallay*, L.J., *Re* Spence, 51 L. J. Ch. 277; see also per *Brett*, L.J., Wilson *v.* Lord Bury, 5 Q. B. D., see p. 532; per *Stirling*, J., *Re* Blundell, 40 C. D. 370; per *Kay*, L. J., Soar *v.* Ashwell, (1893) 2 Q. B. p. 405.

(*b*) Paterson, Sc. Ap. 1447; 4 Macq. H. of L. Sc. Ap. 424, see p. 433. See also per *Kekewich*, J., in *Re* Barney, (1892) 2 Ch. 265.

(*c*) *Re* Barney, supra, at p. 273 of the report, Mara *v.* Browne, (1896) 1 Ch. 199, (C. A.); Brinsden *v.* Williams, (1894) 3 Ch. 185.

(*d*) Rhodes *v.* Moules, (1899) 1 Ch. 236. See Partnership Act, 1890, ss. 11, 13; Lindley on Partnership, 7th ed., p. 182; Cleather *v.* Twisden, 28 C. D. 340; cf. Wynne *v.* Tempest, (1897) 1 Ch. 110.

(*e*) (1891) 1 Ch. 351.

(*f*) Midgley *v.* M., (1893) 3 Ch. 282. Lee *v.* Sankey, 15 Eq. 204; Rhodes *v.* Moules, (1895) 1 Ch. 236.

will be of course liable to the *cestui que trust*, and will be dealt with severely under the jurisdiction of the Court over its officers (*a*). The dicta in *Robertson* v. *Armstrong* (*b*) would seem to go too far unless understood with reference to the fact that the agent secured the trust money for himself.

Of course, if the solicitor advised the trustees wrongly, he would be liable for negligence, but this would be a liability to them as their agent and apparently not to the *cestui que trust* (*c*).

But the fact that the solicitor was a trustee and the acting trustee would not, it is conceived, make him primarily liable unless he was also acting as solicitor for the trust (*d*).

If he was not advising it is presumed the law would apply which makes the passive trustee liable equally with the active trustee, and each entitled to contribution from the other (*e*).

A solicitor-trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate (*f*).

3. As to getting in Outstanding Property.

Outstanding Property.—Executors ought not to allow money to remain on personal security without great reason. If they do they will be charged with any loss (*g*), unless they can show that proceedings would have been useless (*h*). The usual rule is that executors

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(*a*) Godwin *v.* Gosnell, 2 Coll. 457; *Re* Chandler, 22 B. 233; *Re* Hall, 2 Jur. (N. S.) 633; *Re* a Solicitor, (1894) 1 Q. B. 254; Harris *v.* Rees, 16 W. R. 91; Keane *v.* Roberts, 4 Madd. 332; Tyler *v.* T., 3 B. 550; Lockhart *v.* Reilly, 25 L. J. Ch. 697, S. C. 1 De G. & J. 464; Thompson *v.* Finch, 8 De G. M. & G. 560, and the observations of *Cotton*, L.J., in Bahin *v.* Hughes, 31 C. D. 395, and *Kay*, L.J., in Chillingworth *v.* Chambers, (1896) 1 Ch. 685.

(*b*) 28 B. 123.

(*c*) *Re* Spence, 51 L. J. Ch. 271. See the speech of Lord *Herschell* in Rae *v.* Meek, 14 A. C. 569.

(*d*) See cases cited, notes (*d*), (*e*), (*f*), (*g*), supra, p. 554.

(*e*) Bahin *v.* Hughes, 31 C. D. 395; Lingard *v.* Bromley, 1 V. & B. 117; Chillingworth *v.* Chambers, (1896) 1 Ch. 685; Robinson *v.* Harkin, (1896) 2 Ch. 415. See supra, p. 554.

(*f*) *Re* Linsley (1904) 2 Ch. 785. Cf. *Re* Turner, (1897) 1 Ch. 536.

(*g*) See judgment, *Lindley*, L.J., *Re* Gasquoine, (1894) 1 Ch. p. 476, and cases there referred to.

(*h*) See Clack *v.* Holland, 19 B. 271; *Re* Brogden, 38 C. D., pp. 557, 558; *Re* Roberts, 76 L. T. 483; *Re* Greenwood, 105 L. T. 509.

must convert within twelve months, and if they delay longer the onus is on them to show a reason, for their discretion is limited (*a*). And a direction to convert with all convenient speed is no more than the ordinary duty implied in the office of executor (*b*).

In *Sculthorpe* v. *Tipper* (*c*), where the loss took place two years after the testator's death, one of the trustees who did not attain twenty-one until seventeen months after the death of the testator was held liable equally with his co-trustees (*d*).

So a trustee is liable for his default in allowing time to elapse so that the debt is statute-barred (*e*): for neglecting to enforce payment from a receiver until arrears amount to 1,500*l.*, see *Tebbs* v. *Carpenter* (*f*): for neglecting to realise when ordered by the Court to do so (*g*): for leaving money outstanding upon personal security when it was held to be their duty to commence compulsory proceedings (*h*), even against a co-executor (*i*), and in particular when the debt was payable by instalments (*k*).

Though as a rule the executors may retain for a year, the nature of the property must be considered. Where, for instance, there is live stock, which cannot be kept save at great expense, they should sell without delay (*l*). And although they ought not to keep up unnecessarily the housekeeping expenses of a testator, they will be

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(*a*) Hiddingh *v.* Denyssen, p. 651, infra; Hughes *v* Empson, 22 B. 183, per *Romilly*, M.R.; Prendergast *v.* Lushington, 5 Ha. 171, 176; Selby *v.* Bowie, 4 Gif. 300, 11 W. R. 606; Marsden *v.* Kent, 5 C. D. 598, and p. 652, infra; Grayburn *v.* Clarkson, L. R. 3 Ch. 605; Sculthorpe *v.* Tipper, 13 Eq. 232; Gainsborough *v.* Watcombe, 54 L. J. Ch. 991, see also *Re* Chapman, (1896) 2 Ch. 763, pp. 653, 654, infra; Lowson *v.* Copeland, 2 Bro. Ch. 156; Wiles *v.* Gresham, 2 Dr. 258, affirmed 5 De G. M. & G. 770, *dubitante Turner*, L.J.; McGachen *v.* Dew, 15 B. 84; Grove *v.* Price, 26 B. 103; Waring *v.* W., 3 Ir. Ch. R. 335; Macken *v.* Hogan, 14 Ir. Ch. R. 285; *Re* Brogden, p. 650, infra; Fry *v.* F., 27 B. 144; Devaynes *v.* Robinson, 24 B. 86.

(*b*) Buxton *v.* B., 1 My. & C. 80.

(*c*) 13 Eq. 232.

(*d*) See also Bate *v.* Hooper, 5 De G. M. & G. 338; Wilkinson *v.* Duncan, 23 B. 469.

(*e*) Stone *v.* S., L. R. 5 Ch. 74.

(*f*) 1 Madd. 291; 16 R. R. 224.

(*g*) Davenport *v.* Stafford, 14 B. 319, 338.

(*h*) Lowson *v.* Copeland, 2 Bro. Ch. 156; Bailey *v.* Gould, 4 Y. & C. Ex. 221; Powell *v.* Evans, 5 V. 839; Fenwick *v.* Greenwell, 10 B. 412; Bullock *v.* Wheatley, 1 Coll. 130; Ticker *v.* Smith, 3 Sm. & G. 42, 46; *Re* Brogden, 38 C. D. 546; *Re* Greenwood, 105 L. T. 509.

(*i*) Styles *v.* Guy, 1 Mac. & G. 422; Egbert *v.* Butter, 21 B. 560; Candler *v.* Tillett, 22 B. 257; Lowe *v.* Shields, (1902) 1 Ir. R. 320.

(*k*) Caffrey *v.* Darby, 6 V. 488.

(*l*) Hughes *v.* Empson, 22 B. 183, per *Romilly*, M.R.

allowed a reasonable time for breaking up his domestic establishment (*a*), in which case under the circumstances two months were held reasonable. And before the statutory power conferred by Lord Cranworth's Act (*b*), it was held that trustees in the exercise of a reasonable discretion might release or compound a debt (*c*), and also give time for payment (*d*).

But where trustees consented to a composition with a bankrupt debtor for 2,000*l.* on bond to the trust, it was held that they were liable to make good the full amount of the debt if it should appear that the whole might have been recovered, and that they could not be exonerated without an inquiry as to what might have been recovered (*e*). For old cases as to the onus being on a trustee who released a debt or failed to require payment to show that the release was proper or that nothing could have been recovered, see note (*f*).

Statutory powers were given by Lord Cranworth's Act (*g*) to executors under wills executed after 28th August, 1860, to pay any debts or *claims* on any evidence, and to accept any composition or any security real or personal for any debts due to the deceased, and to *allow any time for payment* of such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, without being responsible for any loss to be occasioned thereby.

This section extended to claims of every kind, such as for a legacy (*h*). It was also held by *James*, L. J., that a trustee could not be made liable on the ground that he did not accept a compromise (*i*).

Larger powers were given by the Conveyancing and Law of Property Act, 1881, sect. 37 (*k*). This section is retrospective, extending to executorships and trusts created before the commencement of

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(*a*) Field *v.* Beckett, 29 B. 576.

(*b*) 23 & 24 Vict. c. 145, s. 30, repealed by Conveyancing Act, 1881.

(*c*) Blue *v.* Marshall, 3 P. W. 381; Ratcliffe *v.* Winch, 17 B. 216; Forshaw *v.* Higginson, 8 De G. M. & G. 827.

(*d*) See *Re* Owens, 47 L. T. 61, infra, p. 652.

(*e*) See Wiles *v.* Gresham, 5 De G. M. & G. 770, affirming S. C. 2 Drew. 258.

(*f*) Jevon *v.* Bush, 1 Vern. 342; George *v.* Chansey, 1 Ch. R. 125; *Re* Alexander's Minors, 1 Ch. R. 137; East *v.* E., 5 Ha. 348; Powell *v.* Evans, 5 V. 839.

(*g*) 23 & 24 Vict. c. 145, s. 30, repealed by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 71.

(*h*) *Re* Warren, (1884) W. N. 181, 51 L. T. 561, 53 L. J. Ch. 1016; West of England Bank *v.* Murch, 23 C. D. 138, *Re* Mackintosh, 42 L. J. Ch. 208.

(*i*) *Ex p.* Ogle, L. R. 8 Ch. 714, 715.

(*k*) 44 & 45 Vict. c. 41.

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the Act, but it only in terms extends to payment of debts and not to payment of *claims*, and as regards transactions coming within its provisions it only extends to those done after the commencement of the Act (*a*); it did not apply to an administrator (*b*).

The section was repealed and re-enacted and extended to administrators by sect. 21 of the Trustee Act of 1893; and this section extends to payment of *claims*, as well as debts (*c*).

In the case of *Re Owens* (*d*), an action commenced before 1882, *Jessel*, M. R., commenting upon the concluding words of sub-s. 2 of section 37, supra, "without being responsible for any loss occasioned by any act or thing so done by him in good faith," said: "I may add that in future cases of this kind sect. 37 of the Conveyancing and Law of Property Act, 1881, will have to be considered. It may have a revolutionary effect on this branch of the law. It looks as if the only question left would be, whether the executors have acted in good faith or not."

It was recently held, however, that the words above cited do not relieve the trustee from the duty of exercising an active discretion in allowing time for payment, and that he is not protected where he merely passively allows the debt to remain outstanding (*e*).

The rules as to delegation, supra, p. 639, apply whenever an agent, or co-executor, or co-trustee is entrusted with recovering or selling property; and to understand their application it is necessary to get at the principle on which the Court acts in determining the liability of an executor in not getting in the testator's estate.

In *Re Brogden* (*f*) there were directions exonerating the executors or trustees from recovering money from the partners of the testator for five years from his death. The testator died in 1869. The partners ultimately became insolvent in 1880, before the money had been recovered, and a claim was made against the executors for their delay. *North*, J. (p. 553), discussed the application to the case of the rule as stated in *Speight* v. *Gaunt* (*g*), "that a trustee discharges his duty if he takes the precautions an ordinary prudent man of business would take in managing his own," and explained

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(*a*) *Re* Brogden, 38 C. D. 546.

(*b*) See *Re* Clay and Tetley, 16 C. D. 3.

(*c*) See as to compromise generally under these sections, West of England Bank *v.* Murch, 23 C. D. 138; *Re* Trenchard, (1902) 1 Ch. 378; Abdallah *v.* Rickardo, 4 T. L. R. 622; as to compromise at common law, see De Cordova *v.* De C., 4 A. C. 692; *Re* Houghton, (1904) 1 Ch. 622.

(*d*) 47 L. T. 61, p. 64.

(*e*) *Re* Greenwood, 105 L. T. 509.

(*f*) 38 C. D. 546, (1888) on neglect before Conveyancing, &c., Act, 1881.

(*g*) 22 C. D. 727; 9 A. C. 1.

that this must be read with the qualification that the trust business ought to be done in accordance with the terms of the trust, that as a trustee investing in securities unauthorised by the trust would be liable, so "a trustee who neglects to call in a sum of money which ought to be called in at once under the terms of the trust will be liable for any loss which may arise from his omitting to do so, however safe and prudent it might have been to leave such moneys outstanding if they had been his own," and held that the trustees were liable for the delay; this judgment was affirmed by the Court of Appeal. *Fry*, L. J., said (p. 571): "It has been urged upon us that if a trustee does as much for his *cestui que trust* as he does for himself he has performed his duty. I cannot accept for one moment that view of the duty of trustees. A trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time, in which and at which he shall carry his duty into effect. But his discretion is never an absolute one; it is always limited by the duty, the dominant duty, the guiding duty, of recovering, securing, and duly applying the trust fund. And no trustee can claim any right of discretion which does not agree with that paramount obligation" (*a*).

So, in *Hiddingh* v. *De Villiers Denyssen* (*b*), an appeal from a Court at the Cape, but in which English law was referred to, Lord *Hobhouse* said, "It was vigorously contended at the bar by Sir Horace Davey that the true test of an executor's reasonable discretion is to see what a reasonable owner might do. But an *executor's discretion is limited by the duty of bringing the assets into a proper state of investment within a reasonable time* * * * The onus lies on the executors of proving that they acted *bonâ fide* and exercised a reasonable discretion. * * *"

As to the nature of the investments, the Judge said, "Their nature was such as to demand conversion; the executors made no efforts to realise between Dec., 1881, and July, 1883; the state of the market was such as to create alarm, and the length of time was excessive. * * *" "On these grounds the executors must be held liable for loss, and then the question is, what loss? The rule in England is, that if the executor fails within a reasonable time to convert investments which require conversion, the end of a year is, in the absence of circumstances pointing to a different date, to be taken as the time for ascertaining the value which he ought to have got."

(*a*) Cf. *Re* Hurst, cited p. 656, infra.

(*b*) 12 A. C. 624, at p. 632; and see Grayburn *v.* Clarkson, L. R. 3 Ch. 605.

Notwithstanding these cases, it would appear from the cases following that executors may exercise a discretion in retaining beyond the year *unauthorised* investments, although there is no express authority to retain them, although the onus would be on them to show that the discretion was reasonably and properly exercised.

It has been held that it is not necessarily a breach of trust for an executor to take a new bond in lieu of an old one, instead of calling up the money due thereon (*a*); and that mere refusal by a personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the personal representative and the alleged debtor (*b*).

In the case of *Re Owens* (*c*), decided in 1882, but commenced in 1880, while Lord Cranworth's Act was in force, the testator had died in March, 1878. W. then owed money on promissory notes to the testator. Demand of payment was made, but ultimately further time was given. On the 10th of February, 1880, W. filed a liquidation petition. The Court of Appeal held that executors had a fair discretion whether they would or would not immediately sue a debtor of the testator for the amount due to the estate; and their not doing so, although loss occurred by the delay, if they exercised a reasonable discretion in considering what was proper, was not necessarily wilful neglect or default for which they were liable.

In *Buxton* v. *B.* (*d*), where there was a direction to sell "with all convenient speed," it was held that, notwithstanding, the trustees had a reasonable discretion. In *Marsden* v. *Kent* (*e*), the testator left three foreign bonds on trust to divide them between four absolute owners. The bonds were of considerable value at his death, but had fallen to 54*l.* each at the end of the twelve months. One legatee pressed for a sale, the other three said nothing. The trustees, exercising an honest discretion, in hopes of a rise retained the bonds beyond the year. They sold two within fifteen months of the death at 54*l.* each; the other was not sold, and had fallen much further in value. It was held by the Court of Appeal that they were not liable. *James*, L. J., said, "The executors were entitled to wait twelve months before they converted them.

(*a*) Charlton *v.* Earl of Durham, L. R. 4 Ch. 433.

(*b*) Yeatman *v.* Y., 7 C. D. 210; and cases therein considered.

(*c*) 47 L. T. 61, but see *Re* Greenwood, 105 L. T. 509.

(*d*) 1 My. & C. 80.

(*e*) 5 C. D. 598.

At that time the market had fallen. * * * The executors, in the honest exercise of their discretion, thought it more prudent to wait for a rise, and we think they ought not to suffer because it turns out that they committed an error of judgment. We think we ought to follow *Buxton* v. *B.*" The Lord Justice, however, to some extent relied in his judgment on the fact that the beneficiaries were *sui juris* competent to direct what should be done, and that three of the four had taken no steps.

In the case of *Re Chapman* (*a*), *Rigby*, L. J., said: "As far as I know the Court has never laid down that, even with regard to risky securities, such as Turkish Bonds for instance, or to shares in an unlimited company, there is an absolute unvarying obligation on executors and trustees to call them in within the twelve months, regardless of the opinion the executors or trustees may have as to the prudence or the advisability of doing so. Of the cases cited by *Lindley*, L. J., I may mention those of *Buxton* v. *B.* and *Marsden* v. *Kent* (*b*), as showing that there is no such rule, and that the Court has never been so unreasonable as to say to a trustee: There is a fixed binding rule; you have not acted upon it; you have acted as you thought for the benefit of the estate, but what you have done has turned out unfortunately, and you must bear the loss. There is no such rule." This case related to retaining investments of an authorised character, and therefore so far as regards investments of a character not authorised it may be the observations of the L. J. only amount to dicta; but it is clear from the references to *Buxton* v. *B.* and *Marsden* v. *Kent* that he was referring to cases of wholly unauthorised investments. A trustee, however, would only be reasonably prudent if he applied to the Court for authority before he retains unauthorised securities beyond the year (*c*).

Where the question is as to property which at the death consists of securities of an authorised nature, such as mortgages of real estate, but the subject of them at the death or afterwards has depreciated so as not to leave the margin which would be required on a trustee's investment, the authorities seem to treat the case as standing on a different footing (*d*).

It has been said that as the Court, in the administration of an

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(*a*) (1896) 2 Ch. 782. See infra, p. 654.

(*b*) Supra, p. 652.

(*c*) *Re* Brogden, 38 C. D. 546, supra, p. 650; Hiddingh *v.* Denyssen, 12 A. C. 624, supra, p. 651.

(*d*) See Robinson *v.* R., 1 De G. M. & G. 247, p. 262; *Re* Chapman, supra; and see Rawsthorne *v.* Rowley, (1909) 1 Ch. 409 (n.); Shaw *v.* Cates, ibid.

estate, would not permit a *real security* to be called in without an enquiry as to its expediency (*a*), so an executor is not obliged to call in a mortgage if the security be good, and the money be not wanted to pay debts (*b*).

It has been also said, that even if a trustee found part of the trust funds invested upon a second mortgage, he might not be bound to call it in (*c*); but the circumstances must be special to justify this. In *Ames* v. *Parkinson* (*d*), it was held and treated as a rule, that if a trustee has reason for supposing that a security is not good, his duty will be to call the money in at once. But this case was examined and distinguished by the Court of Appeal in *Re Chapman* (*e*), where it was held that the trustees of a will authorising investments in real securities were not bound by any absolute rule to call them in without exercising their judgment, even though some of the securities were of a risky nature, and owing to agricultural depression they had become apparently insufficient to answer the mortgage debts; and further, they were not liable for a subsequent fall in value, it appearing that they had acted in an honest and reasonable belief (*f*) that they were doing what was for the best. In that case part of the estate of a testator who died in 1880 consisted of mortgages of real estate. The amounts secured were less than two-thirds of the original purchase-money, but the property had depreciated so that at the death there was not a margin of one-third. There appears to have been no express power to retain investments, but a gift on trust for a tenant for life with remainders to children, and a direction "to invest the trust moneys on good, real, or government security." The same persons were appointed executors and trustees, but *Lindley*, L. J., in delivering judgment in the Court of Appeal considered their duties both as executors and as trustees. The property was not realised in 1895 when the action was commenced; and *Kekewick*, J., in the Court below, had held that sect. 4 of the Trustee, 1893, Amendment Act, 1894 (*g*), expressly authorising retainer, was not retrospective or applicable to a retainer before the

(*a*) Howe *v.* Earl of Dartmouth, 7 V. 150; ante, vol. 1, p. 68.

(*b*) Orr *v.* Newton, 2 Cox, 276, cited with approval in *Re* Chapman; Angerstein *v.* Martin, T. & R. 239.

(*c*) See Robinson *v.* R., 1 De G. M. & G., p. 252.

(*d*) 7 B. 384; Harrison *v.* Thoxton, 4 Jur. (N. S.) 550.

(*e*) (1896) 2 Ch. 763; cf. Shaw *v.* Cates, (1909) 1 Ch., at p. 409; and see *Re* Schneider, 22 T. L. R. 223.

(*f*) Cf. s. 3, Judicial Trustees Act, 1896, and *Re* Grindey, (1898) 2 Ch. 593, where the retention, though not strictly justifiable, was held excusable under this section.

(*g*) 57 Vict. c. 10.

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date of the Act, and that the trustees and executors were liable for not converting the mortgages. His judgment was reversed by the Court of Appeal on grounds applicable under the general law before the last-mentioned Act.

Lindley, L. J., in an elaborate judgment, said :—

"No doubt, speaking generally, it is the duty of executors to get in debts due to their testator, but it was no part of the duty of the executors as such to realise mortgage securities of their testator not wanted for the above-mentioned purposes (*a*); and the executors were not, as executors, guilty of any devastavit in not realising such securities." * * *

"A trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not *per se* proof of such wrong. We have to deal here with *authorised* investments, and this must never be lost sight of; everything turns upon it. Bearing this point in mind, and bearing also in mind that we have to deal with honest trustees placed in great difficulties by the constant fall in value in land, what is it that they have done wrong? * * * There is no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by *retaining an authorised* security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment * * * though the result may prove that they possibly might have done better. *Whiteley* v. *Learoyd* (*b*) is a clear authority to this effect, so are *Buxton* v. *B.* (*c*), *Marsden* v. *Kent* (*d*)." * * *

As to unauthorised investments, see pp. 651, 653, supra.

An absolute discretion to postpone protects executors retaining, though some of the property consists of shares in unlimited companies (*e*).

In *Gray* v. *Siggers* (*f*), *Malins*, V.-C., held that a power to trustees

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(*a*) *I.e.*, payment of funeral and testamentary expenses, debts and legacies; see also Orr *v.* Newton, 2 Cox, 274.

(*b*) 33 C. D. 347, 12 A. C. 727.

(*c*) 1 My. & C. 80.

(*d*) 5 C. D. 598.

(*e*) See *per* C. A. in *Re* Norrington, 13 C. D. 654, distinguishing Sculthorpe *v.* Tipper, 13 Eq. 232; and see *Re* Oddy, 104 L. T. 128. See also the old cases of Padden *v.* Richardson, 7 De G. M. & G. 563, 572; Horton *v.* Brocklehurst, 29 B. 511; cp. *Re* Schneider, 22 T. L. R. 223.

(*f*) 15 C. D. 74.

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to retain "all or any portions of my trust estate in the same state, &c.," took the case both out of the ordinary rule as to conversion, and the rule in *Howe* v. *Dartmouth* (*a*).

In *Edwards* v. *Edmunds* (*b*), a direction to convert "at their or his sole discretion, and at such time or times after the testator's decease as they or he should think proper," was held by *Hall*, V.-C., to authorise the retainer of 100 shares with unlimited liability, but not the acceptance of 25 other such shares.

An executor or trustee may exercise a discretion in carrying out the intention of the will. It has been held that no liability was incurred by executors in not requiring payment of the surplus capital of a testator, lent to his partners, where it appeared that the executors could not have insisted on payment without putting an end to the business, and that this would have been clearly contrary to the intentions of the testator as appearing in the will (*c*).

An executor is not liable for not taking proceedings to recover a debt if he can show either that proceedings would have been ineffectual, or that there is reasonable ground for believing that they would have been ineffectual (*d*).

In *Re Brogden* (*e*), it was laid down, that it is the duty of trustees to press for payment of funds due to them especially if payment has been deferred for a specified time, and that the only excuse for not taking action would be a well founded belief that such action would be fruitless. In *Re Hurst* (*f*), in the event which happened of a son of the testator purchasing the business, the trustees were authorised and directed to leave the purchase-money on mortgage of the business property; they took a mortgage from the son for 50,000*l.*, payable by instalments. They did not enforce payment, and ultimately

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(*a*) See note to Howe *v.* Dartmouth, vol. 1; *Re* Sheldon, 39 C. D. 53; *Re* Thomas, (1891) 3 Ch. 482; see also *Re* Whitehead, (1894) 1 Ch. 682; *Re* Bates, (1907) 1 Ch. 22; *Re* Wilson, (1907) 1 Ch. 394; *Re* Elford, (1910) 1 Ch. 814.

(*b*) 34 L. T. 522.

(*c*) Rowley *v.* Adams, 2 H. L. Cas. 725. See Hiddingh *v.* Denyssen, 12 A. C. 624.

(*d*) Per *Romilly*, M.R., in Clack *v.* Holland, 19 B. 271, cited with approval and commented on by *Lindley*, L.J., in *Re* Roberts, 76 L. T. at p. 483; applied by *Eve*, J., in *Re* Greenwood, 105 L. T. 509; and see East *v.* E., 5 Ha. 343, 348; Ratcliffe *v.* Winch, 17 B. 217; Hobday *v.* Peters, 28 B. 603; Ball *v.* B., 11 Ir. R. Eq., 370, 375; Stiles *v.* Guy, 16 Si. 230; Maitland *v.* Bateman, Ib. 233 (n.); Alexander *v.* A., 12 Ir. Ch. R. 1; Speight *v.* Gaunt, 9 A. C. 1.

(*e*) 38 C. D. 546, supra, p. 650. Note in this case s. 37 of the Conveyancing Act, 1881, was inapplicable. *Re* Greenwood, 105 L. T. 509.

(*f*) 63 L. T. 665; see *Re* Roberts, 76 L. T. 479; Hiddingh *v.* Denyssen, 12 A. C. 624.

there was a great loss, and *Chitty*, J., adopted the statement of the law in *Re Brogden*, and held that under the circumstances they had exercised an honest discretion in difficult circumstances, and were not liable.

Continuing Business of Testator.—This is in practice one of the most common forms of breach of trust, in respect of not getting in outstanding property.

An executor ought not, without express authority, *to carry on the trade* of the testator (*a*), except for the purpose of winding up the concern, but he may, and in some cases is bound to complete the contracts entered into by his testator (*b*). In *Re Crowther* (*c*), under a general power to postpone sale, carrying on a business for twenty-two years was held to be authorised, but this case was commented on in *Re Smith* (*d*), when the Judge sanctioned carrying on a business for two years only.

Securing Trust Property.—It is the duty of a trustee to do what is necessary by giving notice or otherwise to secure the property. In *Dix* v. *Burford* (*e*), one of several executors, having assented to a legacy of a mortgage debt secured on copyholds, was held liable for loss, caused by his not getting admission to the copyholds by reason of which one of his co-executors obtained payment, and gave a receipt as executor. The Judge said (p. 413), "The moment he was constituted trustee (*i.e.*, on the assent to the bequest) it became his duty, by notice or otherwise, to make it impossible for his co-trustee to receive or misapply the trust fund." * * * "The ordinary trustees' indemnity clause affords no security to a trustee who neglects to take the steps necessary to secure the fund."

So in *Jacob* v. *Lucas* (*f*), the Judge intimated that the omission of trustees, assignees of a trust fund vested in other trustees, to

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(*a*) Kirkman *v.* Booth, 11 B. 273.

(*b*) Collinson *v.* Lister, 20 B. 356; and see Godefroi on Trusts, (1907) p. 363; *Re* Chancellor, 26 C. D. 42.

(*c*) (1895) 2 Ch. 56, and see *Re* Elford, (1910) 1 Ch. 814.

(*d*) (1896) 1 Ch. 171. As to the Court giving directions for carrying on business for benefit of infant, see Perry *v.* P., 3 Ir. R. Eq. 452; Land *v.* L., 43 L. J. Ch. 311; Heathcote *v.* Hulme, 1 J. & W. 130. As to liability of executor for carrying on, see Dowse *v.* Gorton, 40 C. D. 536, (1891) A. C. 190; Strickland *v.* Symons, 26 C. D. 246; *Ex p.* Garland, 10 V. 110; *Ex p.* Edmonds, 4 De G. F. & J. 488; Fraser *v.* Murdoch, 6 A. C. 855; *Re* Brooke, (1894) 2 Ch. 600; *Re* Frith, (1902) 1 Ch. 342. See also notes to Robinson *v.* Pett, ante, pp. 616, 619, and Lindley 7th ed., pp. 665 et seq.

(*e*) 19 B. 409.

(*f*) 1 B. 436, see p. 442.

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perfect the arrangement by notice to such other trustees was a breach of trust. In *Kingdon* v. *Castleman* (*a*), according to the report in the W. N., the Court recognised that omission to give notice to an insurance office, of an assignment of a policy of assurance was a breach of trust, though from the other reports it appears the decision was grounded on other reasons.

So a trustee has been held liable for neglect to register in the Irish Registry: see *Macnamara* v. *Carey* (*b*), in which many of the English cases are reviewed. In *Ghost* v. *Waller* (*c*), a trustee for sale was held liable for leaving a conveyance with receipt endorsed in the hands of a solicitor, by means of which he obtained the money. In *Challen* v. *Shippam* (*d*), a trustee was held liable for delay in enquiring of a banker, whether instructions for investment had been carried out. But see where the bankers failed within twelve months of the testator's death, *Johnson* v. *Newton* (*e*). It is necessary also for trustees on a settlement of land to make the enquiries for the deeds that would be necessary on a purchase, *Lloyds Bank* v. *Jones* (*f*).

In *Ker's Case* (*g*), Lord *Cairns* recognises the duty of perfecting the title. He says with reference to some stock in the City of Glasgow Bank, "It is to be observed, that the bank stock having been included in the marriage settlement, it would become the duty of the trustees and of their legal agent to provide in some way for the perfecting of the title by the trustees to the stock, and for preventing any improper dealing with it by the original owner."

As regards life policies, it was long since held that a trustee is bound to keep up a policy if he should have funds in hand for that purpose (*h*), but not if he neither has nor can procure funds, and it would have been useless to sue the covenantor (*i*). If he either advances or borrows money for payment of premiums he will

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(*a*) (1877) W. N., 15, 46 L. J. Ch. 448, 36 L. T. 141.

(*b*) 1 Ir. R. Eq. 9; see also Lester *v.* L., 6 Ir. R. Ch. 513.

(*c*) 9 B. 497; but see now s. 17 Trustee Act, 1893, Wyman *v.* Paterson, (1900) A. C. 271; *Re* Sheppard, (1911) 1 Ch. 50.

(*d*) 4 Ha. 555; Cf. *Re* Sheppard, supra.

(*e*) 22 L. J. Ch. 1039.

(*f*) 29 C. D. 221, and see Walker *v.* Linom, (1907) 2 Ch. 105.

(*g*) 4 A. C. 598.

(*h*) Marriott *v.* Kinnersley, Taml. 470.

(*i*) Hobday *v.* Peters, 28 B. 603. As to the trustees' duty in such cases see Kingdon *v.* Castleman, 25 W. R. 345.

have a lien on the policy for the amount (*a*). An executor is empowered to insure against fire.

By sect. 7 of the Trustee Act of 1888, it was enacted that it "shall be lawful for, but *not obligatory* upon a trustee, to insure, and to pay the premiums out of the income of the property insured or other property subject to the same trusts," &c. This section is repealed by the Trustee Act of 1893 (*b*), and the substance of it re-enacted by sect. 18 of that Act, with the omission of the words "not obligatory." It would seem that apart from the statute, trustees and executors are not liable as for wilful default for loss caused by their failing to insure trust property (*c*). It has been recently held that the liability of trustees is unaffected by sect. 18, supra, and that this section imposes no statutory obligation upon the trustees to insure (*d*). For recent cases in which the question at issue was, on which of the beneficiaries the burden of the insurance should fall, see cases below (*e*).

4. As to the Custody of Trust Property.

Subject to the statements in Part 1, supra, trustees and executors will not be liable for accidental loss without carelessness on their part, *e.g.*, for robbery when the trust property is in their own possession, *Morley* v. *M.* (*f*), or in possession of others as agents, *Jones* v. *Lewis* (*g*).

In *Eaves* v. *Hickson* (*h*), *Romilly*, M.R., held that if a person obtained trust property from trustees by means of a forgery, the loss fell on them and not on the *cestui que trust;* and this may be so; but in *Hopgood* v. *Parkin* (*i*), referring to that case, the same Judge

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(*a*) Johnson *v.* Swire, 3 Gif. 194; *Re* Layton's Policy, (1873) W. N. 49; *Re* Leslie, 23 C. D. 552, and see Falcke *v.* Scottish Imperial Insurance Company, 34 C. D. 234, *Re* Earl of Winchilsea's Policy Trust, 39 C. D. 168; Strutt *v.* Tippett, 62 L. T. 475, and Lewin, (1904) p. 1139; Godefroi, (1907) p. 936.

(*b*) 56 & 57 Vict. c. 53.

(*c*) Bailey *v.* Gould, 4 Y. & C. Ex. 221; Fry *v.* F., 27 B. 144.

(*d*) *Re* McEacharn, 103 L. T. 900.

(*e*) *Re* Fowler, 16 C. D. 723; *Re* Courtier, 34 C. D. 146; *Re* Baring, (1893) 1 Ch. 61; *Re* Redding, (1897) 1 Ch. 876; *Re* Tomlinson, (1898) 1 Ch. 232, as to insurance of settled heirlooms, see *Re* Earl of Egmont's Trusts, (1908) 1 Ch. 821.

(*f*) 2 Ch. Ca. 2.

(*g*) 2 Ves. Sen. 240. See Job *v.* J., 6 C. D. 562, explained in Mayer *v.* Murray, 8 C. D. 424; European Assurance Society *v.* Radcliffe, 7 C. D. 733; Vibart *v.* Coles, 24 Q. B. D. 364; Jobson *v.* Palmer, (1893) 1 Ch. 71.

(*h*) 30 B. 136.

(*i*) 11 Eq. 77, 78.

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extended the liability to the case of an investment by trustees on mortgage when they had employed a solicitor in the usual course to investigate the title, and he, by negligence or want of skill, had not discovered a prior incumbrance (*a*). And in *Sutton* v. *Wilders* (*b*), the same Judge said : "He was their agent for lending the money on proper security, and he failed to perform his duty. The Court makes exception in the case of a banker who fails when the trust money is only allowed to remain in his hands for a reasonable time, because the money must be kept by the trustees somewhere till it is invested or distributed ; and no place is so secure as a bank in good repute. But if a trustee entrusts the money to a servant who robs him, the trustee is liable. If he employs a solicitor who neglects his duty, the principal is liable. Here it is even more so, because the trustees did not examine anything or require any opinion on the title, or the like, but trusted implicity to Mousley, who defrauded them." The facts in that case, or the view that the Court took of them, may have warranted the judgment that the trustees were liable, as it seems the Judge considered that the trustees were negligent, and he also made a point of their having the same solicitor as the mortgagor. But the opinions expressed both in *Hopgood* v. *Parkin* and *Sutton* v. *Wilders*, seem to be clearly contrary to the principles laid down in *Speight* v. *Gaunt* (*c*), and other cases cited supra, p. 639.

In *Re Weall* (*d*), *Kekewich*, J., says, "Consider for a moment the position of that special agent, called a trustee, as regards the employment of sub-agents. He certainly has the right to appoint them if and so far as the work of the trust reasonably requires, for instance, he may appoint a broker to make or realise investments, or a solicitor to do legal business." * * * "The limit of the power of appointment is, as pointed out in the well-known case of *Speight* v. *Gaunt*,—reasonableness." * * * (*e*) "A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty." See also *Learoyd* v. *Whitcley* (*f*), where Lord Halsbury says, "I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in

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(*a*) But see Rochfort *v.* Seaton, (1896) 1 Ir. R. 18.

(*b*) 12 Eq. 373.

(*c*) 22 C. D. 727, see remarks of *Lindley*, L.J., at p. 761 ; 9 A. C. 1.

(*d*) 42 C. D. 674.

(*e*) This is also the limit of the power of remuneration, ibid., p. 678.

(*f*) 12 A. C. 727, infra, p. 668.

which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law (*a*), and in this case I do not deny that he would be entitled to rely on a valuer upon a pure question of valuation."

Deposit in a Bank.—Depositing trust money in a bank is in effect a delegation of the custody to the bankers, and the test whether it involves liability on the trustee in case of failure of the bank is the same as in other cases of delegation, namely, whether the deposit was reasonably made according to the ordinary course of business (*b*).

In *Johnson* v. *Newton* (*c*), a bank failed nine months after testator's death, the executors had 2,000*l.* balance in the bank. The Master had found "that there were not any purposes of their trust which rendered it necessary for the executors to retain the balance or any part of it with the bankers." But *Page-Wood*, V.-C., held that the executors were not liable; it was reasonable to keep a balance in the bank before the year had expired. In *Swinfen* v. *S.* (*d*), the Court held it was reasonable to leave a very small sum in the bank apparently after the twelve months. In *Wilks* v. *Groom* (*e*), proceedings were pending in an administration suit, and permanent investment not being proper, the money was deposited by the administratrix in a bank; and the Judge said (p. 59), "Is an executor or administrator under the usual indemnity clause liable by reason of the failure of a banker when investment is improper for depositing a fund in the hands of the banker? I think clearly not." In *Fenwick* v. *Clarke* (*f*), executors after twelve months deposited money in a bank, with the view of investing it and other moneys not yet paid, on a mortgage in order to meet deferred legacies, and the bank failed a short time, *i.e.*, two months, after the deposit. The will contained the usual indemnity clause from losses excepting wilful default. It was held that the trustees were not liable, and *Turner*, L.J., said that the intention to invest the money with others expected to be paid upon a fresh mortgage then being negotiated, "appears a sufficient ground for leaving the money deposited with the bank meanwhile." So trustees have been held not liable for a deposit on a sale left with

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(*a*) But see Doyle *v.* Blake, 2 Sch. & Lef. 243, and supra, p. 645.

(*b*) Supra, p. 639; Clough *v.* Bond, p. 663, infra; *Re* Gasquoine, (1894) 1 Ch. 470; see Trustee Act, 1893, ss. 17 and 24 (56 & 57 Vict. c. 53).

(*c*) 11 Ha. 160.

(*d*) 29 B. 211.

(*e*) 3 Drury, 584.

(*f*) 4 De G. F. & J. 243; 31 L. J. Ch. 728.

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the auctioneer, on the ground that it was necessary in the usual course of business that he should hold it for vendor and purchaser (*a*) ; nor for depositing money at a bank pending the appointment of new trustees (*b*), nor for employing a banker to remit money to a distance (*c*).

On the other hand, trustees and executors have been held liable for money left in banks on the ground that the deposit was *unnecessary* in the following cases. In *Darke* v. *Martyn* (*d*), the testator died in March, 1823. In January, 1824, and January, 1825, the executors put part of the assets in a bank on deposit notes carrying interest ; the bank failed in November, 1825. The executors were held liable because there was no sufficient reason shown for the deposit.

In *Moyle* v. *M.* (*e*), the testator died in June, 1823. An administration suit was commenced in October, 1823, and the executors were held liable for a deposit left in the bank in December, 1825, when the bank failed. This case was referred to in *Johnson* v. *Newton* (*f*), as being a strong case.

In *Gibbins* v. *Taylor* (*g*), the testator died in 1835, a deposit by the executors remained in a bank in 1842, when B., one executor, died, and the other drew out the funds : it was held that B.'s estate was liable.

In *Rehden* v. *Wesley* (*h*), there was the usual indemnity clause against losses by failure of bankers, &c. The testator died in August, 1855. The deposit was made on the 20th January, 1856. The bank stopped in September, 1856. The executors were held liable because, " it was an investment, not a deposit."

So trustees have been held liable for money left in a bank which failed after they had been ordered to pay it into Court (*i*), or to new trustees (*k*).

In *Cann* v. *C.* (*l*), *Kay*, J., expressed an opinion that trustees while seeking an investment on mortgage ought not to leave money in a bank for more than six months; he decided that fourteen

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(*a*) Edmunds *v.* Peake, 7 B. 239.

(*b*) Adams *v.* Claxton, 6 V. 226; Godefroi (1907), p. 288.

(*c*) Knight *v.* Plymouth, Dick. 120; Godefroi (1907), p. 289.

(*d*) 1 B. 525.

(*e*) 2 R. & My. 710.

(*f*) 11 Ha. 160.

(*g*) 22 B. 344.

(*h*) 29 B. 213.

(*i*) Wilkinson *v.* Bewick, 4 Jur. (N. S.) 210.

(*k*) Lunham *v.* Blundell, ibid. 83.

(*l*) 51 L. T. 770; see also *Re* Earl, 39 W. R. 108; Godefroi (1907), p. 288.

months was too long. And trustees may be responsible for loss if they keep larger balances than necessary (*a*).

Although the deposit in a bank may be proper, care must be taken that the account is in the *joint names* of all the trustees. And in the case of a sole trustee, that it is distinguished from his private account (*b*); the ground being that the bank would obtain a right against it, in respect of any personal liability of his to them which would not be the case if there was a separate trust account (*c*).

Although a trustee may not have parted with the control over a trust fund, so as to enable another person to deal with it without his concurrence, he may still be liable if he parts with his exclusive control by associating and incorporating with himself the authority of another person (*d*).

In *Clough* v. *Bond* (*e*), the estate of J. B., the husband of a co-administratrix, was held liable for a payment into a bank in the joint names of J. B. and his wife's co-administrator without the wife's name being added, by reason of which, on the death of J. B., the co-administrator was entitled to and did draw out the whole fund (*f*).

So where two trustees, instead of investing the trust moneys on proper securities, deposited them in a bank, and the surviving trustee drew out the balance and applied it to his own use: it was held by *Romilly*, M. R., that the estate of the deceased trustee was liable to make good the loss (*g*).

(*a*) Home *v.* Pringle, 8 Cl. & Fin. 264; Astbury *v.* Beasley, 17 W. R. 638; Godefroi (1907), p. 289.

(*b*) Matthews *v.* Brise, 6 B. 239; see also Fellows *v.* Mitchell, 1 P. W. 81; Massey *v.* Banner, 1 J. & W. 241; Wren *v.* Kirton, 11 V. 377; Pennell *v.* Deffell, 4 De G. M. & G. 386, 392; G. E. Ry. Co. *v.* Turner, L. R. 8 Ch. 149.

(*c*) *Ex p.* Kingston, L. R. 6 Ch. 632, and see where the bank has no notice of a trust, Thomson *v.* Clydesdale Bank, (1893) A. C. 282; Coleman *v.* Bucks &c. Bank, (1897) 2 Ch. 243, the bank in this case appearing to have notice of some trust; cf. Bank of New South Wales *v.* Goulburn, (1902) A. C. 543, and see note (*e*), p. 645, supra.

(*d*) Salway *v.* S., 2 Russ. & M. 215, affirmed Dom. Proc. nom. White *v.* Baugh, 2 Russ. & M. 220, 9 Bligh, 181, 3 Cl. & Fin. 44. See also Dixon *v.* D., 9 C. D. 587.

(*e*) 3 My. & C. 490.

(*f*) Adopted by the C. A. in *Re* Gasquoine, (1894) 1 Ch. 470, cited supra, p. 641, infra, p. 673, and see Langford *v.* Gascoyne, 11 V. 333, 8 R. R. 170; Shipbrook *v.* Hinchinbrook, 11 V. 252, 16 V. 477, 8 R. R. 138; Underwood *v.* Stevens, 1 Mer. 712; Trutch *v.* Lamprell, 20 B. 116; Browne *v.* Butter, 24 B. 159; Lowe *v.* Shields, (1902) 1 Ir. R. 320.

(*g*) Gibbins *v.* Taylor, 22 B. 344. See also Evans *v.* Bear, L. R. 10 Ch. 76; Ingle *v.* Partridge, 32 B. 661, 34 B. 411.

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Where there are several trustees, trust property consisting of specific articles such as plate, should, since all the trustees cannot have the custody thereof, be deposited with their bankers. If, however, one be in possession of the articles, in the absence of special circumstances, he will be entitled to retain the sole custody as against the others (*a*).

When the trust fund comprised stocks or securities which were payable to bearer, passing by delivery, and on which the interest was payable upon coupons, it has been held that the trustees might, without a breach of trust, deposit such securities in a box at a banker's on account of all the trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons (*b*). So also in *Re De Pothonier* (*c*), it was held that trustees might deposit convertible bonds with bankers, in the manner usual with prudent men of business. In this case the bankers only undertook with the trustees to show ordinary care, and collected the amounts due on the coupons attached to the bonds.

A similar question was considered in *Cottam* v. *Eastern Counties Ry. Co.* (*d*), where one trustee was allowed to keep debentures, and he forging the signatures of his co-trustees, transferred the debentures to purchasers. *Page Wood*, V.-C., held that the purchasers could not set up the defence of purchase for value without notice, and that there had been no negligence on the part of the co-trustees which would prevent them disputing the title of the purchaser. But where each of two trustees by arrangement retained one-half of certain bonds transferable by delivery, and one of them dealt fraudulently with the bonds held by him, *Hall*, V.-C., held that the other was liable (*e*).

As to Custody of Title-deeds.—*Lloyds Bank* v. *Jones* (*f*), shows that if a trustee under a settlement of land fails to inquire for the title-deeds, he and his *cestui que trust* will be postponed by the negligence to an equitable mortgagee obtaining the deeds. The trustee of land should in all cases therefore inquire for the deeds, and if entitled to hold them, should require them to be deposited with him. See the notes to *Russel* v. *R.*, ante, p. 104.

(*a*) Cf. *Re* Sisson's Settlement, (1903) 1 Ch. 262, and see next page.

(*b*) Mendes *v.* Guedalla, 2 John. & H. 259, see also Hall *v.* Franck, 11 B. 519.

(*c*) (1900) 2 Ch. 529.

(*d*) 1 John. & H. 243; and see *Re* Sisson's Settlement, supra.

(*e*) Lewis *v.* Nobbs, 8 C. D. 591.

(*f*) 29 C. D. 221; see Walker *v.* Linom, (1907) 2 Ch. 105; Godefroi (1907), pp. 835 to 838.

As between co-trustees, if one of them be in possession of title-deeds and non-negotiable securities belonging to the estate, the other trustee is not, in the absence of special circumstances, entitled to have them removed from his co-trustees' custody and placed at a bank in a box accessible only to the trustees jointly (*a*).

The right to the custody is not always in the trustee. The legal tenant for life is as a rule entitled to hold the deeds (*b*), but where the trust was for the trustee to receive the rents and pay them to the tenant for life, it was held that the trustee had the legal estate and was entitled to the deeds (*c*), and it would be prudent in all cases for the trustee having the legal estate to require them.

The Court has frequently ordered the deeds to be delivered to the equitable tenant for life (*d*).

In *Field* v. *F.* (*e*), *Kekewich*, J., while he held in the particular case before him, that trustees of a building estate in the course of development might leave the deeds with their solicitors, said that as a general principle, trustees must have their title-deeds as well as their securities under their control; and that certificates and bonds payable to bearer ought not to be under the control of a solicitor or any other agent. Trustees must keep them not necessarily in their own custody, but in some place where they cannot be got at without the consent of the whole body (*f*).

Entrusting Custody to Agents.—So also a trustee is not liable if in the ordinary course of business he employs an agent to collect small debts and they are lost by the agent's insolvency. See *Re Brier* (*g*), where Lord *Selborne* said, "I think that in this case the burden of proof is upon the respondents who seek to charge the executors with this money. The statute 22 & 23 Vict. c. 35, s. 31 (*h*), provides in effect that trustees shall not be responsible for any banker, broker, or other person with whom trust moneys have been deposited (which I understand to mean properly deposited), unless it can be shown that that loss happened through their own wilful default. The

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(*a*) *Re* Sisson's Settlement (1903), 1 Ch. 262; cf. Davies *v.* Vernon, 6 Q. B. 443; Foster *v.* Crabb, 12 C. B. 136.

(*b*) See Sug. V. & P. 14th ed., 446, and Leathes *v.* L., 5 C. D. 221.

(*c*) Garner *v.* Harrington, 22 B. 627. See Allwood *v.* Heywood, 1 H. & C. 745.

(*d*) *Re* Burnaby, 42 C. D. 621; Langdale *v.* Briggs, 8 De G.M. & G. 391; *Re* Wythes, (1893) 2 Ch. 369, but not if he has mortgaged, *Re* Newen, (1894) 2 Ch. 297.

(*e*) (1894) 1 Ch. 425.

(*f*) See observations of *Cozens-Hardy*, J., upon this case in *Re* De Pothonier, (1900) 2 Ch., at p. 532.

(*g*) 26 C. D. 238 (C. A.).

(*h*) Repealed by Trustee Act. 1893; see sects. 17 & 24 of that Act.

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statute incorporated generally into instruments creating trusts the common indemnity clause which was usually inserted in such instruments. It does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and appears to me to throw the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from *the default of an agent when the propriety of employing an agent has been established.* In the present case, the learned Judge in the Court below has virtually decided that this was a case of proper employment of an agent for a proper purpose, and as far as I can judge, the nature of the case justifies that view" (*a*).

But where money was handed by a trustee to his solicitor to invest and the solicitor misapplied it, it was held that the trustee was liable (*b*). So where a trustee allowed trust money to be paid to the account of his co-trustee, a solicitor (*c*).

As to the necessity of selecting agents professionally qualified see *Fry* v. *Tapson* (*d*), *Re Weall* (*e*).

Where each of two trustees retained possession of a moiety of bonds passing by delivery, one was held liable to make good the loss sustained by the other appropriating his moiety (*f*), and where two of three trustees had committed a box containing such securities to the third (a stockbroker), for the purpose of conversion they were bound to ascertain when the box was returned to the bankers, that such conversion had been effected and the new securities restored (*g*).

Apart from statute, trustees for sale are not justified in employing a solicitor to receive the purchase-money (*h*), and in *Viney* v. *Chaplin* (*i*) it was held that in the case of a sale by an owner, a solicitor must produce written authority to receive the money, and that the possession of the deed with receipt endorsed is not

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(*a*) See also *Re* Bird, 16 Eq. 203; Castle *v.* Warland, 32 B. 660; *Re* Mackay, (1911) 1 Ch. 300.

(*b*) Bostock *v.* Floyer, 1 Eq. 26, explained by *Lindley*, L.J., in Speight *v.* Gaunt, 22 C. D. p. 737.

(*c*) Wynne *v.* Tempest, 13 T. L. R. 360.

(*d*) 28 C. D. 268; see *Re* Olive, 34 C. D. 70; Smethurst *v.* Hastings, 30 C. D., p. 494; Learoyd *v.* Whiteley, 12 A. C. 731, where trustees did not act with ordinary prudence; Knox *v.* Mackinnon, 13 A. C. 754

(*e*) 42 C. D. 674.

(*f*) Lewis *v.* Nobbs, 8 C. D. 591.

(*g*) Mendes *v.* Guedalla, 2 J. & H. 259.

(*h*) Ghost *v.* Waller, 9 B. 497.

(*i*) 2 De G. & J. 468, 482; see also *Ex p.* Swinbanks, 11 C. D. 526.

sufficient to enable the solicitor to give a valid discharge to the purchaser.

In order to meet this latter case, it was in effect enacted by sect. 56 of the Conveyancing Act, 1881, that the deed with the receipt in the body of the deed, or endorsed thereon, should be sufficient authority to the person liable to pay to make payment to the solicitor. It was held (*a*) that this did not authorise solicitors for trustees to receive the money unless, as put by *Bowen*, L. J., in case of "moral necessity."

Sect. 17 (*b*) of the Trustee Act, 1893, by sub-s. (1), authorises a trustee to appoint a solicitor to receive and give a discharge for moneys receivable under the trust by permitting him to have the custody of and to produce a deed falling within sect. 56 (1), of the Conveyancing Act, 1881, and expressly declares that a trustee shall not be chargeable with breach of trust by reason only of his having made such an appointment, and provides that the production of any such deed by the solicitor shall have the same effect as if the person appointing the solicitor had not been a trustee (*c*). By sub-s. 2, a trustee is authorised to appoint a banker or a solicitor to receive and give a discharge for policy moneys by permitting the banker or solicitor to have and produce the policy with a receipt signed by the trustee, and provides that a trustee shall not be chargeable with a breach of trust by reason only of his making such an appointment (*d*). By sub-s. 3, nothing in the section is to relieve the trustee from any liability he would have been under, had the Act not been passed, by reason of his allowing the moneys to remain under the control of the banker or solicitor a longer time than was reasonably necessary to enable payment to the trustee (*e*). This provision only applies where the trustee either knew or ought to have known of the receipt of the money (*f*).

(*a*) *Re* Bellamy and Metropolitan Board of Works, 24 C. D. 387; *Re* Flower, 27 C. D. 592, and see Webb *v.* Ledsham, 1 K. & J. 385; Hope *v.* Liddell, 21 B. 183.

(*b*) Replacing sect. 2 of the Trustee Act, 1888, and applying only (sub-sect. 4) in cases where the money or valuable consideration was received after December 24, 1888.

(*c*) *Re* Hetling & Merton, (1893) 3 Ch. 269.

(*d*) Note this sub-section does not, as sect. 56 (1), supra, does, in the case of a deed, make the production of the receipted policy a receipt for the money, and so apparently the solicitor or banker must give a separate receipt.

(*e*) See Wyman *v.* Paterson, (1900) A. C. 271; and see *Re* Sheppard, (1911) 1 Ch. 50, at pp. 55 et seq., as to when a solicitor is an unreliable agent for the receipt of moneys.

(*f*) *Re* Sheppard, supra.

5. Investment of Trust Property.

Subject to the rules as to delegation above stated (p. 639), trustees might apart from statute for the purpose of making or realising an investment adopt the judgment of a skilled agent, such as a broker or solicitor, in matters which properly came within their professional knowledge (*a*).

Learoyd v. *Whiteley* (*b*) also marks the important limitation, that the trustee must judge whether the investment is *authorised by his trust*, and that he would not be exonerated in this respect by the opinion of the agent that the investment was a good one. In that case trustees invested trust money on the security of a 5 per cent. mortgage of a freehold brickfield, with buildings, machinery and plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested. The valuers' report was in fact based upon a valuation of more than double the amount invested, and upon the supposition that the concern was going; but the report did not state this, nor distinguish between the value of the land and that of the buildings, machinery, &c. The trustees acted upon the report in good faith, but without making further inquiries. They were held liable for the security being insufficient, because the valuation did not distinguish the value applicable to the land apart from the speculative trade, and they were bound to judge for themselves that they could only trust to the value of the land as a real security and not to the trade.

Since this decision important provisions have been made for the protection of trustees in respect of investments; these are now contained in the Trustee Act, 1893, sects. 1 to 9. Sects. 8 and 9 require special notice.

Sect. 8, sub-sect. 1 (*c*) provides that a trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reason-

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(*a*) *Re* Weall, 42 C. D. 674; Learoyd *v.* Whiteley, 12 A. C. 727, see p. 731; Fry *v.* Tapson, 28 C. D. 268; Jobson *v.* Palmer, (1893) 1 Ch. 71.

(*b*) Supra. Cp. *Re* Hunt's Settled Estates, (1905) 2 Ch. 418.

(*c*) Sect. 8 replaces sect. 4 of the Trustee Act, 1888, and applies to all mortgages made after December 24th, 1888.

ably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate, or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report and that the loan was made under the advice of the surveyor or valuer expressed in the report.

On this section the following points may be noticed.

(1) The investment must be within the terms of the trust. So the section was held not to apply, where the trustee having power to invest the trust fund "in his own name or under his legal control," he invested on contributory mortgages in the names of himself and another person, having rights co-extensive with his own in reference to the property (*a*).

(2) The surveyor or valuer must be instructed and employed independently of the owner of the property (*b*). If the surveyor's fees are to be paid by the owner of the property this circumstance must not be known to the surveyor, nor may there be an arrangement that the surveyor shall have only a preliminary fee or no fee at all if the transaction falls through (*c*). It is plain that the conditions will not be satisfied where the surveyor or valuer is "suggested by the mortgagor, instructed by the mortgagor's solicitors, is referred to the mortgagor both as to his fee and as to the properties he was to value, and is accompanied by the mortgagor when he made his survey (*d*).

It has been held that the words "reasonably believed" do not govern the words "instructed and employed independently" (*e*), and that a trustee to obtain the protection of the section must be able to show that the surveyor was so instructed and employed. This, however, appears to be inconsistent with the decision in *Re Stuart* (*f*), and the question was left open by *Parker*, J., in *Shaw* v. *Cates* (*g*).

(3) The section does not relieve the trustee from his general duty to show care and prudence. Trustees are not, because of a valuer's report as to value and his advising an advance of two-thirds of that

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(*a*) *Re* Dive, (1909) 1 Ch. 328.

(*b*) *Re* Solomon, (1912) 1 Ch. 261.

(*c*) Marquis of Salisbury *v.* Keymer, (1909) W. N. 31; *Re* Dive, (1909) 1 Ch. 328.

(*d*) Shaw *v.* Cates, (1909) 1 Ch., at p. 403.

(*e*) Per *Kekewich*, J., in *Re* Walker, 59 L. J. Ch. 386; 62 L. T. 449; *Re* Somerset, (1894) 1 Ch. 231.

(*f*) (1897) 2 Ch. 583.

(*g*) (1909) 1 Ch. 389, at p. 403.

value, necessarily justified in making that advance. The character and circumstances of the property, its liability to deterioration, to fluctuation in value, must be taken into consideration by the expert and by the trustee who acts on his advice. In *Shaw* v. *Cates* (*a*), *Parker*, J., said, "I dissent entirely from the position taken up by some of the defendants' expert witnesses, that when once they have ascertained the value of the property, they are, whatever its nature and whatever method of valuation they have adopted, at least *primâ facie* justified in advising an advance of two-thirds of its value. Such a position, in my opinion, defeats the object of the section by making what the legislature has recognised as the standard of the minimum protection which a prudent man will require into a standard of the normal risk which, whatever the nature of the property, a prudent man will be prepared to run; and it deprives the expert advice on which the trustee is to rely as to the margin of protection to be required of all its value."

(4) The fact that a trustee is unable to show that he has complied with s. 8 (1), is not necessarily a bar to his obtaining relief under sect. 3 of the Judicial Trustee Act, 1896 (*b*).

It is to be observed that in *Learoyd* v. *Whiteley* (*c*) the Court treated the investment as wholly unauthorised, and in estimating the trustees' liability did not think it necessary to take into account the value of what might have been within the definition of real security; and it seems that before the Act, if the security was for any reason unauthorised, it was treated as wholly improper, and the trustees liable to make good any loss (*d*). A distinction is drawn between an absolutely unauthorised investment and an improvident investment on security of an authorised character. The trustee is entitled to take over an investment of the former nature, accounting to the trust estate for the sum invested therein; he is not, however, entitled to an investment of the latter nature, and it may be realised without his consent (*e*).

By sect. 9, sub-sect. 1, of the Trustee Act, 1893, where a trustee improperly advances trust money on a mortgage security which

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(*a*) (1909) 1 Ch. at p. 398, and see p. 405; Palmer *v.* Emerson, (1911) 1 Ch. 758; *Re* Solomon, (1912) 1 Ch. 261 (see this case as to weekly tenancies).

(*b*) *Re* Stuart, (1897) 2 Ch. 583, at p. 591; Palmer *v.* Emerson, supra.

(*c*) 12 A. C. 727.

(*d*) E.g., Budge *v.* Gummow, L. R. 7 Ch. 719.

(*e*) *Re* Salmon, 42 C. D. 351; *Re* Hotham, (1902) 2 Ch. 575; Head *v.* Gould, (1898) 2 Ch. 250.

would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. The trustee must prove that the investment was of an authorised character, and that, independently of the question of value, it was proper (*a*). In considering the question for what amount the property taken as security could properly have been accepted, the Court is guided by the same general considerations which would have guided it prior to the Trustee Act, 1888 (*b*).

This section is important in cases where land has declined in value, and may to a great extent diminish the liability of trustees. In *Learoyd* v. *Whiteley* the land was constantly being diminished in value by digging for bricks, and trustees would not be safe in trusting to the value at the time of investment of any wasting security.

It appears that trustees are not under any duty to make a periodic investigation of the value of authorised investments retained by them (*c*).

By the Trustee Act, 1893, Amendment Act, 1894 (*d*), sect. 4, "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law" (*e*).

Emergency.—As a general rule the Court has no jurisdiction to authorise trustees to do any act in relation to the trust estate which is not authorised by the terms of the trust instrument (*f*). In a very limited class of cases, however, the Court has in recent years authorised trustees to do certain acts in the management of a trust estate which under ordinary circumstances they would have no

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(*a*) *Re* Walker, 59 L. J. Ch. 386; 62 L. T. 452; Shaw *v.* Cates, supra; cf. Blyth *v.* Fladgate, (1891) 1 Ch. 353. See Learoyd *v.* Whiteley, 12 A. C. 727; Stickney *v.* Sewell, 1 My. & Cr. 8 & 14; *Re* Clive, 34 C. D. 70; Brinsden *v.* Williams, (1894) 3 Ch. 185, for instances of improper advances.

(*b*) Per *Parker*, J., in Shaw *v.* Cates, (1909) 1 Ch., pp. 405 et seq.

(*c*) See per *Parker*, J., in Shaw *v.* Cates, supra, at p. 409, referring to *Re* Chapman, infra, and Rawsthorne *v.* Rowley, 24 T. L. R. 51, (1909) 1 Ch. at p. 409 (n).

(*d*) 57 Vict. c. 10.

(*e*) *Re* Chapman, (1896) 1 Ch. 323; (1896) 2 Ch. 763.

(*f*) See, e.g., *Re* Morrison, (1901) 1 Ch. 701; *Re* Crawshay, 60 L. T. 357; *Re* New, (1901) 2 Ch. 534.

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power to do. This overriding jurisdiction, which is usually exercised in chambers, is defined by the judgment of the Court of Appeal in *Re New* (*a*), and that decision has been said to constitute the high water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts (*b*). The jurisdiction is exercised where there is an emergency in administration of a trust which may reasonably be supposed not to have been foreseen by the author of the trust; that emergency must render the doing of some act unauthorised by the trust most desirable or even essential in the interest of all the *cestuis que trust;* and some or all of the *cestuis que trust* must be not *sui juris,* or not then in existence, so that the consent of them all cannot be given. In *Re New* the Court authorised the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a limited liability company, under which shares in the company settled in specie were to be exchanged for shares or debentures in the new company, investments not authorised by two of the trust instruments. The trustees of these two instruments were put on an undertaking to apply to the Court if they desired to retain the new shares or debentures for more than a year. In *Re Tollemache* (*c*), *Kekewich*, J., states by way of illustration the more familiar examples of the exercise of this jurisdiction in chambers, showing that where the Court authorises an investment unauthorised by the trust, it never authorises the permanent retention of that investment, but merely allows it to be made as a temporary necessity in the administration of the trust estate (*d*).

Personal Security.—In the absence of plain *express* (*e*) authority to that effect, a trustee cannot lend trust moneys on personal security (*f*). If an express power is given, then it must be exercised with proper discretion (*g*), and any conditions prescribed as to its exercise must be precisely observed (*h*).

(*a*) Supra; and see West of England, &c. *v.* Murch, 23 C. D. 138.

(*b*) Per *Cozens-Hardy*, L.J., in *Re* Tollemache, (1903) 1 Ch. 955, at p. 956. Cf. *Re* Willis, (1902) 1 Ch. 15 (C. A.).

(*c*) (1903) 1 Ch. 457, at pp. 459 et seq.

(*d*) And see *Re* Wells, (1903) 1 Ch. 848; Havelock *v.* H. 17 C. D. 807; *Re* Collins, 32 C. D. 229; *Re* Walker, (1901) 1 Ch. 229.

(*e*) Pocock *v.* Reddington, 5 V. 794.

(*f*) Walker *v.* Symonds, 3 Swans. at p. 62.

(*g*) Knox *v.* Mackinnon, 12 A. C. 753. Cf. Smith *v.* Patrick, (1901) A. C. 282.

(*h*) See, e.g., Bateman *v.* Davis, 3 Madd. 98. As to a loan to a tenant for life on his personal security, see *Re* Laing's Settlement, (1899) 1 Ch. 593, explaining Keays *v.* Lane, Ir. R. 3 Eq. 1.

6. Liability for the Acts or Defaults of Co-trustees and Co-executors.

The same principles apply as are stated, ante, pp. 639, 643, with respect to delegation generally, and liability will attach if property is "unnecessarily" placed, or, if properly placed, is left too long under the control of a co-executor or co-trustee. And, further, a trustee will be liable if he, without interfering, permits a breach of trust by a co-trustee; see infra, p. 677.

There is but little difference whether the control or custody be given to a co-trustee or co-executor or to a stranger as agent. *Speight* v. *Gaunt* (*a*) was a case of an employment of a broker who was not a co-trustee.

Re Gasquoine (*b*) was a case of the employment of a broker who was a co-trustee, and this fact was referred to in the judgment as being to some extent material in the selection of a broker. But the same principle was applied in both cases, and applies to all cases of delegation, (namely) that it is only allowed when necessary according to usage in ordinary course of business.

The ordinary clause of indemnity used by conveyancers in trust documents was embodied in all such documents by Lord St. Leonard's Act (*c*). This section is repealed and re-enacted by sect. 24 of the Trustee Act, 1893, and is extended to executors and administrators by sect. 50.

This section does not, it would seem, protect trustees who neglect to receive the trust property themselves, if they ought to have so received it, unless they can show they were prevented by moral necessity, arising from the usage of mankind.

In *Re Brier* (*d*), a case under the former Act, it was held that this statutory indemnity only enforced the law as recognised by the old cases, and gave no protection where the act was not necessary according to the ordinary course of business, in which case it would amount to "wilful default," as to which see *Re Owens* (*e*).

Of course, the wording of a special indemnity clause is sometimes so extensive as to protect a trustee from the consequences of what might otherwise be a breach of trust: see the judgment of *Westbury*, C., in *Wilkins* v. *Hogg* (*f*).

(*a*) 22 C. D. 737, 9 A. C. 1, ante, p. 639.

(*b*) (1894) 1 Ch. 470, ante, p. 641.

(*c*) 22 & 23 Vict. c. 35, s. 31.

(*d*) 26 C. D. 238.

(*e*) 47 L. T. 61; Buxton *v.* B., 1 My. & C. 80; *Re* Stevens, (1897) 1 Ch. 422.

(*f*) 8 Jur. (N. S.) 25; Pass *v.* Dundas, 43 L. T. 665.

Ordinary Course of Business.—The judgment in the principal case is grounded on the receipt of the rents in question being necessary according to common practice in business, and the rule may now be stated, thus: if one executor does an act *unnecessarily*, which enables his co-executor to obtain sole possession of property belonging to the testator's estate, which, but for that act, he could not have obtained possession of, the executor doing such an act will be liable for any loss that occurs from the misapplication of such property by his co-executor (*a*).

A trustee is bound not only to make proper inquiries from his co-trustees for what purpose the trust moneys are wanted, but also to take care that they have been duly invested in accordance with the representations made to him : *Hanbury* v. *Kirkland* (*b*).

And an executor or trustee will be liable not only if by *some act* he puts the control of property unnecessarily in the co-trustee or co-executor, but also if passively through neglect of duty he allows the co-trustee or co-executor to obtain the control, or stands by while the breach of trust is committed (*c*), or does not take proper measures to secure the property (*d*), or permits the co-executor to retain part of the assets in his hands for an unnecessarily long time (*e*).

Of course, in considering what is necessary according to the ordinary course of business, there is a difference between the case of an executor and that of a trustee of some defined trust, for the trustee as a rule has only to see to the custody and investment of the property

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(*a*) Judgment of *Kay*, L. J., in *Re* Gasquoine, (1894) 1 Ch. 477, qualifying the rule as stated in Candler *v.* Tillett, 22 B. 257, 263. The rule applies to trustees and executors alike; see judgment in Townley *v.* Sherborne, supra. The following cases show the liability of a trustee for enabling his co-trustee to deal with trust property when not necessary in the ordinary course of business. Walker *v.* Symonds, 3 Swans. 1; Booth *v.* B., 1 B. 125; Dix *v.* Burford, 19 B. 409; Brumridge *v.* B., 27 B. 5; Ingle *v.* Partridge, 32 B. 661; Thompson *v.* Finch, 22 B. 316; *Re* Fryer, 3 K. & J. 317; Lewis *v.* Nobbs, 8 C. D. 591; Robinson *v.* Harkin, (1896) 2 Ch. 415; Lowe *v.* Shields, (1902) 1 Ir. R. 320.

(*b*) 3 Si. 265; see also Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Mendes *v.* Guedalla, 2 John. & H. 259.

(*c*) Mucklow *v.* Fuller, Jac. 198; Booth *v.* B., 1 B. 125; Dix *v.* Burford, 19 B. 409; Candler *v.* Tillett, 22 B. 257.

(*d*) Lincoln *v.* Wright, 4 B. 427.

(*e*) Styles *v.* Guy, 1 Hall & T. 523; S. C., 1 Mac. & G. 422; Sir *L. Shadwell*, V.-C., 16 Si. 230; Scully *v.* Delaney, 2 Ir. R. Eq. 165; West *v.* Jones, 1 Si. (N. S.) 205; Dix *v.* Burford, 19 B. 409; Egbert *v.* Butter, 21 B. 560; Thompson *v.* Finch, 22 B. 326; Cowell *v.* Gatcombe, 27 B. 568.

and the payment of income to the beneficiaries. Executors have to wind up the testator's estate, and pay debts, and power may in a proper case be intrusted to a co-executor for the purpose (*a*).

But it has been held in old cases (*b*) that an executor will not be justified in joining in a transfer to his co-executor, after a considerable time has elapsed from the testator's death, upon the mere representation by his co-executor that the stock is wanted for payment of debts; and if he neglects to make proper inquiries, he will be liable for the misappropriation of his co-executor, but he will not be charged for so much as was properly applied. In *Shipbrook* v. *Hinchinbrook* (*c*), three executors, two years and a half after the death of the testator, joined in executing a power of attorney to a co-executor for the sale of stock, upon his representations that it was required for payment of debts. *Eldon*, C., held, that they were liable for so much of the proceeds of sale as was misappropriated by their co-executor, but not for such part as they could prove was applied in payment of debts. In *Langford* v. *Gascoyne* (*d*), the widow of the testator gave a bag of money to Spurrell, who delivered it over to Gascoyne, one of his co-executors, without Lambert, the other co-executor,—who it seems was present at the time—having said or done anything whereby, or in consequence of which, the money was so placed in the hands of Spurrell. *Grant*, M. R., held that Spurrell and Gascoyne, but not Lambert, were to be charged with the money contained in the bag. The Judge said, "As to the other executor, Lambert, it is impossible to charge him. He has neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne. It is not incumbent upon one executor by force to prevent its getting into the hands of another." It seems, however, that this would not be law now, unless it were necessary according to the ordinary course of business to permit one executor to have the control. Though an executor may not be bound to use force, he may be bound to take legal proceedings to protect the trust property.

(*a*) See Hovey *v.* Blakeman, 4 V. 608; Bacon *v.* B., 5 V. 331, 5 R. R. 52; Chambers *v.* Minchin, 7 V. 197, 6 R. R. 111; *Re* Brier, supra, p. 673; *Re* Chapman, (1896) 2 Ch. p. 773; Hiddingh *v.* Denyssen, supra, p. 651; *Re* Lord de Clifford's Estate, (1900) 2 Ch. 707.

(*b*) Shipbrook *v.* Hinchinbrook, 11 V. 252, 16 V. 477, 8 R. R. 138; see also Underwood *v.* Stevens, 1 Mer. 712; Bick *v.* Motly, 2 My. & K. 312; Williams *v.* Nixon, 2 B. 472; Hewett *v.* Foster, 6 B. 259; Townsend *v.* Barber, Dick. 356. See also Candler *v.* Tillett, 22 B. p. 263.

(*c*) Supra.

(*d*) 11 V. 333; 8 R. R. 170.

So an executor has been held liable if he gives a co-executor a power of attorney to collect the assets, *Doyle* v. *Blake* (*a*); or to hold securities whereby he is enabled to receive the money due thereon, *Candler* v. *Tillett* (*b*); or if he joins his co-executor in indorsing, *Hovey* v. *Blakeman* (*c*), or drawing, *Sadler* v. *Hobbs* (*d*), a bill whereby he obtains sole possession of the proceeds (*e*).

So it has been held, if, by agreement amongst themselves, one is to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both, *Gill* v. *Attorney-General* (*f*).

On the other hand, the judgment of Lord *Cottenham* in *Clough* v. *Bond* (*g*), and the qualification given in *Re Gasquoine* (*h*) of the rule as stated in *Candler* v. *Tillett* (*i*), show that the ground for the decisions that the trustees are liable for the co-trustee's receipts is, that it was *not necessary* in the ordinary course of business to give the co-trustee or co-executor control.

When three executors and trustees were authorised to carry on the testator's farming business, which was by arrangement managed by one of them, *Romilly*, M. R., held that in taking the accounts the executor who managed the farm was to be considered as an agent, and the others were not liable (*k*).

Upon the same principle, Lord *Redesdale*, putting the case of an executor, living in London, remitting money to his co-executor in Suffolk, to pay debts owing there, observes, "He is considered to do this of necessity; he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way" (*l*).

(*a*) 2 Sch. & L. 231; see also Kilbee *v.* Sneyd, 2 Moll. 200; Lees *v.* Sanderson, 4 Si. 28.

(*b*) 22 B. 263; Lewis *v.* Nobbs, 8 C. D. 591.

(*c*) 4 V. 596, 608.

(*d*) 2 Bro. Ch. 114.

(*e*) And see Gregory *v.* G., 2 Y & C. Exch. 313; Dines *v.* Scott, T. & R. 361; Clough *v.* Bond, 3 My. & C. 497; Balchen *v.* Scott, 2 V. 678.

(*f*) Hard. 314; and see Moses *v.* Levi, 3 Y. & C. Exch. 359.

(*g*) 3 My. & C. 497.

(*h*) (1894) 1 Ch. p. 477.

(*i*) 22 B. p. 263; and see Lowe *v.* Shields, (1902) 1 Ir. R. 320.

(*k*) See Toplis *v.* Hurrell, 19 B. 423; and see Home *v.* Pringle, 8 Cl. & Fin. 288.

(*l*) See Joy *v.* Campbell, 1 Sch. & L. 341; Chambers *v.* Minchin, 7 V. 193; Bacon *v.* B., 5 V. 331, 5 R. R. 52; *Re* Lord de Clifford's Estate, (1900) 2 Ch. 707.

So it has been held that an executor is not liable for the loss of a fund which he hands over to his co-executor, if he has no legal right to retain it (*a*); nor if, having disclaimed and renounced, he applies it as the agent of the one who proved the will (*b*); *secus*, if he has once acted (*c*).

A distinction was taken by Lord *Harcourt* between the *effect* of a *legatee* and of a *creditor* seeking to charge an executor joining in a receipt with his co-executor; see *Churchill* v. *Lady Hobson* (*d*). But as legatees are bound by the terms of the will, and creditors are not, in many cases executors would be discharged as against legatees, where they would not as against creditors, *e.g.*, in case of a direction in a will to entrust the assets to some particular person: see *Doyle* v. *Blake* (*e*).

It has been held that where a trustee becomes aware of a breach of trust either meditated or committed by his co-trustee, and he conceals it, or at any rate abstains from taking the needful steps, by injunction or action, either to prevent it or to obtain restitution or redress on behalf of his *cestui que trust*, he will render himself liable for the misconduct of his co-trustee (*f*).

The legal personal representative of a sole surviving trustee who has died insolvent and indebted to his trust estate cannot, unless he has elected to act as trustee or is otherwise in the position of trustee, be ordered to exercise, in favour of the *cestuis que trust*, his right of retainer in respect of the debt (*g*).

Contribution and primary liability (*h*).—Though a trustee liable for a breach of trust is as a rule entitled to contribution from his

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(*a*) See Davis *v.* Spurling, 1 Russ. & M. 64; Crisp *v.* Spranger, Nels. 109.

(*b*) See Dove *v.* Everard, 1 Russ. & M. 231; Stacey *v.* Elph, 1 My. & K. 195.

(*c*) Doyle *v.* Blake, 2 Sch. & L. 245.

(*d*) 1 P. W. 241; but see the remarks of Lord *Northington* in Harden *v.* Parsons, 1 Eden, 148, and of Lord *Thurlow* in Sadler *v.* Hobbs, 2 Bro. Ch. 117; and *semble*, these cases must be read in the light of the recent decisions herein referred to.

(*e*) 2 Sch. & L. 231, 240, 245, per Lord *Redesdale*; and see Wilson *v.* Keating, 4 De G. & J. 593.

(*f*) See Boardman *v.* Mosman, 1 Bro. Ch. 68; Walker *v.* Symonds, 3 Swans. 1; Blackwood *v.* Borrowes, 2 Com. & L. 477; Booth *v.* B., 1 B. 125; Williams *v.* Nixon, 2 B. 472; *Re* Chertsey Market, 6 Price, 279; Oliver *v.* Court, 8 Price, 166; Hudson *v.* H., 1 Atk. 460; Willand *v.* Fenn, cited in 2 V. 268.

(*g*) See *Re* Benett, (1906) 1 Ch. 216, approving *Re* Ridley, (1904) 2 Ch. 774, disapproving Fox *v.* Garrett, 28 B. 16, and *Re* Owen, 23 L. R. Ir. 328, and distinguishing Sander *v.* Heathfield, 19 Eq. 21, and *Re* Faithfull, 57 L. T. 14.

(*h*) See supra, pp. 554 et seq.

co trustee (*a*), if the trustee be a beneficiary, and has obtained a benefit, he is primarily liable to the extent of his beneficial interest (*a*). As a general rule, a trustee advising a breach of trust for his own benefit is primarily liable (*b*); but in *Butler* v. *B* (*c*), trust money was advanced to a builder on insufficient security, and part of it applied by him in paying off a mortgage on the land to one of the trustees. That trustee was held not to be primarily liable, as the benefit was too small and remote to affect his position. In *Re Gurney* (*d*), trust funds advanced on a mortgage were applied in payment of a debt charged on the property in favour of a bank in which one of the trustees was partner, and it was held that the receipt of the money was not a conversion to his own use by the trustee, within the meaning of sect. 8, sub-sect. 1, of the Trustee Act, 1888. In *Chillingworth* v. *Chambers* (*e*) it was held that the fact that a borrower of trust money from trustees repaid out of the money so borrowed a debt due from him to one of the trustees was not of itself sufficient to render the trustee so accepting payments primarily liable for breach of trust, as having made the investment for his own benefit, the borrower of the trust money being under no restriction as to its application.

In *Jackson* v. *Dickinson* (*f*), two trustees in breach of trust invested trust funds in partly paid shares of a company. Some years after the death of one trustee, the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call as a contribution in the liquidation of the company; it was held that the deceased trustee's representatives, though not liable to the company for the call, were liable to the surviving trustee for contribution.

7. Trustee Joining with Co-trustees in Receipts.

The cases on this point seem to depend on matter of evidence, namely, whether the person joining did receive or not, or can rebut the presumption of actual receipt implied by signing a receipt.

In the principal case of *Brice* v. *Stokes*, *Eldon*, C., said, supra, p. 634, "At law, where trustees join in a receipt, *primâ facie*, all are

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(*a*) Chillingworth *v.* Chambers, (1896) 1 Ch. 685; and see p. 554, supra.

(*b*) Lockhart *v.* Reilly, 25 L. J. Ch. 697; Thompson *v.* Finch, 8 De G. M. & G. 560; cp. *Re* Linsley, (1904) 2 Ch. 785.

(*c*) 7 C. D. 116.

(*d*) (1893) 1 Ch. 590.

(*e*) (1896) 1 Ch. 685.

(*f*) (1903) 1 Ch. 947; and see Matthews *v.* Ruggles-Brise, (1911) 1 Ch. 194.

to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity."

The cases in note (*a*) are cited as showing that a person who joins with his co-trustees in a receipt for trust money, when it is indispensable that he should do so for the sake of conformity, will not *thereby alone* be rendered liable for the misapplication of the money which comes to the hands of the trustees (*a*). In *Fellows* v. *Mitchell*, Lord Keeper *Cowper* added, "It may be reasonable, where, upon proof, it cannot be distinguished how much was received by the one trustee, and how much by the other, to charge each with the whole, for in such case the trustees are to blame for not keeping distinct accounts."

In the last-mentioned case, where two trustees in a mortgage of a term for 2,000*l*. (one of whom became insolvent) joined in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the purchase-money, Lord Keeper *Cowper*, upon the authority of *Heaton* v. *Marriot*, held that each trustee was answerable only for as much as he actually received. But it seems that *Fellows* v. *Mitchell* is not in this respect in accordance with modern authorities (supra, p. 674), unless it were necessary, for carrying out some duty in the ordinary course of business, that a moiety should be entrusted to one trustee.

As to statutory indemnity under sect. 24 of the Trustee Act, 1893, see infra, p. 681.

8. Executors Joining with Co-executors in Receipts.

Lord *Eldon* in the principal case of *Brice* v. *Stokes*, after the passage above quoted, showing that a trustee may prove that he only joined in receipt for conformity, proceeds, supra, p. 635, as to executors: "In the case of executors, it has been said, and well said, to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way, he is to be considered as assuming a power over the fund, and

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(*a*) Heaton *v.* Marriot, cited Pr. Ch. 173; Fellows *v.* Mitchell, 1 P. W. 81; Shipbrook *v.* Hinchinbrook, 11 V. 252, 16 V. 477, 8 R. R. 138; *Re* Fryer, 3 K. & J. 317.

therefore answerable for the application, as far as it is connected with the particular transaction in which he joins" (*a*).

It was, however, long since settled that where the act of signing a receipt by an executor was merely formal, and had not the effect of putting the trust funds in the possession of a co-executor, *e.g.*, if he had received the money previously, it will not render the other liable for signing. This was all that was actually decided by Lord *Northington* in *Westley* v. *Clarke* (*b*). This decision, though somewhat doubted by Lord *Thurlow* in *Sadler* v. *Hobbs* (*c*), is approved by Lord *Alvanley* in *Scurfield* v. *Howes* (*d*).

In the same case of *Westley* v. *Clarke* (*e*), Lord *Northington* laid down that the rule in the case of executors "amounts to no more than that a joint receipt given by executors is a stronger proof that they actually joined in the receipt because generally they have no occasion to join for conformity." Lord *Eldon*, in *Brice* v. *Stokes* (supra, p. 635), says, "Upon considering the cases paring down the rule of late, I repeat what I have said upon a former occasion (*f*), that it is much safer for executors to abide by a general rule of that sort, than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds." But he recognises the rule in the case of *Walker* v. *Symonds* (*g*).

The rule is thus explained by Lord *Redesdale* in *Joy* v. *Campbell* (*h*), where he says, "The distinction seems to be this with respect to a mere signing; that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving: but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it

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(*a*) See also Aplyn *v.* Brewer, Pr. Ch. 173; *Ex p.* Belchier, Amb. 219; Leigh *v.* Barry, 3 Atk. 584; Chambers *v.* Minchin, 7 V. 198; 6 R. R. 111.

(*b*) 1 Eden, 357.

(*c*) 2 Bro. Ch. 117.

(*d*) 3 Bro. Ch. 94; Hovey *v.* Blakeman, 4 V. 608; Chambers *v.* Minchin, 7 V. 198; Walker *v.* Symonds, 3 Swans. 1.

(*e*) 1 Eden, 360.

(*f*) Chambers *v.* Minchin, supra.

(*g*) 3 Swans. 1.

(*h*) 1 Sch. & L. 341. See also Doyle *v.* Blake, 2 Sch. & L. 242.

could have no other meaning. He became responsible for the application of the money just as if he had received it."

It may be taken, therefore, that under the old law, a co-executor could not by joining in a receipt be precluded from showing that he did not in fact receive the money, though it may be that as his joining was unnecessary, the presumption that he did receive is stronger than in the case of a trustee.

The Trustee Act, 1893 (*a*), sect. 24, gives indemnity to trustees and protection from liability from signing receipts for conformity, and under sect. 50, the word "trustee" is extended to administrators as well as executors.

This section, like the repealed section which it re-enacts, only expresses the law recognised by the old cases (*b*), and only applies where the receipt is signed for the sake of conformity, which on the later authorities must be taken to include not only a case where the signing was a mere form, and had no effect in enabling the co-executor or trustee to obtain control, but also cases where the control of the money may properly, in the ordinary course of business, be given to the co-trustee or co-executor.

In the former of these two cases, where the signing has been a mere form, and the money has been, or might have been, obtained before or without it, yet if the co-trustee or co-executor has allowed the money to remain under the control of the other, without seeing that it was properly applied, or taking proceedings to enforce its being so applied, he would probably be held liable (*c*).

9. Remedies against Trustees Barred by Concurrence, Acquiescence, or Laches.

Concurrence.—The remedy of a *cestui que trust* against his trustee for a breach of trust with regard to the investment or custody of the trust funds may be barred either by (1) concurrence, (2) acquiescence, or (3) *laches* on the part of the *cestui que trust*.

Concurrence necessarily involves, but does not include, all cases of acquiescence, it means some active participation in the breach.

(*a*) 56 & 57 Vict. c. 53, s. 24, re-enacting 22 & 23 Vict. c. 35, s. 31.

(*b*) *Re* Brier, 26 C. D. 238.

(*c*) See pp. 673, 674, supra.

In *Brice* v. *Stokes* (supra) it is laid down by Lord *Eldon* that when the *cestui que trust* concurs with a trustee in the misapplication of the trust funds, he cannot be heard in a Court of Equity to complain of the acts of the trustee which he has himself knowingly authorised (*a*).

And a *cestui que trust* who is also trustee cannot call upon a co-trustee to replace stock which both had permitted to be sold out and misapplied (*b*), but he is entitled to call on the person who has actually received and spent the money to pay to him that part of it which became his own property (*c*).

A *cestui que trust* cannot be held to be a party to a breach of trust unless it be shown that he was cognizant at least of the facts which made it a breach of trust (*d*).

Concurrence of a person under disability would not as a rule be a protection for the trustees. Thus an infant, being incapable of consenting, cannot relieve a trustee by concurring (*e*).

But an infant has been held liable by fraud, *e.g.*, where he or she made a false representation that he or she was of age (*f*), but a person who is aware of the fact of infancy, and therefore not deceived, cannot claim that the infant is bound (*g*).

As regards married women before recent legislation (*h*), the separate estate of a married woman was not in general liable for breaches of trust committed by her, where the breach of trust did not relate to property in which, or subject to a settlement under which, she had separate estate, *e.g.*, where she was trustee of an

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(*a*) Ante, p. 635; and see Buckeridge *v.* Glasse, 1 Cr. & Ph. 135; Fellows *v.* Mitchell, 1 P. W. 81; Walker *v.* Symonds, 3 Swans. 1; Byrchall *v.* Bradford, 6 Madd. 13; Wilkinson *v.* Parry, 4 Russ. 272; *Ex p.* Barnewall, 6 De G. M. & G. 801; Griffiths *v.* Porter, 25 B. 236. Life Association *v.* Siddal, 3 De G. F. & J. 58, 74, is one of the leading cases on acquiescence.

(*b*) Butler *v.* Carter, 5 Eq. 281, per Lord *Romilly*, M.R.

(*c*) Ibid.

(*d*) Buckeridge *v.* Glasse, 1 Cr. & Ph. 135, per Lord *Cottenham*, C., and *Re* Garnett, 31 C. D. 1; but see dicta of *Bacon*, V.-C., in Sleeman *v.* Wilson, 13 Eq. 36.

(*e*) Wilkinson *v.* Parry, 4 Russ. 272.

(*f*) See notes to Savage *v.* Foster, vol. 1, ante, at p. 491; and see Overton *v.* Banister, 3 Ha. p. 503; Evroy *v.* Nicholas, 2 Eq. Cas. Abr. 488, pl. 1; Wright *v.* Snowe, 2 De G. & Sm. 321; Clarke *v.* Cobley, 2 Cox, 173; Lempriere *v.* Lange, 12 C. D. 675.

(*g*) Goode *v.* Harrison, 5 B. & A. 147; Bilton *v.* Hodges, 9 Bing. 365.

(*h*) See vol. 1, ante, at pp. 726, 766, and infra, p. 692. The Married Women's Property Act, 1882, the Trustee Act, 1888, s. 6, repealed and re-enacted by Trustee Act, 1893, s. 45, infra.

annuity for another person and misapplied it: *Wainford* v. *Heyl* (*a*).

But where a married woman actually concurred in a breach of trust with respect to property comprised in a settlement under which she had separate estate not subject to restraint, such property has been held to be bound (*b*), as was also property subject to an absolute power of appointment under the settlement (*c*), but not property subject to a general power of appointment by will (*d*). It is not clear, however, in this last case that she actually concurred or that there was more than acquiescence.

Neither the married woman nor her property was bound, however, unless she actually "concurred," mere *laches* or acquiescence (*e*) was not sufficient (*f*).

Nor would her right against the trustees be barred if she was deceived or was under the pressure of undue influence (*g*). Whether a restraint on anticipation prevented her concurrence or acquiescence from having an operation on property subject to the restraint is not clear (*h*).

Where she concurred in a fraudulent breach of trust, and was herself guilty of fraud, her separate estate not restrained was held liable (*i*).

(*a*) 20 Eq. 321; Davies *v.* Stamford, 61 L. T. 234; Johnson *v.* Gallagher, 3 De G. & J. 494. See Hulme *v.* Tenant, ante, vol. 1, pp. 722 et seq.

(*b*) Clive *v.* Carew, 1 John. & H. 199; Mara *v.* Manning, 2 Jo. & Lat. 311; Crosby *v.* Church, 3 B. 485; Pemberton *v.* McGill, 1 Dr. & Sm. 266, referred to in Sawyer *v.* S., 28 C. D., p. 605.

(*c*) Brewer *v.* Swirles, 2 Sm. & G. 219.

(*d*) Kellaway *v.* Johnson, 5 B. 319.

(*e*) Montford *v.* Cadogan, 19 V. 639, 640, 13 R. R. 270, 16 R. R. 135; Bateman *v.* Davis, 3 Madd. 98; Ryder *v.* Bickerton, 3 Swans. 80 (n.); Underwood *v.* Stevens, 1 Mer. 717; Cresswell *v.* Dewell, 4 Gif. 460. See also Hale *v.* Sheldrake, 60 L. T. 292.

(*f*) Per *Fry*, L.J., Sawyer *v.* S., 28 C. D. 605; see also Ryder *v.* Bickerton, 3 Swans. 80 (n.), 1 Eden, 149 (n.); Mara *v.* Manning, 2 Jo. & Lat. 311, 318. See Trustee Act, 1893, s. 45, infra, p. 692, as to indemnifying a trustee who commits a breach of trust at the *instigation* of married woman.

(*g*) Whistler *v.* Newman, 4 V. 129; Walker *v.* Shore, 19 V. 393; Hughes *v.* Wells, 9 Ha. 749, see p. 773.

(*h*) See Derbishire *v.* Home, 3 De G. M. & G. 102, at p. 113, and cases cited infra, p. 776, note (*f*); and see Fletcher *v.* Green, 33 B. 426; Arnold *v.* Woodhams, 16 Eq. 29; Stanley *v.* S., 7 C. D. 589, and cases infra, p. 684, with respect to fraud.

(*i*) Sharpe *v.* Foy, L. R. 4 Ch. 35; Vaughan *v.* Vanderstegen, 2 Drew. 363, 408; Hobday *v.* Peters, 28 B. 354, 360; Cahill *v.* C., 8 A. C. 420, see p. 426; Savage *v.* Foster, ante, vol. 1, p. 469; Ryder *v.* Bickerton, 3 Swans. 82 (n.); Montford *v.* Cadogan, 19 V. 640, 13 R. R. 270, 16 R. R. 135

As to the law since the Married Women's Property Act, 1882, sect. 19 of that Act provides that it shall not "interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for settlement, will, or other instrument" (*a*). As to liabilities, sect. 1, sub-sect. 2, provides for a married woman being sued separately, either in contract or in tort *or otherwise* (*b*); there is no express reference to her concurrence in breaches of trust except in sect. 24, where she is herself a trustee or executor, but taking sect. 2 with sub-sect. 3 of sect. 1, which provides that every contract shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown, and sub-sect. 4 of sect. 1, that contracts to bind the separate property should bind existing and future separate property, it may be held that the effect is to make any separate property of hers liable in respect of her concurrence in breaches of trust. A liberal view is taken of debts and liabilities (*c*). Sub-sects. 3 and 4 of sect. 1 are repealed and re-enacted with some extensions by the Married Women's Property Act, 1893, but without any express reference to breaches of trust. As regards the liability of the property of a married woman subject to a general power, sect. 4 of the Act of 1882 declares that the execution of such a power shall make the property appointed subject to debts and other liabilities in the same way as separate estate; see as to this section vol. 1, ante, p. 722. The word liabilities is used in sect. 4, but as the section limits liabilities to those which would affect separate estate, it does not seem to carry the matter further except as assisting to give a wide construction to the words contract and tort (*d*).

Before the Trustee Acts of 1888 and 1893 (*e*), even fraud of a married woman would not make her property liable if subject to restraint on anticipation. In the report of *Sharpe* v. *Foy* (*f*), above cited, where her property was held liable, it does not appear that there was a restraint. In other cases, it has been held that if there was a restraint the property would not be

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Hulme *v.* Tenant, vol. 1, pp. 722 et seq.

(*a*) And see Married Women's Property Act, 1893, sect. 1.

(*b*) Whittaker *v.* Kershaw, 45 C. D. 320.

(*c*) *Re* Lumley, (1896) 2 Ch. 690.

(*d*) See *Re* Fieldwick, (1909) 1 Ch. 1.

(*e*) 51 & 52 Vict. c. 59, s. 6, re-enacted by 56 & 57 Vict. c. 53, s. 45, infra, p. 692.

(*f*) L. R. 4 Ch. 35.

bound even in case of fraud. This was laid down by Lord *Eldon* in 1817, in the case of *Jackson* v. *Hobhouse* (*a*), followed by *Wood*, V.-C., in *Clive* v. *Carew* (*b*), and by *Malins*, V.-C., in *Arnold* v. *Woodhams* (*c*).

In *Stanley* v. *S.* (*d*), a married woman joined with her husband in a mortgage, fraudulently concealing the restraint on anticipation; her estate was held not to be bound; and see further the Trustee Act, 1893, s. 45, infra, p. 692.

The question as to how far an interest of a married woman which is not subject to restraint, but is of a character which she could not alienate, such as a reversionary interest in personal estate before the Married Women's Property Act, 1882, can be made liable on the ground of her concurrence in a breach of trust, is very doubtful. In *Hale* v. *Sheldrake* (*e*), *North*, J., expressed the opinion that no claim could be made out against such an interest for mere concurrence in a breach of trust, and said that the principle of *Whittle* v. *Henning* (*f*) was directly against it. See also as bearing on this the doubt, expressed by the Court of Appeal in *Re European Assurance Society, Conquest's Case* (*g*), as to whether a contract securing a reversionary payment to a wife in the way of a policy could be altered during the coverture, and see also *Ricketts* v. *R.* (*h*).

In the cases above cited the married woman was a *cestui que trust* not a trustee. As to the position of a married woman trustee, see *Hulme* v. *Tenant*, ante, vol. 1, p. 768.

Where the wife became trustee before her marriage, and before the Act of 1870, judgment appears to have been given against husband and wife as jointly and severally liable, without regard to the question at what date the breach of trust was committed; but the cases which have been observed by the editors were reported only on other points: see note (*i*) below. As to a breach of a constructive trust by a married woman, the trust being created and breach

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(*a*) 2 Mer. 483.

(*b*) 1 John. & H. 199, 206.

(*c*) 16 Eq. 29.

(*d*) 7 C. D. 589; Hyde *v.* H., 13 P. D. 173; *Re* Glanvill, 31 C. D. 532.

(*e*) 60 L. T. 292, pp. 296—7.

(*f*) 2 Ph. 739.

(*g*) 1 C. D. 334, 342.

(*h*) 64 L. T. 263.

(*i*) Bahin *v.* Hughes, 31 C. D. 390, 54 L. T. 188. See also Bell *v.* Turner, 2 C. D. 409, 45 L. J. Ch. 681; S. C. nom. Bacon *v.* Camphausen, 58 L. T. 851, where, however, *Stirling*, J., declined to express any opinion as to the extent of the liability as to separate estate.

committed after the Act of 1874, and before the Act of 1882, see note (*a*).

Acquiescence.—The word "acquiescence" is used in many different senses in different cases. It has sometimes been applied to cases of "estoppel," where such estoppel is raised not by express representation in words, but by conduct (*b*); as said by Lord *Eldon,* "Looking on is in many cases as strong as using terms of encouragement" (*c*).

This is the acquiescence of "standing by" without objection while somebody else is dealing with the property in which the person acquiescing has rights, as if it were free from such rights. It is sometimes termed "equitable estoppel." See *Savage* v. *Foster*, vol. 1, ante, p. 469. Such acquiescence as would operate to give a title as between the person acquiescing and a stranger would, of course, be sufficient, as between *cestui que trust* and a trustee, to prevent any objection for a breach of trust.

Acquiescence, again, is sometimes referred to as meaning *laches*, or stale demand, "without express or implied assent." See p. 688, infra, as to this.

Acquiescence is here confined to assent given either to the breach, or subsequently thereto, so as to amount to ratification.

According to the judgment of *Fry*, L.J., in *Sawyer* v. *S.* (*d*), a person under disability would not be affected by this kind of acquiescence without actual concurrence, except perhaps a married woman having separate estate since the Act of 1882.

This kind of acquiescence, *i.e.*, actual assent on the part of a *cestui que trust* not being under disability, with knowledge of the facts, will discharge trustees from all liability (*e*).

But it must be made with full knowledge (*f*), and without any misrepresentation or concealment by the trustees (*g*).

Thus, in *Re Salmon* (*h*), an assent by beneficiaries to an

(*a*) Dawes *v.* Stanford, 61 L. T. 334.

(*b*) Pickard *v.* Sears, 6 A. & E. 469.

(*c*) Dann *v.* Spurrier, 7 V. 231.

(*d*) 28 C. D. 605.

(*e*) See Harden *v.* Parsons, 1 Eden, 145; Langford *v.* Gascoyne, 11 V. 333; Booth *v.* B., 1 B. 125; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Nail *v.* Punter, 5 Si. 555; Walker *v.* Symonds, 3 Swans. 1; Munch *v.* Cockerell, 5 My. & C. 178; Farrar *v.* Barraclough, 2 Sm. & G. 231; Raby *v.* Ridehalgh, 7 De G. M. & G. 104; Sleeman *v.* Wilson, 13 Eq. 36; Philips *v.* Pennefather, 8 Ir. R. Eq. 474; Fletcher *v.* Collis, (1905) 2 Ch. 24.

(*f*) Montford *v.* Lord Cadogan, 17 V. 489; Munch *v.* Cockerell, 5 My. & C. 178; Rehden *v.* Wesley, 29 B. 213.

(*g*) Walker *v.* Symonds, 3 Swans. 1; Underwood *v.* Stevens, 1 Mer. 712; Burrows *v.* Walls, 5 De G. M. & G. 233.

(*h*) 42 C. D. 351; and see and cf. Head *v.* Gould, (1898) 2 Ch. 250.

Townley v. Sherborne.—Brice v. Stokes.

investment of an authorised description, but improper, was held not to bind them, and a distinction was taken that if it had been of an "unauthorised" description they must have known it was a breach of trust, and been bound. But where money was paid with knowledge of facts, but under a mistake of rights, it was considered inequitable to allow the claim of a person who had "stood by" and allowed the payment (*a*).

In *Burrows* v. *Walls* (*b*), it was held that a letter consenting to an arrangement for deferred payments, written by one *cestui que trust* on behalf of others, did not preclude them from suing the trustees, because it was written without full knowledge of their rights.

Lord *Cranworth*, L.C. (*c*), said: "I take it that although it is perfectly clear, on all the authorities and all principle, that no *cestui que trust* can allege that to be a breach of trust which has been done under his own sanction (for that is the meaning of acquiescence, either previous sanction or subsequent ratification); or as was said by Lord *Eldon* in *Walker* v. *Symonds* (*d*), 'Either concurrence in the act, or acquiescence without original concurrence, will release the trustees, yet,' as was added by Lord *Eldon*, 'that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence.'" And after pointing out that the beneficiaries had simply done nothing until the fund was distributable, the L.C. proceeded: "In order to be favourable to the trustee who alleges acquiescence, it must be a consent on the part of the persons who have a right to call the trustees to account, that they shall be absolved from liability, and that they will adopt the misapplication of the funds as having been done with their assent and sanction."

In *Bate* v. *Hooper* (*e*), long annuities were left unconverted for thirty years, and the tenant for life received the income, but protested that the annuities should be commuted. The children reversioners assigned their interests to a mortgagee, with the concurrence of the tenant for life. It was held that there was no acquiescence, and the trustees were to account for the difference between the value of the long annuities one year from the testator's death and the value when paid into Court.

In *Stafford* v. *S.* (*f*), there was no question raised against the

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(*a*) Stafford *v.* S., 1 De G. & J. 193; Rogers *v.* Ingham, 3 C. D. 351; *Re* Hulkes, 33 C. D. 552.

(*b*) 5 De G. M. & G. 233.

(*c*) Ibid. at p. 251.

(*d*) 3 Swans. 1, at p. 64.

(*e*) 5 De G. M. & G. 338.

(*f*) 1 De G. & J. 193.

trustee, but between beneficiaries. It was held that after acquiescence in a payment for fifteen years, under a mistake of construction, there was no claim against the other beneficiaries for repayment.

A *cestui que trust* will not be affected with constructive knowledge of a breach of trust merely because he might by inquiries have discovered it (*a*).

A person is not less capable of giving an assent when his interest is in reversion than when it is in possession, but whether he has done so or not is a question to be determined on the facts of each particular case (*b*).

But in general, in order to affect a reversioner with acquiescence, knowledge of the facts ought to be alleged and proved (*c*), though in some cases it may be presumed from great lapse of time (*d*).

Laches, or Delay.—*Without any positive evidence of Assent.*—Mere delay not amounting to assent will not, apart from the Statute of Limitations, operate as a bar to a claim by a *cestui que trust.* In order to make it a bar there must be other circumstances rendering it inequitable to grant relief (*e*).

As regards what *laches*, in the way of mere lapse of time, will induce a Court of Equity to refuse to interfere in the case of an express trust, compare, first, *Bright* v. *Legerton* (*f*) with *Re Cross* (*g*), and both with the judgment of *Lindley*, L.J., in *Rochefoucauld* v. *Boustead* (*h*).

In *Bright* v. *Legerton* (*f*), relief was refused on the ground of what the Court called "gross *laches*." In this case the question raised was as to trustees' dealings with cottages between 1828 and 1839. The beneficiary came of age in 1839, and it was proved that accounts were then submitted to him and he did not object. He commenced an action in 1860 with respect to the management of the cottages. The three trustees were dead, and apparently the vouchers were lost. The L.C. dismissed the claim, and said (*i*):—

(*a*) Thompson *v.* Finch, 22 B. 325, 327; Farrant *v.* Blanchford, 1 De G. J. & S. 107, 119; Life Association of Scotland *v.* Siddal, 3 De G. F. & J., p. 73.

(*b*) Life Association of Scotland *v.* Siddal, 3 De G. F. & J., p. 72, per *Turner*, L. J.

(*c*) Taylor *v.* Cartwright, 14 Eq. 167.

(*d*) Life Association of Scotland *v.* Siddal, 3 De G. F. & J. 77, per Lord *Campbell*, L.C.; Smethurst *v.* Hastings, 30 C. D. 490; Evans *v.* Benyon, 37 C. D. 329.

(*e*) *Re* Cross, 20 C. D. 109; Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196; see also *Re* Birch, 27 C. D. 622.

(*f*) 2 De G. F. & J. 606.

(*g*) 20 C. D. 109.

(*h*) (1897) 1 Ch. 196, at p. 204; and see p. 690, infra.

(*i*) 2 De G. F. & J. p. 616.

"Might such a bill as this be filed at the end of a century by the plaintiff's personal representative against the personal representatives of the three trustees, if they could be found out? I apprehend that in such a case it is unnecessary to presume the execution of a release, or to resort to any Statute of Limitations. A Court of Equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished, much less cast a burden of proving such an affirmative as that forty years ago cottage rents were properly collected, when the witnesses who might have proved the fact have long ago been called into another state of existence. It has been beautifully remarked with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed." See further, pp. 773 et seq., infra.

In *Re Sharpe* (*a*), it was held that neither the Statute of Limitations, nor the equitable doctrine of *laches*, was a bar to an action to make directors liable for paying interest out of capital where *ultra vires*, because directors were in the position of trustees, and a claim by a liquidator in 1889 against the estate of a director who died in 1883 was held not to be a stale demand. In this case *Lindley*, L. J., said: "That staleness of demand as distinguished from the Statute of Limitations and analogy to it may furnish a defence in equity to an equitable claim was settled at least as early as *Smith* v. *Clay*" (*b*). The principles on which the doctrine is based will be found clearly set forth by the Privy Council in *Lindsay Petroleum Co.* v. *Hurd* (*c*), and in the judgment of Lord *Blackburn* in *Erlanger* v. *New Sombrero Phosphate Co.* (*d*).

In *Erlanger* v. *New Sombrero Phosphate Co.* (*e*), Lord *Blackburn* said: "A Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in morâ*, than a similar change before he was *in morâ* should do." In *Lindsay Petroleum Co.* v. *Hurd* (*f*), it is said: "The doctrine of *laches* in Courts of Equity

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(*a*) (1892) 1 Ch. 168.

(*b*) Amb. 645.

(*c*) L. R. 5 P. C. 221, 239.

(*d*) 3 A. C. 1218, 1279.

(*e*) 3 A. C. 1279.

(*f*) L. R. 5 P. C. 239.

Townley v. Sherborne.—Brice v. Stokes.

is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

In *Rochefoucauld* v. *Boustead* (*a*), *Lindley*, L. J., said as to the defence of lapse of time: "But as already stated, since 1882 the defendant has done nothing to induce the plaintiff not to sue him, nor to lead her to believe that any claim by her would be recognised. On the other hand, the plaintiff has done nothing actively to lead the defendant to suppose that she abandoned any claim she might have against him as her trustee. There is nothing to be said against her, except that she has forborne to sue for twelve years." * * * "Even where there is an express trust, lapse of time coupled with other circumstances which render it unjust to give the plaintiff relief against the defendant, will induce the Court to refuse the relief, although no Statute of Limitations might bar his claim (*b*).

(*a*) (1897) 1 Ch. 196; 75 L. T. p. 507.

(*b*) See Bright *v.* Legerton, 2 De G F. & J. 606, and *Re* Cross, 20 C. D. 109.

But in this case, which is one of express trust, there is nothing except time, and that without more is not sufficient apart from some Statute of Limitations" (*a*).

10. Indemnity of a Trustee by his Cestui que Trust.

The general rule is that, independently of any express contract of indemnity, a trustee who accepts office *at the request* of a *cestui que trust*, is entitled to be indemnified by that *cestui que trust* personally against all loss which may accrue from the trust (*b*).

Where, for instance, the trustee of shares in a company is made a contributory on the failure of the company, he can compel the *cestui que trust* at whose request he became a trustee to indemnify him (*c*). On the same principle an absolute beneficial owner *sui juris* must in equity bear all the burdens of the ownership, and that whether he created the trust or took a transfer of the beneficial ownership (*d*). A *cestui que trust* does not by assigning his interest cease to be liable to indemnify the trustee (*e*).

And in such a case trustees and executors, after the death of the *cestui que trust*, are entitled to be indemnified out of his estate, and for that purpose can call upon residuary legatees to refund what has been paid to them (*f*); and the mere fact that the executor, previous to payment, had notice of a contingent liability, as, for instance, that trustees on behalf of the testator as *cestui que trust*, held shares in a company, which might be wound up, and in respect of which the trustees (whom the testator was bound to indemnify), might be liable as contributories, is immaterial (*g*).

It has been held in the absence of contract, trustees cannot claim an indemnity from *cestui que trust* beforehand, against a contingent liability (*h*). An executor and trustee, authorised to carry on the testator's business both by the will and by the Court, who has properly incurred liabilities to trade creditors, must be indemnified against such liabilities; and where assets are deficient, such

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(*a*) See Note 12, p. 696, infra.

(*b*) Per *Jessel*, M. R., in Jervis *v.* Wolferstan, 18 Eq. 18, at p. 24; and see per Lord *Blackburn* in Fraser *v.* Murdoch, 6 A. C. 855, at p. 872; and per Lord *Lindley* in Hardoon *v.* Belilios, (1901) A. C. 118, at p. 123; Matthews *v.* Ruggles-Brise, (1911) 1 Ch. 194.

(*c*) Jervis *v.* Wolferstan, supra

(*d*) Hardoon *v.* Belilios, (1901) A. C. 118.

(*e*) Matthews *v.* Ruggles-Brise, supra.

(*f*) Jervis *v.* Wolferstan, supra.

(*g*) Ibid. Cf. *Re* King, (1907) 1 Ch. 72.

(*h*) Brough *v.* Oddy, 1 Russ. & M. 55; Hughes-Hallett *v.* Indian Mammoth Gold Mines Co., 22 C. D. 561; *Re* Mullett, (1885) W. N. 130.

indemnity takes priority on allocation over costs awarded, on further consideration, to a plaintiff legatee. The trade creditors stand in the shoes of the executor, and are subrogated to his rights of indemnity and priority (*a*).

Before and independently of the Trustee Act, 1893, a similar right to indemnity accrued when a trustee committed a breach of trust at the instigation or request of a beneficiary who was not under disability, see note (*b*).

But in the case of a married woman the trustees could not claim to retain any interest of hers, though belonging to her for her separate use, unless they showed she acted for herself, and was fully informed as to the breach of trust (*c*) and *Fry*, L. J., said, in delivering the judgment of the Court of Appeal, *Sawyer* v. *S.* (*d*): "All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, so far as we are aware, cases in which she has been an actual actor in the transaction herself; such are the cases of *Crosby* v. *Church* (*e*), *Clive* v. *Carew* (*f*), and *Pemberton* v. *McGill* (*g*).

Sect. 45 (1) of the Trustee Act, 1893, enacts (*h*): "Where a trustee commits a breach of trust at the instigation or request, or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

(2) "This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the 24th day of December, 1888, and is pending at the commencement of this Act."

This is an alteration of the old law, so far as regards impounding the interest restrained from anticipation, but the cases cited supra

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(*a*) Moore *v.* M'Glynn, (1904) 1 Ir. R. 334.

(*b*) Sawyer *v.* S., 28 C. D. 605, and cases there cited. Walker *v.* Symonds, 3 Swans, 1; Booth *v.* B., 1 B. 125; Fletcher *v.* Collis, (1905) 2 Ch. 24.

(*c*) Sawyer *v.* S., 28 C. D. 595.

(*d*) See note (*b*), supra.

(*e*) 3 B. 485.

(*f*) 1 John. & H. 199.

(*g*) 1 Dr. & Sm. 266.

(*h*) Trustee Act, 1893, s. 45, replacing Trustee Act, 1888, s. 6; see *Re* Holt, 45 W. R. 650.

show that apart from the statute the interest of a *cestui que trust* not under a disability might have been impounded for the indemnity of the trustee, where the *cestui que trust* instigated the breach of trust (*a*). The words "in writing" only apply to consent, not to instigation or request (*b*).

In *Ricketts* v. *R.* (*c*), *Romer*, J., refused to make an order impounding the interest of a married woman in personal estate, which was reversionary at the date of the breach of trust.

So in *Bolton* v. *Curre* (No. 2) (*d*), the same Judge refused to impound the interest of a married woman restrained from anticipation, on the ground that it was the duty of the trustee to protect so far as practicable a married woman, and he had failed in this duty (*e*).

In order to make a beneficiary liable under sect. 45 of the Trustee Act, 1893, in respect of an improper investment, it must be shown not only that he instigated, requested, or consented in writing to the investment, but that he knew the facts which would make it a breach of trust (*f*), but it is not necessary that the trustees should have been deceived by the beneficiary (*g*).

11. Relief of Trustees under the Judicial Trustees Act, 1896.

Section 3 (1). If it appears to the Court that a trustee, whether appointed under this Act or not, is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

(2) This section shall come into operation at the passing of this Act.

In Re Lord De Clifford's Estate (*h*), *Farwell*, J., pointed out the difficulty in applying this section on any intelligible principle.

(*a*) Chillingworth *v.* Chambers, (1896) 1 Ch. 685, and cases there cited, and Bolton *v.* Curre (No. 2), (1895) 1 Ch. 544.

(*b*) Griffith *v.* Hughes, (1892) 3 Ch. 105.

(*c*) 64 L. T. 263.

(*d*) (1895) 1 Ch. 544; see also Sawyer *v.* S., 28 C. D. 595.

(*e*) *Re* Somerset, (1894) 1 Ch. 231.

(*f*) *Re* Somerset, (1894) 1 Ch. 231; Mara *v.* Browne, (1895) 2 Ch. 69, affirmed, (1896) 1 Ch. 199; Fletcher *v.* Collis, (1905) 2 Ch. 24.

(*g*) Griffith *v.* Hughes, supra; Bolton *v.* Curre, supra.

(*h*) (1900) 2 Ch. 712, 713.

Courts of Equity had intervened in case of forfeiture and the like "on a thoroughly intelligible principle." "Equity gave no relief, unless it could secure the payment of the money or the performance of the contract in favour of the person entitled to enforce the forfeiture, and it granted relief on the ground that it thereby gave effect to the real contract between the parties. No such principle is applicable in the present case in which equity is called upon to give relief against its own decree." The learned Judge then pointed out that there is in fact no principle which can serve as a guide in applying the section. The Court has to find, as a fact, that the trustee has acted honestly and reasonably, and ought fairly to be excused, and has then power to grant relief.

The immediate reason for the enactment of the section is probably that stated by *Rigby*, L. J. (*a*) : "In the old days, when a trustee could get rid of his trust entirely by throwing the whole of the obligation on the Court of Chancery, it might have been reasonable to hold the trustee to the very strict performance of his trust, which we know was in those days enforced." This cannot now be done, and to leave the trustee under all liabilities imposed upon him by the Court after the change in practice would have been intolerable. Another reason may well have been the feeling that an act may be honest and reasonable though not done under a moral necessity arising from the usage of mankind (*b*). But though the section would appear to recognise two standards of care, that which would be shown by a trustee acting up to the decisions of the Court, and that which would be shown by an honest, ordinary, reasonable man, the Court, it would appear, has refused to recognise the existence of the lower standard. The mere fact that the trustee has shown an equal degree of care in his own affairs and in those of his *cestui que trust*, though evidence of *bona fides*, is not evidence that his action was reasonable within the section (*c*).

The power given by the section is meant to be freely and fairly acted on in the exercise of judicial discretion (*d*).

Is or may be personally liable.—The section is applicable, not only where there is a clear breach of trust, but also where it is uncertain whether there is any breach of trust or not, as in cases

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(*a*) Perrins *v.* Bellamy, (1899) 1 Ch. 801, 802, and *Re* Roberts, 76 L. T. 484.

(*b*) See Speight *v.* Gaunt, 9 A. C. 1.

(*c*) See per *Farwell*, J., in *Re* Lord De Clifford's Estate, (1900) 2 Ch. at p. 716, and see per *Parker*, J., *Re* Mackay, (1911) 1 Ch. pp. 304, 307.

(*d*) *Re* Turner, (1897) 1 Ch. at p. 542. *Re* Roberts, 76 L. T. 479.

of doubtful construction (*a*). The jurisdiction will not, however, be exercised by anticipation of a breach of trust (*b*).

Honestly.—The standard of honesty must, of course, be always the same (*c*). It was held by *Kekewich*, J., that a trustee who, completely relying on his co-trustee, did nothing, and accepted his co-trustee's statements without any inquiry, did not act honestly within the section (*d*).

Honesty, however, is in itself, no ground for relief; the act must likewise be reasonable (*e*).

Reasonably.—In considering whether the action of the trustee was or was not reasonable, all the circumstances of the case and the terms of the trust instrument must be regarded. If those terms be doubtful or ambiguous the trustee may be given the benefit of the doubt (*f*). The fact that he did not ask for the directions of the Court may be important in determining whether he acted reasonably (*g*). The fact that he acted with the same care as in his own affairs has been said to be irrelevant under this head (*h*), and, on the other hand, to be a fact in the trustee's favour (*i*). It has been suggested that it may be admitted as a test of the trustee having acted reasonably (*k*) but this, as appears above, p. 694, cannot be maintained.

The fact that in lending money on mortgage, the trustees have not satisfied the conditions of sect. 8 (1) of the Trustee Act, 1893, is a material circumstance, though not necessarily fatal to an application under this section (*l*).

Ought fairly to be excused.—Even though it is established that the trustees have acted honestly and reasonably, the right to relief

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(*a*) *Re* Grindey, (1898) 2 Ch. at p. 598; *Re* Mackay, (1911) 1 Ch. 300.

(*b*) *Re* Tollemache, (1903) 1 Ch. at p. 465; S. C. 955.

(*c*) Per *Parker*, J., in *Re* Mackay, supra, at p. 304.

(*d*) *Re* Second East Dulwich, &c., Society, 68 L. J. Ch. 196, but see *Re* Smith, (1893) 2 Ch. 1 at p. 18, where a similar decision as to the nature of fraud (ibid. p. 11), by *Kekewich*, J., was dissented from by the Court of Appeal.

(*e*) *Re* Turner, supra; *Re* Barker, 77 L. T. 712; *Re* Stuart, (1897) 2 Ch. at p. 590; *Re* Greenwood, 105 L. T. 509.

(*f*) *Re* Grindey, supra; *Re* Mackay, supra.

(*g*) *Re* Kay, (1897) 2 Ch. 523, but see *Re* Grindey, supra.

(*h*) *Re* De Clifford's Estates, supra.

(*i*) *Re* Barker, supra.

(*k*) *Re* Stuart, (1897) 2 Ch. 583.

(*l*) *Re* Stuart, supra; Waite *v.* Parkinson, 85 L. T. 456, and see *Re* Dive, (1909) 1 Ch. 328; Shaw *v.* Cates, (1909) 1 Ch. 389, where proper reports were not obtained and relief was refused.

does not follow as a matter of course. The Court has then to exercise its discretion. So where a trust company, not being gratuitous trustees, under erroneous advice paid away trust moneys to persons not entitled thereto, it was held that as the company had made no effort to recover the moneys so paid away, it was not entitled to relief (*a*).

Relief under the section need not be claimed by the pleadings (*b*).

12. Statutes of Limitation and Breaches of Trust.

The question how far trustees can rely upon the provisions of Statutes of Limitation by way of defence to proceedings for breach of trust now depends almost entirely upon sect. 8 of the Trustee Act, 1888. It is, however, necessary to state the law in outline, as it stood, and stands apart from that section, and in particular to consider the distinction drawn by the Courts in this matter between express and constructive trusts.

The Judicature Act, 1873, sect. 25, sub-sect. 2, enacts that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of trust shall be barred by any Statute of Limitations. This provision is merely a statutory declaration of a law which has always been recognised and administered in Courts of equity (*c*). This section, however, must, it would appear, be read subject to the provisions of sect. 10 of the Real Property Limitation Act, 1874. This latter section dealing with actions to recover sums of money, or legacies, charged upon land or rent, and secured by express trust is discussed in Vol. I., supra, at page 907.

Sect. 25 of the Real Property Limitation Act, 1833 (*d*), provides that in the case of a sale of land or rent by an express trustee, time shall begin to run in favour of the *purchaser* as from the date of the conveyance. This section gives no protection to the express trustee for any breach of trust by him.

Though, as above stated, Courts of equity altogether refused to allow the trustee in cases of express trusts to set up the statute against his *cestui que trust*, still they did permit the defence in

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(*a*) National Trustees Co. of Australasia *v.* General Finance, Ltd., (1905) A. C. 373 (a decision on a corresponding statute of Victoria).

(*b*) Singlehurst *v.* Tapscott Co., (1899) W. N. 133, and as to relief on further consideration in an administration action, see *Re* Stuart, (1897) 2 Ch. 588.

(*c*) Per *Baggalay*, L. J., in *Re* Cross, 20 C. D. at p. 121.

(*d*) 3 & 4 Will. 4, c. 27.

many, but by no means all, cases of constructive trusts. The principal decisions upon this matter are discussed in the judgments of *Bowen* and *Kay*, L. JJ., in *Soar* v. *Ashwell* (*a*). These decisions show that the Courts had gone very far in imposing the clearly recognised disability of the express trustee to plead the statute upon persons who were merely constructive trustees in the technical sense of the term (*b*). Thus, the trustee *de son tort*, a person who though not actually trustee of an instrument, yet assumes to act, and acts as though he were a trustee appointed by that instrument could not set up any statutory defence (*c*), neither could a person who received trust property knowing that it was transferred to him wrongfully in breach of trust (*d*), nor one who borrowed trust monies with notice of the trust (*e*).

Further, since express trusts of personalty may be created verbally, or by conduct only, the defence was held not available in certain cases where agents were entrusted with monies or funds for particular purposes (*f*). So also in *Rochefoucauld* v. *Boustead* (*g*) a person purchasing land for another was, under the circumstances of the case, held an express trustee for the person for whom he had acted, and therefore incapable of setting up the statute. The defence has, however, been allowed in cases of purely constructive trusts, where the trust was created by no instrument but arose by inference of law through the position, acts, and circumstances of the parties (*h*).

(*a*) (1893) 2 Q. B. 390. Note s. 8 of the Trustee Act, 1888, had no application to this case, for the action was commenced within six years of the accruer of the plaintiff's title.

(*b*) For a statement of the nature of an express trust, see per *Cairns*, L. C., in Cunningham *v.* Foot, 3 A. C. 974, at p. 984; and see per *Kay*, L. J., in Soar *v.* Ashwell, (1893) 2 Q. B. at p. 400; see also Churcher *v.* Martin, 42 C. D. 312; Patrick *v.* Simpson, 24 Q. B. D. 129.

(*c*) Life Association of Scotland *v.* Siddal, 3 De G. F. & J. 58; cf. *Re* Bell, 34 C. D. 462, where the solicitor for the mortgagee selling mortgaged property retained the balance and was held an express trustee thereof.

(*d*) Wilson *v.* Moore, 1 My. & K. 337; Bridgman *v.* Gill, 24 B. 302, and see per *Selborne*, L. C., in Barnes *v.* Addy, L. R. 9 Ch. 244, at p. 251; and cf. Wassell *v.* Leggatt, (1896) 1 Ch. 554, where a husband (married before 1883) was held trustee of moneys bequeathed to his wife for her separate use, and forcibly appropriated by him.

(*e*) *Re* Dixon, (1900) 2 Ch. 561.

(*f*) Burdick *v.* Garrick, L. R. 5 Ch. 233; Foley *v.* Hill, 2 H. L. Cas. 28; Soar *v.* Ashwell, (1893) 2 Q. B. 390; North American Co. *v.* Watkins, (1904) 1 Ch. 242; cf. Mara *v.* Browne, (1896) 1 Ch. 199.

(*g*) (1897) 1 Ch. 196.

(*h*) Townsend *v.* T., 1 Bro. Ch. 550; Beckford *v.* Wade, 17 V. 87; see Banner *v.* Berridge, 18 C. D. 263; Price *v.* Phillips, (1894) W. N. 213.

So in *Petre* v. *P.* (*a*), a tenant for life of leaseholds renewing in his own name was held entitled to plead the statute. Distinct from these cases are those where though a person has received or dealt with trust property yet he does not become a trustee at all, as for instance where a solicitor acts honestly and properly for duly constituted trustees in the administration of the trust (*b*). In such cases an action brought by the *cestui que trust* for loss caused by acts so done, or concurred in, by the solicitor, will not be for breach of trust but in contract or *in tort* for negligence (*c*).

The law under this heading was, however, profoundly modified by sects. 1, 8 and 12, of the Trustee Act, 1888, and trustees, whether express or constructive, are now allowed under certain conditions to set up the statutory defences in answer to actions for breach of trust.

Sect. 1 (3) provides that "For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds."

Sect. 1 (4). "The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee" (*d*).

The term "trustee" includes, for the purposes of the Act, constructive as well as "express" trustees, but the distinction above noted has not entirely lost its importance. The constructive trustee, though in possession of the trust property, could in certain cases rely upon the statutes (*e*); the defence under this Act would not apply in such a case. It would seem that in the majority of cases in which prior to the Act the constructive trustee would have been held unable to set up the statutes by way of defence, he still remains unable owing to the provisions of the introductory clause in sect. 8 (*f*). Directors of companies are trustees within the section as to moneys of the company coming into their hands (*g*). The

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(*a*) 1 Drew. 371, and see Locking *v.* Parker, L. R. 8 Ch. 30, discussed in Rochefoucauld *v.* Boustead, supra.

(*b*) Barnes *v.* Addy, as cited supra, p. 645; Mara *v.* Browne, (1896) 1 Ch. 191; but cf. Soar *v.* Ashwell, supra; *Re* Bell, supra; Dooby *v.* Watson, 39 C. D. 178.

(*c*) See, e.g., Mara *v.* Browne, supra.

(*d*) Moore *v.* Knight, (1891) 1 Ch. 547, 553.

(*e*) See, e.g., Doyle *v.* Foley, cited supra, p. 643; Petre *v.* P., supra; cf. *Re* Lacy, cited infra, p. 705.

(*f*) See, e.g., M'Ardle *v.* Gaughran, (1903) 1 Ir. R. 106; cf. Wassell *v.* Leggatt, (1896) 1 Ch. 554.

(*g*) See *Re* Lands Allotment Company, (1894) 1 Ch. 616; *Re* National Bank of Wales, (1899) 2 Ch. 629, p. 663; Whitman *v.* Watkin, 78 L. T. 178.

section does not apply to a trustee in bankruptcy or any other trustee who is an officer of the Court (*a*). An executor can plead the Statute of Limitations in an action for devastavit (*b*), but it is not clear how far the Statute applies to claims against the executor personally (*c*), as for instance where he has parted with assets without providing for outstanding liabilities of the testator.

Sect. 8 (1) of the Trustee Act, 1888, provides that "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

"(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

"(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded (*d*).

(*a*) *Re* Cornish, (1896) 1 Q. B. 99.

(*b*) Thorne *v.* Kerr, 2 K. & J. 54; *Re* Gale, 22 C. D. 820.

(*c*) See Lacons *v.* Warmoll, (1907) 2 K. B. 350, at pp. 362, 364.

(*d*) See Collings *v.* Wade, (1896) 1 Ir. R. 340, 345; *Re* Somerset, (1894) 1 Ch. 231; *Re* Fountaine, (1909) 2 Ch. 382.

"(3) This section shall apply only to actions or other proceedings commenced after the first day of January, one thousand eight hundred and ninety (*a*), and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations."

Generally. "The short effect of sect. 8 appears to be that except in three specified cases (namely, fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach trust is entitled to the protection of the several Statutes of Limitations as if actions and suits for breaches of trust were enumerated in them," per *Lindley*, L. J., in *How* v. *Earl Winterton* (*b*).

Trustee or any person claiming through him.—For the meaning of trustee, see above under sect. 1, supra. The words "*claiming through*" do not apparently include beneficiaries, but refer to "persons deriving property from and subject to the liabilities of the trustee or executor; that is, generally speaking, his executors, administrators or assigns" (*c*). Beneficiaries accordingly making title through trustees cannot rely on the section. The section also in terms applies only to proceedings "against" a trustee, and it was consequently held inapplicable where the executors of one of several trustees of a will took out an originating summons to ascertain whether any liability still continued in respect of a breach of trust alleged to have been committed by the trustees of the will (*d*).

Fraud or fraudulent breach of trust to which the trustee was party or privy.—Fraud, within the meaning of the Act must amount to dishonesty. A loan on authorised security or on no security at all is not fraudulent (*e*).

A trustee will only be a party or privy where his moral complicity in the fraud can be shewn (*f*). A trustee principal is not a party or privy to fraudulent conduct of his agent of which he has no knowledge. "A man cannot be said to be party or privy to that in which he has taken no part and of which he knows nothing, and which has, in fact, been committed by another for his own

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(*a*) *Re* Harrison, (1892) W. N. 148.

(*b*) (1896) 2 Ch. 626, at p. 640.

(*c*) Per *Porter*, M. R., in Leahy *v.* De Moleyns, (1896) 1 Ir. R. 206, at p. 213.

(*d*) *Re* Chapman, (1896) 1 Ch. 323 at p. 326, reversed on other grounds, (1896) 2 Ch. 763.

(*e*) Collings *v.* Wade, (1896) 1 Ir. R. 340, at p. 349.

(*f*) Thorne *v.* Heard, (1894) 1 Ch. 599; Collings *v.* Wade, supra.

benefit" (*a*). In *Thorne* v. *Heard* (*b*), S., a solicitor, acted for both the first and second mortgagees of certain property. The first mortgagees sold for a sum in excess of the amount due on the first mortgage, and thereby became trustees of the balance. S. fraudulently represented to them that he was authorised to give a receipt on behalf of the second mortgagees for the monies due to them. The first mortgagees, relying on the representation, left the balance in the hands of S., who fraudulently appropriated it and subsequently became insolvent. Here the fraud was purely for the benefit of the agent, and it was held that he did not act for the first mortgagees, that they were not parties or privies within the section, and that time ran, not from the discovery of the fraud, but from the date of misappropriation.

The misrepresentations of one partner in a firm bind the other partners as to any matter within the limits of their joint business, *Blair* v. *Bromley* (*c*). If by such misrepresentations fraud is concealed, time will only run from the date at which the fraud is discovered (*d*). Sect. 8 in no way affects the operation of these rules relating to partners, for they depend upon principles of representation and not trust (*e*).

Still retained.—When the section is pleaded, the burden is on the plaintiff to prove that the trustee "still" retains or has converted the trust property to his own use (*f*). The word "still" refers to the commencement of the action, and this "exception applies to, and is confined to, cases in which at the date of the writ, the trustee still retains—that is, has in his hands or under his control—the trust property or the proceeds thereof sought to be recovered" (*g*). If the money has been lent and lost the exception does not apply.

Received by the trustee and converted to his own use.—In *Re Gurney* (*h*), trustees, one of whom, M., was a partner in the K. Bank, advanced trust moneys to G. on mortgage of certain properties of a speculative value which were then subject to an equitable

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(*a*) Per *A. L. Smith*, L. J., in Thorne *v.* Heard, as cited supra, at p. 613.

(*b*) Supra.

(*c*) 2 Ph. 354; 5 Ha. 542, distinguished in Thorne *v.* Heard, supra.

(*d*) Gibbs *v.* Guild, 8 Q. B. D. 296; 9 Q. B. D. 59.

(*e*) Moore *v.* Knight, (1891) 1 Ch. 547. Cf. *Re* Gurney, (1893) 1 Ch. 590.

(*f*) *Re* Page, (1893) 1 Ch. 304.

(*g*) Per *Lindley*, L. J., in Thorne *v.* Heard, (1894) 1 Ch. 599, at p. 604; and see *Re* Tufnell, 18 T. L. R. 705.

(*h*) (1893) 1 Ch. 593.

mortgage in favour of the Bank. The moneys advanced were, by the direction of the mortgagor, applied in the payment off of G.'s indebtedness. In proceedings against the trustees it was held that the payment into the bank was not a conversion to his own use by M.

In *Re Timmis* (*a*), each of three trustees was absolutely entitled to one-fourth of the trust estate, the remaining fourth share was settled. It was held that the receipt by each trustee of the fourth share payable to him could not be held a conversion to his own use of a part of the remaining fourth settled share as to which there had been a breach of trust.

Sub-Clause (a). The construction of this sub-clause has proved a matter of the utmost difficulty, and the extent of its application is not even yet precisely ascertained. It assumes the existence of cases in which statutory provisions could be pleaded were it not for the fact that the defendant is a trustee. It can have no application in actions for the recovery of trust property where the trustee is in possession, for the words of the introductory clause in the section exclude from the operation of the section cases where the trust property is still retained by the trustee. Strictly construed it could have no application to actions to compel the trustee to make good loss caused by breaches of trust, for, as *Fry*, L. J., pointed out, there is no right or privilege conferred by any Statute of Limitations in respect of a breach of trust (*b*).

In *How* v. *Earl Winterton* (*c*), *Lindley*, L. J., though sharing the difficulty of *Fry*, L. J., pointed out, that to exclude the operation of clause (*a*) on the short ground stated by *Fry*, L. J., would be really to deprive the clause of all meaning whatever (*d*). The learned judge pointed out that the statute might be pleaded to an equitable action for an account against a trustee were it not for the fact that the defendant was a trustee.

Rigby, L. J., in the same case, pointed out that the clause dealt with remedies and not with causes of action. The trustee who undertakes a trust agrees to perform that trust. A breach of trust

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(*a*) (1902) 1 Ch. 176. Cf. *Re* Sharp, (1906) 1 Ch. 793. In this case trustees of a will whereby a number of annuities were given, including annuities to the trustees themselves, paid for more than twenty years all the annuities, including their own, without deducting for income tax. The liability of the trustees to make good the overpayments was limited to six years, except in the case of over payments to themselves.

(*b*) *Re* Bowden, 45 C. D. 444, at p. 450.

(*c*) (1896) 2 Ch. 626.

(*d*) Ibid., p. 639.

has a dual character; from one point of view, it is simply the violation of a legal obligation arising out of a contract into which the trustee has entered. For that breach the wrongdoer would be liable even though he were not a trustee. From another point of view the breach of duty is a breach of trust, the violation of the equitable obligation of a trustee. In applying the section this latter aspect of the breach of duty is to be ignored and the case treated simply as a breach of contract either of a simple contract or of a covenant. The appropriate statute of limitations must then be looked at, and the period appropriate in the case of a breach of a contract of the character in question would be applicable.

In the case before the Court the trustees' duty arose under a will and the six years' period was held applicable, that being the period which would be applicable both to an action for an account and to an action on a promise express or implied. As a general rule a trustee, save where he has covenanted to perform the trust, becomes a simple contract debtor to his *cestui que trust* if he misapplies trust funds (*a*). Where he has covenanted to execute the trust (*b*), or acknowledged the receipt of trust moneys under hand and seal (*c*), he becomes a speciality debtor. On the other hand, he does not become a speciality debtor by declaring that he accepts office, nor by acting under a deed without executing it (*d*).

Sub-Clause (b). The words "*recover money or other property*" do not necessarily mean recover money as belonging to the person making the application. "An action to make the defendant trustee pay money into a fund in which the applicant is interested is within the section" (*e*). The clause only applies to actions against trustees where no Statute of Limitations existed at the date of the passing of the Trustee Act, 1888 (*f*). An action against an executor to recover a legacy is barred by sect. 8 of the Real Property Limitation Act, 1874, unless brought within twelve years from the time the right to receive it accrued (*g*). No Statute of Limitations applies in similar cases to trustees. The result is that where persons are appointed executors and trustees by a will, and acting

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(*a*) Vernon *v.* Vawdrey, 2 Atk. 119; Cox *v.* Bateman, 2 Ves. Sen. 19.

(*b*) Montford *v.* Cadogan, 19 V. 638; Richardson *v.* Jenkins, 1 Drew. 477.

(*c*) Gifford *v.* Manley, Cas. t. Talbot, 109.

(*d*) Holland *v.* H., L. R. 4 Ch. 449; Richardson *v.* Jenkins, supra.

(*e*) Per *Rigby*, L. J., in How *v.* Earl Winterton, (1896) 2 Ch. 626, at p. 642.

(*f*) See sub-s. 3, supra.

(*g*) See *Re* Davis, (1891) 3 Ch. 119; *Re* Barker, (1892) 2 Ch. 491; *Re* Mackay, (1906) 1 Ch. 25.

Townley v. Sherborne.—Brice v. Stokes.

thereunder, become trustees through the completion of the administration, or by assenting to the legacies, they acquire through their trustee character the benefit of the section, and the period of limitation may be shortened (*a*).

Time runs from the date of the wrongful act—the breach of trust complained of (*b*), and not from its discovery, save where the trustee has concealed the fraud (*c*). Where the breach of trust consists in improper investment of trust funds resulting in loss to the estate, time runs from the date of the investment, not from the resulting loss to the estate (*d*). Time begins to run in an action by one trustee against a co-trustee for contribution in respect of a joint breach of trust from the time that the claim of the *cestui que trust* is established (*e*). The period of limitation in an action of debt is under 21 Jac. I., c. 16, sect. 4, six years from the arising of the right of action. In *Re Somerset* (*f*), trustees of a settled fund committed an innocent breach of trust by lending on mortgage on insufficient security. The mortgagor paid interest directly to the tenant for life by arrangement with the trustees. It was held that time ran from the date of the mortgage, and that the payment of interest was not an admission by the trustees which would take the case out of the statute. Time does not begin to run against any beneficiary until his interest is an interest in possession. The trustees accordingly may have a good defence against the tenant for life, whose claim against them may be barred, and yet have no defence against the beneficiaries in remainder. In such cases, the trustees on making the trust fund good are entitled to receive the income of moneys brought in by them during the life of the tenant for life (*g*).

In *Mara* v. *Browne* (*h*), the same beneficiary took two distinct interests under the settlement. The breach of trust occurred during the existence of the first interest, and it was held that time only ran from the commencement of the second interest.

(*a*) *Re* Timmis, (1902) 1 Ch. 176; and see *Re* Swain, (1891) 3 Ch. 233.

(*b*) Thorne *v.* Heard, supra.

(*c*) See Moore *v.* Knight, (1891) 1 Ch. 547, supra, p. 701.

(*d*) *Re* Somerset, (1894) 1 Ch. 231.

(*e*) Robinson *v.* Harkin, (1896) 2 Ch 415, applying the principle laid down in Wolmerhausen *v.* Gullick, (1893) 2 Ch. 514, in the case of sureties.

(*f*) (1894) 1 Ch. 231; and see *Re* Fountaine, (1909) 2 Ch. 382.

(*g*) *Re* Somerset, supra; *Re* Fountaine, supra; Collings *v.* Wade, (1896) 1 Ir. R. 340, 345, and see sub-s. 2 of section 8.

(*h*) (1895) 2 Ch. 69, reversed on some points on appeal, (1896) 1 Ch. 199, but this point was not appealed from.

SUB-SECTION (3). The *existing Statutes of Limitation.*—The following are the statutes referred to in the sub-sect.: Sect. 40 of 3 and 4 Will. 4, c. 27, for which sect. 8 of the Real Property Limitation Act, 1874 (37 and 38 Vict., c. 57), is substituted as from the 1st January, 1879. Both of these sections deal with *inter alia* moneys charged on lands and legacies (*a*). Sect. 13 of the Law of Property Amendment Act, 1860 (23 and 24 Vict., c. 38), extends the provisions of sect. 40 of 3 and 4 Will. 4, c. 27, to claims against the estates of intestates. Sect. 8 of the Real Property Limitation Act, 1874, does not apply to intestate estates, and the period is, therefore, twenty years. The section applies to a partial intestacy (*b*). It is to be noted that executors are not express trustees of undisposed-of personalty for the next of kin. In *Re Lacy* (*c*), the testator, who died in 1873, gave all his property, which included freeholds and leaseholds, charged with certain annuities, to the trustees of a charity, and appointed X. executor. X. entered on the devised properties and received the rents and profits for more than twenty years. X. did not inform the testator's only son, the heir-at-law and sole next of kin, that the trusts were invalid. The son died in 1895 without claiming the properties. It was held that the title of the heir was barred under 3 and 4 Will. 4, c. 27, sect. 34, and that the executor was not an express trustee for the next of kin, and could, therefore, rely on sect. 13 of the Law of Property Amendment Act, 1860 (*d*).

SECT. 12 (1). "This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act.

(2). "Provided always, that, save as in this Act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust."

(*a*) See ss. 8 and 10 of 37 & 38 Vict. c. 57, discussed, Vol. I., pp. 907, 908.

(*b*) Willis *v.* Howe, 43 L. T. 375.

(*c*) (1899) 2 Ch. 149, and see Churcher *v.* Martin, 42 C. D. 312, where trustees of a *void* conveyance of land to charities who had entered into possession of the premises purported to be conveyed and held them for more than twelve years, were held to have acquired a title.

(*d*) Cf. Patrick *v.* Simpson, 24 Q. B. D. 128; distinguishing Churcher *v.* Martin (supra), and following Salter *v.* Cavanagh, 1 Dr. & Wal. 668: devises of real estate with incomplete declarations of trust. The trustees were held express trustees under 3 & 4 Will. 4, c. 27, s. 25, the trust appearing on the face of the instrument itself.

Qua acquisition of reversion the principle only applies [illegible] Bevan v Webb 1905 1 Ch 620

TRUSTS.

KEECH *v.* SANDFORD.

1726. Select Cases in Chancery, 61.

Renewal of a Lease by a Trustee.

A. being possessed of a lease of a market bequeathed it to B. in trust for an infant. B., before the expiration of the term, applied to the lessor for a renewal for the benefit of the infant. The lessor refused to grant such renewal, whereupon B. got a lease made to himself. Held, that B. was trustee of the lease for the infant, and must assign the same to him and account for the profits, but that he was entitled to be indemnified from the covenants contained in the lease.

A PERSON being possessed of a lease of the profits of a market devised his estate to a trustee in trust for the infant. *Before* the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that, it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not enter into.

There was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself.

Bill is now brought [by the infant] to have the lease assigned to him, and for an account of the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que use*, which principle was agreed on the other side, though endeavoured to be differenced on account of the express proof of refusal to renew to the infant.

LORD CHANCELLOR KING.—I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui* *que use.* Though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use.*

So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

NOTES.

1. The rule as to renewal of leases generally.
2. The rule as regards particular persons, p. 713.

1. The Rule as to Renewal of Leases Generally.

The leading case is an illustration of a constructive trust arising upon the renewal of a lease by a trustee in his own name and for his own benefit; but the principle of that case applies to all varieties of property (*a*), and not merely to persons who are trustees in the strict sense of that word (*b*). The trustee is under an absolute disability to acquire for himself; in the cases of other persons affected by the rule, there are merely presumptions of varying degrees of force against their acquiring for themselves (*c*). The principle acted upon in the principal case has been applied to the acquisition of the reversion in fee upon a lease by a tenant for life or trustee of the lease (*d*), and it has recently been held to apply to the purchase of mortgaged property by a trustee or tenant for life of the equity of redemption in that property from the mortgagee exercising his

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(*a*) See, e.g., Cooper *v.* Phibbs, L. R. 2 H. L. p. 165; Griffith *v.* Owen, (1907) 1 Ch. 195.

(*b*) See instances in Note 2, and see *Re* Biss, (1903) 2 Ch. 40, but cf. Bevan *v.* Webb, (1905) 1 Ch. 620.

(*c*) See judgments of *Collins*, M. R., and *Romer*, L. J., in *Re* Biss, (1903) 2 Ch. 50.

(*d*) See Phillips *v.* P., 29 C. D. 673; Bevan *v.* Webb, (1905) 1 Ch. 620; and see infra, p. 720.

statutory power of sale (*a*). The principle illustrated by the rule in the leading case may perhaps be stated as follows :—

Wherever a person clothed with a fiduciary or quasi fiduciary character or position gains some personal advantage by availing himself of such character or position, a constructive trust is raised by Courts of Equity, such person becomes a constructive trustee, and the advantage gained must be held by him for the benefit of his *cestui que trust* (*b*). In the extension of the rule to the acquisition of reversions the general principle has, however, become obscured by consideration of the right to renew the lease to which the reversion is subject (*c*); and the analogy between the acquisition of the reversion and the renewal of the lease is somewhat imperfect, as is pointed out by *Parker*, J., in *Griffith* v. *Owen* (*a*).

The Rule strictly followed.—The rule laid down in the principal case has been very strictly followed. Thus, as was then decided, the refusal of the lessor to renew to the *cestui que trust* (*d*) : the refusal of co-trustees to concur in a renewal for the benefit of the *cestui que trust* (*e*) : the fact that the old lease had expired (*f*) : that the lease had not customarily been renewed (*g*) : the fact that the new lease differed from the old one as being for lives instead of for a term (*h*) : or was for a different term, or at a different rent (*i*) : or comprised lands not in the old lease (*k*) : or was for a reversionary term to commence after determination of the old term (*l*) : will not prevent the application of the rule. But where the new lease comprises additional lands, the trust will attach only to the original lands (*m*).

(*a*) Griffith *v.* Owen, (1907) 1 Ch. 195.

(*b*) Docker *v.* Somes, 2 My. & K. 664; Aberdeen T. C. *v.* Aberdeen University, 2 A. C. 544; *Re* Biss, (1903) 2 Ch. 40; Griffith *v.* Owen, supra.

(*c*) See the cases cited supra in note (*d*), p. 707, and infra, p. 720, notes (*b* and *c*); and see per *Parker*, J., in Griffith *v.* Owen, ubi supra at pp. 204, 205.

(*d*) Supra, p. 706; Griffin *v.* G., 1 Sch. & L. 353.

(*e*) Blewett *v.* Millett, 7 Bro. P. C. 367.

(*f*) Edwards *v.* Lewis, 3 Atk. 538.

(*g*) Killick *v.* Flexney, 4 Bro. Ch. 161; Featherstonhaugh *v.* Fenwick, 17 V. 298; 11 R. R. 77; Mulvany *v.* Dillon, 1 Ball & B., 409; Eyre *v.* Dolphin, 2 Ball & B. 290.

(*h*) Eyre *v.* Dolphin, 2 Ball & B. 298.

(*i*) Mulvany *v.* Dillon, 1 Ball & B. 409; James *v.* Dean, 11 V. 383; 15 V. 236; 8 R. R. 178.

(*k*) Giddings *v.* G., 3 Russ. 241.

(*l*) Bradford *v.* Brownjohn, L. R. 3 Ch. 711.

(*m*) Giddings *v.* G., supra; Acheson *v.* Fair, 3 Dr. & W. 512; O'Brien *v.* Egan, 5 L. R. Ir. 633.

Lloyd Jones v Clark Lloyd — 1919 1 Ch 424

A trustee who has renewed will be directed to assign the lease, free from incumbrances, except, it seems, any lease made by him *bonâ fide* at the best rent (*a*), and he must account also for the mesne rents and profits and fines which he may have received (*b*), even although the lease had expired before the bill was filed (*c*). But where a tenant for life has renewed, the account will commence only from his decease (*d*). The person renewing will be entitled to be indemnified against the personal covenants in the new lease (see the principal case and *Giddings* v. *G.* (*e*)), and to a lien upon the estate for expenses of renewal, with interest (*f*), and for lasting improvements (*g*), even though made after bill filed (*h*), but not for any improvements adopted as a mere matter of taste or personal convenience (*i*). At the same time there may be many charges in the nature of waste, and as to deterioration, which must be set off against anything found due in respect of improvements.

And where additional lands are comprised in the renewed lease, the expenses will be apportioned according to the value of the respective lands (*k*). Where a tenant for life renews a lease by putting in his own life, he cannot claim to be repaid any part of the expense, because by putting in his own life, he obviously conferred no benefit upon those in remainder, who were to take after his death (*l*); where, however, the tenant for life, without any obligation to do so, renews a lease by putting in the life of a stranger, the expenses thereof will, on the death of the tenant for life, be apportioned by the remainderman paying the proportion of the benefit he derived from the renewal (*m*); and such apportioned expenses will be a charge on the

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(*a*) Bowles *v.* Stewart, 1 Sch. & L. 230.

(*b*) Mulvany *v.* Dillon, 1 Ball & B. 409; Walley *v.* W., 1 Vern. 484; Luckin *v.* Rushworth, Finch, 392; Blewett *v.* Millett, 7 Bro. P. C. 367; Rawe *v.* Chichester, Amb. 715.

(*c*) Eyre *v.* Dolphin, 2 Ball & B. 290.

(*d*) Giddings *v.* G., 3 Russ. 241.

(*e*) Supra.

(*f*) Rawe *v.* Chichester, Amb. 715, 720; Coppin *v.* Fernyhough, 2 Bro. Ch. 291; Lawrence *v.* Maggs, 1 Eden, 453, and note; James *v.* Dean, 11 V. 383; 8 R. R. 178; Bradford *v.* Brownjohn, L. R. 3 Ch. 711; Isaac *v.* Wall, 6 C. D. 706; *Re* Ranelagh's Will, 26 C. D. 590.

(*g*) Holt *v.* H., 1 Ch. Ca. 190; and see Lawrence *v.* Maggs, 1 Eden, 453, and note; Mill *v.* Hill, 3 H. L. Cas. 828, 869.

(*h*) Walley *v.* W., 1 Vern. 487.

(*i*) Mill *v.* Hill, supra.

(*k*) Giddings *v.* G., 3 Russ. 241, 251.

(*l*) Lawrence *v.* Maggs, 1 Eden, 453, 455.

(*m*) White *v.* W., 9 V. 554; 4 R. R. 161; Allan *v.* Backhouse, 2 V. & B. 65; Giddings *v.* G.; Bradford *v.* Brownjohn; Isaac *v.* Wall, supra.

premises (*a*), even although the remaindermen are the children of the tenant for life, and claim as an advancement the sum paid for renewal by their father (*b*).

Where a testator has devised his interest in a leasehold subject to an annuity, it has been held by some judges that the annuitant is not bound to contribute towards a renewal (*c*). Lord *Manners*, however, held that an annuitant ought to contribute according to his interest in the property (*d*). See, further, as to contributions towards payment of fines upon renewals, the cases cited in note (*e*).

A tenant for life, under a settlement of leaseholds, procuring a renewal to himself, was held not to take the renewal as an express trustee upon the trusts of the settlement; the Statute of Limitations (*f*) therefore was held to run as against other persons claiming under the settlement (*g*).

When it is impossible to obtain the renewal of a lease, if there be no paramount trust for renewal, overriding the disposition in favour of the tenant for life, the latter will be entitled to the sum accumulated by the direction of the settlor for that purpose (*h*). Nor would the Court in such a case, where the trustees have a mere *power* to renew, allow them to purchase the reversion under the Ecclesiastical Commissioners Act, 1860 (*i*), to the prejudice of the tenant for life (*k*). If the renewal has become impossible through the act of the testator, the trust is at an end (*l*).

Where, however, it appears to have been the *paramount intention of the testator, as indicated by the disposition made by his will*, that upon the decease of a tenant for life the remainderman should

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(*a*) Adderley *v.* Clavering, 2 Bro. Ch. 659; 2 Cox, 192.

(*b*) Lawrence *v.* Maggs, 1 Eden, 453, 456.

(*c*) Maxwell *v.* Ashe, 7 V. 184, 12 R. R. 80 (n.); and see Thomas *v.* Burne, 1 Dru. & W. 657; Jones *v.* Kearney, 1 C. & L. 47.

(*d*) Winslow *v.* Tighe, 2 Ball & B. 195; Stubbs *v.* Roth, 2 Ball & B. 548.

(*e*) White *v.* W., 9 V. 554, 4 R. R. 161; Playters *v.* Abbott, 2 My. & K. 97; Shaftesbury *v.* Marlborough, 2 My. & K. 111; Reeves *v.* Creswick, 3 Y. & C. Ex. 715; Jones *v.* J., 5 Ha. 440; Giddings *v.* G., supra; Bradford *v.* Brownjohn, supra; Isaac *v.* Wall, 6 C. D. 706.

(*f*) 3 & 4 Will. 4, c. 27.

(*g*) *Re* Dane's Estate, 5 Ir. R. Eq. 498; Trustee Act, 1888, s. 8, and see supra, pp. 697, 698.

(*h*) Morres *v.* Hodges, 27 B. 625; Seton (1901), pp. 1151, 1781.

(*i*) 23 & 24 Vict. c. 124. See Statute Law Revision Act, 1892.

(*k*) Hayward *v.* Pile, L. R. 5 Ch. 214.

(*l*) Penfold *v.* Shillingford, 46 L. J. Ch. 491.

succeed to the enjoyment of substantially the same estate, the tenant for life, upon renewal becoming impracticable, will only be entitled to the income of the renewal fund, and of the proceeds of sale of the leaseholds (*a*).

In *Re Wood's Estate* (*b*), leaseholds under a Dean and Chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; and the trustees were directed, "two years, or sooner, before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . . for ever." In June, 1865, and February, 1866, notices to treat for parts of the leaseholds, then having about thirteen, and five, years respectively to run, were given by a Railway Company. At Lady-day, 1866, the Dean and Chapter ceased to renew leases; and about the same date their property was taken over by the Ecclesiastical Commissioners. The values of the two properties having been assessed at amounts which, when paid, and invested in £3 per cent. stock, gave a diminished income, it was argued that as the renewal had become impossible, all trust for renewal had ceased, and that the property ought to be dealt with as if it were a mere leasehold for a term of years, to which the tenant for life was entitled *in specie*; and that, therefore, the tenant for life was entitled to have the whole fund treated as converted into an annuity of duration equivalent to the term, and to have each year one year's payment of the annuity. *James*, V.-C., however, held that the tenant for life was only entitled to the dividends of the fund arising from the sale of the leaseholds to the railway company. Referring to *Morres* v. *Hodges* (*c*) and *Tardiff* v. *Robinson* (*d*), he said: "In those cases the conclusion arrived at by the Court was, that the tenant for life was entitled *in specie* to the whole rents and profits, charged only with the payment of such a sum as might be required for the renewal, and as no renewal was practicable, there was nothing by which the charge could be ascertained, and no means by which any substituted benefit could be ascertained by the Court to be given to the remainderman. In this case, however, the *primary and paramount intention* was 'that the estates may be always

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(*a*) Maddy *v.* Hale, 3 C. D. 327; *Re* Barber's S. E., 18 C. D. 624; *Re* Ranelagh's Will, 26 C. D. 597; Seton (1901), pp. 1151, 1779, 1782, 2451.

(*b*) 10 Eq. 572.

(*c*) 27 B. 625; Seton (1901), pp. 1151, 1781.

(*d*) 27 B. 629 (n.).

kept renewed, that the younger children may have an equal benefit of time, and so continue to be provided for, for ever.' * * * The testator intended to create, and was creating as he thought a perpetual estate, out of which he was carving successive interests. * * * The result, in my opinion, of the purchase by the railway company is, that one property in perpetuity is substituted for another property in perpetuity; and that as between the tenant for life and the remainderman, I cannot take away any part of the corpus belonging to the latter, in order to make good the diminished income of the former."

Where a trust for renewal of leaseholds is absolute and overrides the interest of the tenant for life, he is not entitled to object, on the ground of the reduction of his interest, to any arrangement in lieu of renewal, which may be made under the provisions of the Ecclesiastical Commissioners Act, 1860 (*a*), where renewal ceases to be possible, so long as the best practicable terms are obtained (*b*).

And where there is a paramount trust for the renewal of such leases, overriding the interest of the tenant for life, when the renewal afterwards becomes impossible, it is the duty of trustees, if possible, to purchase the reversion from the Ecclesiastical Commissioners (*c*). And where a purchaser of the equitable interest of the tenant for life in such renewable lease, not having the legal estate in the lease in him, but assuming to act with reference to that property as if he had, purchases the reversion from the Ecclesiastical Commissioners, he will be considered to have acted in the place of the real trustees of the lease, and to have acquired the property for the benefit of all the persons entitled under the will (*d*); and if the property be taken under compulsory powers and the money paid into Court, then subject to his right to be recouped his purchase-money, he will only be entitled to an order for payment on the interest on the fund in Court during the life of the tenant for life under the will (*e*).

(*a*) 23 & 24 Vict. c. 124; ss. 1 and 21 repealed by Statute Law Revision Act, 1892.

(*b*) Hollier *v.* Burne, 16 Eq. 163, 167.

(*c*) *Re* Ranelagh's Will, 26 C. D. 596, 598; *Re* Wood's Estate, 10 Eq. 572; Hollier *v.* Burne, 16 Eq. 163; Gabbett *v.* Lawder, 11 L. R. Ir. 295; Maddy *v.* Hale, 3 C. D. 327.

(*d*) *Re* Ranelagh's Will, 26 C. D. 590, 596, 599; De Rechberg *v.* Beeton, 38 C. D. 192; Leigh *v.* Burnett, 29 C. D. 231.

(*e*) *Re* Ranelagh's Will 26 C. D. 590.

Trustee Act, 1893.—By the Trustee Act, 1893 (*a*), s. 19, a trustee of any leaseholds for lives or years which are renewable under contract or custom, &c., is empowered, if he think fit, and is obliged, if required to do so by any person interested, to use his best endeavours to obtain a renewed lease, and he is empowered to do everything necessary in that behalf. But this section is not to apply where the tenant for life, &c., is under no obligation to renew, or contribute to the expenses of renewal, unless the consent in writing of such person is obtained. Power is also given to raise money for the purpose of the section which applies to trusts created either before or after the Act.

Sale of Property or of Right to Renewal.—If a person having the right of renewal sells such right, the money produced by the sale will be affected by the same trusts as the leaseholds, if renewed, would have been (*b*). And if money be taken for withdrawing opposition to a bill affecting the property, the money so received, whether the bill passes or not, must be held for all parties interested (*c*).

Forfeiture.—A lessee will not be allowed to evade the operation of the rule laid down in the principal case by fraudulently incurring a forfeiture of the lease, and then inducing the landlord to take advantage of it, and afterwards obtaining from him a new lease (*d*).

Charges, &c.—If a person entitled to a lease, subject to debts, legacies, or annuities, renews, either in his own name or in the name of a trustee, the incumbrances will remain a charge upon the renewed lease (*e*).

2. The Rule as regards Particular Persons.

Administrator.—In a case in Ireland the rule was held to apply to an *administratrix* of a deceased tenant from year to year, who upon obtaining a new tenancy from year to year, was held a trustee thereof for the next of kin of the intestate (*f*).

(*a*) 56 & 57 Vict. c. 53.

(*b*) Owen *v.* Williams, Amb. 734.

(*c*) Pole *v.* P., 2 Dr. & Sm. 420; *Ex p.* Lockwood, 14 B. 158.

(*d*) Hughes *v.* H., 25 B. 575; Stratton *v.* Murphy, 1 Ir. R. Eq. 345.

(*e*) Seabourne *v.* Powell, 2 Vern. 11; Winslow *v.* Tighe, 2 Ball & B. 195; Stubbs *v.* Roth, 2 Ball & B. 548; Webb *v.* Lugar, 2 Y. & C. Ex. 247; Jones *v.* Kearney, 1 C. & L. 34; Trumper *v.* T., L. R. 8 Ch. 879.

(*f*) Kelly *v.* K., 8 Ir. R. Eq. 403; cf. *Ex p.* Grace, 1 Bos. & P. 376, explained in *Re* Biss, (1903) 1 Ch. 40; see also James *v.* Dean, 11 V. 383, and infra, p. 718, under Tenant for Life; M'Cracken *v.* M'Clelland, 11 Ir. R. Eq.

Agents.—A person acting as agent, or in any similar capacity, for a person having an interest in a lease, cannot renew for his own benefit (*a*). In *Mulhallen* v. *Marum* (*b*), a lease was obtained by a person standing, by delegation, in the place of guardians, and who, at the same time, filled the characters of agent, receiver, and tenant. It was set aside by *Sugden*, L.C., upon the equity arising out of those relations and upon public policy.

Executor de son tort.—The general rule applies also to an executor *de son tort* renewing a lease in his own name (*c*). And where a husband having made a voluntary settlement of leaseholds on his wife obtained, without disclosing the settlement, a renewal in his own name, but with the intention of giving his wife the benefit thereof, it was held he was a constructive trustee for his wife (*d*).

Infants.—If a person jointly interested with an *infant*, and standing in a fiduciary relation towards him, renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial, the infant can claim his share of the benefit to be derived from it. But the infant must contribute to sums paid for or in consequence of renewal before he can claim any advantage (*e*). Although the lessor refuse to renew to the infant, the trustee nevertheless cannot take a renewal to himself (*f*).

Joint Owners.—There is no fiduciary relation between joint tenants or tenants in common as such (*g*), but if one of them stands in some special position to the other persons interested, by virtue of which position he owes a duty towards them in respect of the property, the principle of the leading case will apply (*h*).

Where a tenant for life and a remainderman of a lease for lives,

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172; *Re* Evans, 34 C. D. 597; Gabbett *v*. Lawder, 11 L. R. Ir. 295; and *Re* Manser, (1910) W. N. 61.

(*a*) Edwards *v*. Lewis, 3 Atk. 538; Griffin *v*. G., 1 Sch. & L. 352; Mulvany *v*. Dillon, 1 Ball & B. 417.

(*b*) 3 Dr. & W. 317. Cf. Boddington *v*. Langford, 15 Ir. Ch. R. 538 (n.), and cases cited, note (*b*), p. 765 infra.

(*c*) Mulvany *v*. Dillon, 1 Ball & B. 409; Griffin *v*. G., 1 Sch. & L. 352.

(*d*) *Re* Lulham, 33 W. R. 788; Parker *v*. Brooke, 7 R. R. 299; Dixon *v*. D., 9 C. D. 587.

(*e*) *Ex p*. Grace, 1 B. & P. 376, explained by *Collins*, M. R., in *Re* Biss, (1903) 2 Ch. 40, at pp. 58 and 59.

(*f*) See the leading case.

(*g*) *Re* Biss, (1903) 2 Ch. 40; Kennedy *v*. De Trafford, (1897) A. C. 180.

(*h*) Palmer *v*. Young, incorrectly reported in 1 Vern. 276. See the full report (1903) 2 Ch. 65 (n.); and see Hamilton *v*. Denny, 1 Ball & B. 199; Jackson *v*. Welsh, L. & G. t. Plunk. 346.

take a renewal thereof to themselves and their heirs as joint tenants, though they contribute unequally towards the consideration for the new lease, in the absence of anything showing a contrary intention, their prior interests in equity will remain unaltered (*a*).

Mortgagee.—"The mortgagee is not a trustee for the mortgagor except in a very special and modified sense" (*b*), but if a mortgagee renew a lease *primâ facie* he "doth but graft upon his stock, and it shall be for the mortgagor's benefit" (*c*). The mortgagee, however, stands in a different position to the trustee; the trustee cannot acquire the renewed lease for himself; the mortgagee can, for as against him there is only a presumption that he acquires for the mortgagor, and that may be rebutted (*d*). So a new lease obtained *bonâ fide* by the mortgagee, after giving all parties interested notice, and an opportunity of renewal, has been held not to be in trust for the mortgagor, *Nesbitt* v. *Tredennick* (*e*), where it was pointed out that in all previous cases the party had obtained renewal by being in possession, or it was done behind the back or by some contrivance in fraud of those interested in the old lease, and there was either a remnant of the old lease, or a tenant-right of renewal, on which the new lease could be ingrafted, but that here no part of the mortgagee's conduct showed a contrivance, nor was he in possession, and all that the mortgagee treated for was a new lease, giving full opportunity to the lessee to dispose of his interest, or to renew if able to do so.

Mortgagor.—On the other hand, if a lessee mortgage a lease renewable by custom, and afterwards either obtains a new lease, or purchases the reversion in fee simple (*f*), the new lease will be held a graft on the old, for the benefit of the mortgagee (*g*), or the fee simple (when the reversion is acquired) will be subject to the mortgage. But where the owner in fee, subject to a lease, mort-

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(*a*) See Hill *v*. H., 8 Ir. R. Eq. 140, 622.

(*b*) Per *Farwell*, L. J., in Turner *v*. Walsh, (1909) 2 K. B. 484 at p. 496, citing Cholomondeley *v*. Clinton, 2 J. & W., at pp. 182 et seq.; and see Kennedy *v*. De Trafford, (1897) A. C. 180; Nutt *v*. Easton, (1899) 1 Ch. 873.

(*c*) Rushworth's Case, Freem. 12; Luckin *v*. Rushworth, Rep. t. Finch, 392; Rakestraw *v*. Brewer, 2 P. W. 510; Darrell *v*. Whitchot, 2 Ch. R. 59; Fosbrooke *v*. Balguy, 1 My. & K. 226.

(*d*) See per *Collins*, M. R., in *Re* Biss, (1903) 2 Ch., at p. 56.

(*e*) 1 Ball & B. 29; and see *Re* Biss, supra.

(*f*) Leigh *v*. Burnett, 29 C. D. 231; *Re* Biss, supra; and cf. Bevan *v*. Webb, (1905) 1 Ch. 620.

(*g*) Smith *v*. Chichester, 1 C. & L. 486.

gaged a public-house, which at the time he was occupying as under-lessee, and the mortgage did not expressly include the goodwill of the business, and the lease was subsequently surrendered to the mortgagor, it was held that, having regard to the existence of the lease, the goodwill did not pass to the mortgagee by the mortgage deed, and that it did not accrue to him by the surrender of the lease (*a*).

Partners.—If one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, such lease *primâ facie* will be assets of the firm (*b*), but this presumption may, *semble*, though only with great difficulty, be rebutted (*c*).

In *Clegg* v. *Fishwick* (*d*), the plaintiff's husband and his partners took a lease in 1828 for the purpose of the partnership. He died in 1836, and the plaintiff became his administratrix. There was no provision made for the continuance of the partnership with the administratrix; but it was in fact carried on between her and the other partners up to the year 1849, the same partnership property being used for the purposes of the partnership. In that year the old lease having expired a new lease was taken by some of the other partners, without the privity of the plaintiff. The old lease was held the foundation of the new, and the administratrix entitled to a receiver in respect of the intestate's share of the partnership including the renewed lease.

The rule, however, to be deduced from the last-mentioned class of cases has been to some extent departed from where the trade or business carried on in connection with a lease is one of a speculative character (such as a mining concern), requiring great outlay with uncertain returns, and in any event it will not be acted upon in favour of parties who lie by in order to see how the speculation turns out (*e*).

Stranger.—Where a stranger obtains a renewal of a lease, or a reversionary lease, the old tenant has no equity against him (*f*).

(*a*) *Re* Bennett, (1899) 1 Ch. 316.

(*b*) Featherstonhaugh *v.* Fenwick, 17 V. 298; 11 R. R. 77; Alder *v.* Fouracre, 3 Swans. 489; FitzGibbon *v.* Scanlan, 1 Dow. 269; Partnership Act (1890), s. 29; Clegg *v.* Edmondson, 8 De G. M. & G. 787; Clements *v.* Hall, 2 De G. & J. 173; Clements *v.* Norris, 8 C. D. 129; *Re* Biss, (1903) 2 Ch. 40.

(*c*) See per *Turner*, L. J., in Clegg *v.* Edmondson, 8 De M. & G. 787, 807

(*d*) 1 M. & G. 294.

(*e*) Clements *v.* Hall, 2 De G. & J. 173, 188.

(*f*) Lee *v.* Vernon, 5 Bro. P. C. 10; Sandwich *v.* Lichfield, Colles, P. C. 104; Nesbitt *v.* Tredennick, 1 Ball & B. 29; A.-G. *v.* Gains, 11 B. 63.

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Sub-lessee.—A lessee has no equity against his sub-lessee who obtains a renewal from the head landlord without consulting him (*a*). A lessee, however, obtaining a renewal of a lease at an increased rent, or purchasing the reversion, is somewhat in the position of a partner or fiduciary with respect to a sub-lessee with whom he has entered into a *toties quoties* covenant to renew at a fixed rent or fine, and is bound either to renew upon the old terms or to convey the property to the sub-lessee upon proper terms. In *Evans* v. *Walshe* (*b*), A., the defendant, the lessee of a corporation, underlet to the plaintiff at a certain rent, with a covenant to renew to him at the same rent, as often as the corporation should renew to him. The corporation raised the rent payable by A. Lord *Redesdale* granted an injunction to restrain the defendant from proceeding in ejectment, observing, "that he considered the defendant as bound to renew on the old terms, unless he chose to abandon the property, and allow the plaintiff to stand in his place for the renewal which he had obtained, which, as he had not covenanted to renew with the corporation, he might perhaps be at liberty to do. But if he thought fit to retain the benefit which he had obtained, he was bound specially to execute his covenant for renewal."

The result is the same where a lessee having granted a similar sub-lease becomes a purchaser of the reversion from the original *lessor*. Thus, in *Postlethwaite* v. *Lewthwaite* (*c*), the defendants, lessees for lives from a Dean and Chapter, without a covenant for perpetual renewal, granted an under-lease to the plaintiff for the same lives, of part of the premises, with a *toties quoties* covenant for renewal at a fixed fine. The reversion having become vested in the Ecclesiastical Commissioners, they refused to renew, but offered to sell, and the lessee purchased the reversion. *Page Wood*, V.-C., having regard to *Evans* v. *Walshe*, made the following decree: "The defendants offering to convey the reversion in fee simple of the premises comprised in the plaintiff's lease, in preference to granting a new lease of the premises with a covenant for perpetual renewal and otherwise on the terms of the present lease, declare that the plaintiff is entitled to have such reversion conveyed to him on the terms of paying the defendants a due proportion of the consideration paid or given by them, and of the expenses incurred by them, in purchasing the fee simple of so much of the property comprised in

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(*a*) Maunsell *v.* O'Brien, 1 Jones, 176, Ex. Rep. Ir.

(*b*) 2 Sch. & L. 519.

(*c*) 2 John. & H. 237.

their original lease as they did purchase, regard being had to the existing interest of the plaintiff under his lease, and to the extent of the property therein comprised. Then there must be an inquiry what this interest is worth" (*a*).

Tenant for Life, &c.—The ground of decreeing renewals by trustees and executors to enure to the benefit of *cestuis que trust* rests upon public policy to prevent persons in similar positions from acting so as to take a benefit to themselves (*b*).

So, if a person having a limited interest in a renewable lease, as a tenant for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease, for in cases of limited ownership there is a duty to act for the benefit of the whole interest (*c*). Thus in *James* v. *Dean* (*d*), a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his residuary legatee and executrix) for life, with remainder over; the term expired *during the testator's life*, who continued to hold as tenant from year to year: a subsequent lease, obtained by his widow, was held to be subject to the trusts of the will, as the residue of the term at his death, if any, however short, would have been (*e*).

In that case it was held that if the testator had been merely a tenant at will or at sufferance of leaseholds which were renewed by his executrix (being also tenant for life under the will), she would not become a trustee of these renewed leaseholds for the remaindermen, for as a tenancy at will or at sufferance determines upon the death of the testator, no interest passes to them (*f*).

But in the same case, *Eldon*, C., said he was inclined to think, that, had the widow not been *residuary legatee*, as well as tenant for life, she would have been a trustee for the residuary legatee. "The

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(*a*) See also Pilkington *v.* Gore, 8 Ir. Ch. R. 589; Trumper *v.* T., L. R. 8 Ch. 870.

(*b*) Griffin *v.* G., 1 Sch. & L. 354, per Lord *Redesdale;* and see Blewett *v.* Millett, 7 Bro. P. C. 367.

(*c*) Kennedy *v.* De Trafford, (1897) A. C., p. 182, and see Rawe *v.* Chichester, 1 Bro. Ch. 198 (n.); *Re* Biss, (1903) 2 Ch. 40; see the extract from Bacon's Abridgment, 4 Bac. Ab. 222; set out Parker *v.* Brooke, 9 V., at p. 585; 7 R. R., p. 301; Randall *v.* Russell, 3 Mer. 190; Longton *v.* Wilsby, 76 L. T. 770; Norris *v.* Le Neve, 3 Atk. 37; Mill *v.* Hill, 3 H. L. C. 828; Trumper *v.* T., L. R. 8 Ch. 870.

(*d*) 11 V. 383; 15 V. 236; 8 R. R. 178.

(*e*) And see M'Cracken *v.* M'Clelland, 11 Ir. R. Eq. 172; Kelly *v.* K., 8 Ir. R. Eq. 403.

(*f*) James *v.* Dean, 11 V. 383, 15 V. 236, 8 R. R. 178. Cf. *Re* Manser, (1910) W. N. 61.

× Unrenewable lease & the lessor refused the [illegible]
♂ apparently renewable lease and a provision for [illegible] in the settlement
+ Unrenewable lease

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question," observed his Lordship (*a*), "is new, whether an executrix, *dealing with the opportunities which she derives by her succession without title to the estate* a tenant by sufferance or at will had held, is a trustee for the person who cannot say he took an interest under the will, or whether it is to be said against her only, that the advantage she made of those opportunities should be for the general estate. The result is this: I think it is impossible she could hold it for herself. Not applying it to this case, but supposing another person, not the wife, was residuary legatee, the question, I should think, would be in favour of that other residuary legatee, *being a casual advantage from the dealing of the executrix*" (*b*).

Where, however, a testator believing that a certain piece of land (to which he had no title) was included in a lease, by will gave the premises comprised in the lease to his executrix for life, with remainders over, and she took a lease of the piece of land, she was held to be absolutely entitled thereto (*c*).

Although a tenant for life of a lease under a settlement be himself the settlor, if he renew in his own name, he will be a trustee for the parties interested under the settlement (*d*). And the fact of the settlement containing a special provision that a particular renewal shall enure for the benefit of the trust will not prevent the application of the general rule in the case of other renewals (*e*). The renewal of a lease by a tenant for life, in her own name and at her expense, has not the effect of an appointment in her own favour under a general power of appointment by deed (*f*).

Upon the general principle where the tenant for life, under a devise, of an encroachment upon Crown property in the Forest of Dean took, under an Act of Parliament (*g*), for confirming the titles to the encroachments, a conveyance to herself in fee, it was held that as the Act was intended only to provide for disputes between parties claiming adversely the legal right (speaking without regard to the Crown's title) to be in possession and treated as holders, she

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(*a*) See 8 R. R. 185.

(*b*) And see Mill *v.* Hill, 3 H. L. Cas. 866; Archbold *v.* Scully, 9 H. L. Cas. 360; *Re* Tottenham's Estate, 16 Ir. Ch. R. 115; and see under "Administrator" on p. 713, supra.

(*c*) Rawe *v.* Chichester, Amb. 715, 720.

(*d*) Pickering *v.* Youles, 1 Bro. Ch. × 197; Colegrave *v.* Manby, 6 Madd. ♂ 72; *Re* Lulham, 33 W. R. 788. +

(*e*) Tanner *v.* Elworthy, 4 B. 487.

(*f*) Brookman *v.* Hales, 2 V. & B. 45, 13 R. R. 9; cf. *Re* Thurston, 32 C. D. 508.

(*g*) 1 & 2 Vict. c. 42.

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had acquired the fee, not only for her own benefit, but also for the benefit of those in remainder (*a*).

Reversion.—The doctrine applies equally to a purchase by a tenant for life or trustee of the reversion (*b*). But it has recently been held that the doctrine, that whenever the reversion on a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase shall be for the benefit of the trust estate, applies only in cases where the leases to which the reversion is subject are renewable by custom or contract (*c*).

Where a trustee or a person holding a fiduciary position has purchased the reversion on renewable leaseholds and thereby made renewal impossible, he is bound to give full effect to charges on the previously renewable leasehold, and to satisfy those charges out of the acquired estate, so far as necessary (*d*).

Tenant in Tail (Quasi).—The constructive trust does not arise in the case of a quasi tenant in tail of leaseholds; thus, a testator devised leaseholds for lives to trustees for A., and the heirs of his body, and if he should die without issue, remainder to B.; A. surrendered the old lease, and took a new one to himself and his heirs for three new lives, and died without issue, having devised the leaseholds to his widow for life, remainders over. A bill, filed by B., to have the benefit of the new lease, insisting that the surrender of the old lease and taking the new one was not sufficient to bar the limitation to him, and that those claiming under A. ought to be held trustees of the new lease, was dismissed (*e*).

Trustees.—Where a person, trustee of property for himself and others, acquires, under an Act of Parliament, upon the representation that he was solely entitled, an absolute interest therein, he will nevertheless be held a trustee for all parties beneficially interested,

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(*a*) Yem *v.* Edwards, 3 K. & J. 564; 1 De G. & J. 598.

(*b*) Phillips *v.* P., 29 C. D. 673 (C. A.), giving effect to a dictum of Sir W. *Grant* in Randall *v.* Russell, 3 Mer. at pp. 197, 198, and see Leigh *v.* Burnett, 29 C. D. 231; *Re* Ranelagh's Will, 26 C. D. 590, commenting on Hardman *v.* Johnson, 3 Mer. 347; Gabbett *v.* Lawder, 11 L. R. Ir. 295; Trumper *v.* T., L. R. 8 Ch. 879.

(*c*) Bevan *v.* Webb, (1905) 1 Ch. 620, following the decision of *Stirling*, J., in Longton *v.* Wilsby, 76 L. T. 770, and correcting the report of that case; but see Griffith *v.* Owen, (1907) 1 Ch. 195 at p. 205, and quære whether these decisions are reconcilable with the general principle which applies to a renewed lease where there is neither custom nor right to renew, see, e.g., *Re* Biss, (1903) 2 Ch. at p. 60 and cases cited, notes (*a*) and (*g*), p. 708 supra.

(*d*) Trumper *v.* T., supra.

(*e*) Blake *v.* B., 1 Cox, 266.

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of whatever estate or right he has so acquired (*a*), subject only to a lien for the moneys properly expended by him in acquiring any additional rights and improving the whole (*b*). And where the trustees of land affecting actual ownership, acquired from the Crown a right of fishing in the adjacent sea, it was held by the House of Lords, affirming the decision of the Court of Session, that the acquisition was secured for the benefit of the *cestui que trust* (*c*).

Volunteers and Purchasers with Notice.—The same remedies which may be had against trustees, executors, and limited owners renewing leases in their own names, may also be had against volunteers claiming through them (*d*) and purchasers from them, with notice express or implied (*e*).

And where a settlement of a lease was registered under the Irish Registry Act (6 Anne, c. 2), a purchaser, although without notice, from a limited owner who had renewed the lease in his own name, was held to be a trustee for the parties interested under the settlement (*f*).

But the *cestui que trust* may be bound by acquiescence and lapse of time (*g*). But where no new rights have been created, and no one is prejudiced by the delay, the decree will be made, but without costs (*h*).

It is immaterial that the *cestui que trust* made a continual claim, if during the time he made it he took no effectual steps to enforce his alleged rights (*i*).

(*a*) Cooper *v.* Phibbs, L. R. 2 H. L. 149.

(*b*) Ibid.

(*c*) Aberdeen Town Council *v.* Aberdeen University, 2 A. C. 544.

(*d*) Bowles *v.* Stewart, 1 Sch. & L. 209; Eyre *v.* Dolphin, 2 Ball & B. 290; Blewett *v.* Millett, 7 Bro. P. C. 367.

(*e*) Walley *v.* W., 1 Vern. 484; Eyre *v.* Dolphin, 2 Ball & B. 290; Parker *v.* Brooke, 9 V. 583, 7 R. R. 299 Coppin *v.* Fernyhough, 2 Bro. Ch. 291; Lombard *v.* Hickson, 13 Ir. Ch. R. 98; *Re* Morgan, 18 C. D. 93.

(*f*) Mill *v.* Hill, 3 H. L. Cas. 828.

(*g*) Norris *v.* Le Neve, 3 Atk. 38, 39; Jackson *v.* Welsh, L. & G., Cas. t. Plunk. 346; Clegg *v.* Edmondson, 8 De G. M. & G. 787.

(*h*) Archbold *v.* Scully, 9 H. L. Cas. 360; Erlanger *v.* New Sombrero, &c., Co., 3 A. C. 1282.

(*i*) Clegg *v.* Edmondson, supra; Lehmann *v.* McArthur, L. R. 3 Ch 496.

FOX *v.* MACKRETH.
PITT *v.* MACKRETH.

1788—1791. The case and arguments, shortened, are taken from 2 Bro. Ch. 400. The judgment from 2 Cox, 320. See 2 R. R. 55.

Purchase by a Trustee for Sale.

A trustee for the sale of estates for payment of debts, who purchased them himself, by taking an undue advantage of the confidence reposed in him by the settlor, and previous to the completion of the contract sold them at a highly advanced price; decreed to be a trustee for the original vendor as to the sums produced by such second sale.

This cause came on by appeal from the Rolls.

The original bill was filed in June, 1781, by the plaintiff, James Fox, Esq., against Robert Mackreth, John Dawes, and John Baynes Garforth, Esqrs. The supplemental bill was by William Morton Pitt, Esq., and James Farrer, trustees of the estate and effects of James Fox, against the same defendants, to have the benefit of the former suit.

The material part of the prayer of the original bill was, that the sale of the plaintiff's estates in the county of Surrey made to Thomas Page, Esq., might be declared to have been made in trust for the plaintiff, and that Mackreth and Dawes might be declared to be accountable to the plaintiff for what the estates were sold for to Page, and also for accounts of what was due to the defendants Mackreth and Dawes, and upon what securities; and that they might be decreed to deliver up the securities, the plaintiff offering that they should be at liberty to retain respectively, out of the purchase-monies of the estate, what should be found justly due to them from the plaintiff, and an account of monies due to the defendants, on account of annuities granted by the plaintiff to the defendants, the plaintiff offering that the defendants should be at liberty to retain the sum found due out of the said purchase-monies.

The circumstances of the case made against the principal defendants, Mackreth and Dawes, as taken from the bill, answer, and evidence, appear to be these:—

That the plaintiff Fox, being seised in tail of an estate at Horseley and elsewhere, in the county of Surrey, subject to an estate for life, in some parts thereof, to his mother for her jointure in lieu of dower, and likewise seised or possessed of copyhold and leasehold estates in the same county, and also entitled to several other estates in expectancy or for life only, had, before he came of age, embarked in a very expensive course of life, and was reduced to great distresses, and, under these circumstances, had procured money by granting annuities, and engaging his friends who were of age, in bonds and judgments, for securing the payment of them; and his friends, being acquainted with his situation, proposed, that as soon as might be after he should attain his age of twenty-one years, he should suffer a recovery of the Surrey estate, which, or a competent part thereof, should be conveyed to trustees, to be sold for the payment of his debts, and redeeming the annuities for which he, and his friends on his behalf, had engaged; and he attained his age of twenty-one in the month of August, 1777, and was very soon afterwards (in the latter end of that or beginning of the next month) introduced to the defendant Mackreth (who usually supplied young men of fortune with money in their distresses), and, on account of the plaintiff's inability to make a security by mortgage, as a recovery could not be suffered till Michaelmas Term, it was agreed that the defendants, Mackreth and Dawes, should supply the plaintiff with the sum of 5,100*l.*, upon the plaintiff's granting two annuities of 500*l.* and 350*l.* each for his life; that Dawes, on the 23rd of September, advanced the 5,100*l.*, for which the following securities were executed:—A bond of that date by the plaintiffs, in the penal sum of 6,000*l.*, for securing to the defendant Dawes an annuity of 500*l.*, for the life of the plaintiff; a warrant of attorney of even date to confess judgment on the said bond; and an indenture tripartite, between the plaintiff of the first part, Dawes of the second part, and Garforth of the third part, whereby lands in the county of York, of which the plaintiff was seised for life, were conveyed to Garforth, for securing the payment of the annuity of 500*l.* to Dawes. The annuity of 350*l.* was secured by a similar bond of the same date, warrant of attorney to confess judgment thereon, and a similar conveyance of the same lands to Garforth, for better securing the same. In the annuity of 500*l.*, Mackreth, in his answer, admitted he was interested with Dawes, but denied that he was so in that of 350*l.*

In Michaelmas Term, 1777, a recovery was suffered of the freehold part of the Surrey estates, by which they were vested (subject to the mother's estate for life in a part thereof) in Oliver Farrer, in trust to convey the same in such manner as the plaintiff should direct, Mr. Farrer having agreed to act as a trustee for the purpose of selling the same and discharging the debts, together with and under the direction of two of the plaintiff's friends (who appear to have been Lord Ligonier and Lord Grantley), if they could be prevailed upon to accept the trust. In December, 1777, the plaintiff, being threatened with an arrest for the sum of 2,000*l.* by the holder of bills of exchange drawn by the plaintiff while at Paris, applied to the defendant Mackreth, who agreed to lend the plaintiff 3,000*l.* on mortgage of the Surrey estates; upon which mortgage deeds, dated 22nd and 23rd of this month, were accordingly prepared and executed. At the time of the execution of these deeds, it was proposed that the defendant Mackreth should be a trustee with Farrer for payment of the debts and redeeming the annuities, when the defendant Mackreth proposed the defendant Dawes for that purpose, as being, from the course of his business, well acquainted with many of the persons who had purchased the plaintiff's other annuities, and could assist in purchasing them at a cheaper rate than Mr. Farrer; which was assented to by the plaintiff, upon an assurance that nothing should be done without Mr. Farrer being consulted and approving thereof.

In the same month the plaintiff delivered to the defendant Mackreth a particular or rental of the estate in Surrey, made by Thomas Jackman, by which it appeared that the rents of the houses and cottages on the premises amounted to 283*l.* 1*s.*, and those of the lands to 979*l.* 14*s.* (subject to the mother's jointure, which was stated at 240*l.* a year), and the timber was valued in the rental at 4,000*l.*, and the whole was valued at 45,000*l.* It was also in evidence, that Mackreth sent down a man of the name of Hampton to view the estate, who was there a week, but what valuation he made, or whether the same was communicated to Mackreth, did not appear.

A trust deed was prepared by Garforth, reciting the mortgage, by which the estates were conveyed to Mackreth and Dawes (subject to Mackreth's mortgage and the annuity to Dawes) in trust to sell or mortgage the same, and to pay the debts and redeem the annuities granted by the plaintiff. These deeds being sent to Mr. Farrer, he made some objections thereto, on account of the sums advanced as the prices of the annuities, not being scheduled as gross sums carrying interest at 5*l.* per cent., and also on account of the trustees being empowered to sell or mortgage the estates without the intervention of Mr. Fox. And it being afterwards agreed, that Mackreth should pay off Dawes, and advance some further sums, a deed-poll was prepared, calculated for execution on the 16th January, 1778, and indorsed on the mortgage deed, to secure such further sum of 7,000*l.*, consisting of 5,100*l.*, the consideration-money for the annuities granted by the plaintiff to Dawes, with 212*l.* 10*s.*, interest thereon, for the quarter's arrear due 23rd December, 1777 (but which was not paid by Mackreth to Dawes until the 16th July, 1778), and 51*l.* 14*s.* 9½*d.*, twenty-three days' arrear of the said annuities, from 23rd December to said 16th January, and 1,635*l.* 15*s.* 2½*d.* paid to the plaintiff on the 16th January, 1778. A new trust deed was also prepared, in which this deed-poll was recited, and the 3,000*l.* and the 7,000*l.* made the first charges on the estate.

On the 16th January, 1778, the plaintiff Fox and the defendant Mackreth dined together at the house of the defendant Garforth, for the purpose of executing these deeds, and after dinner, and before the plaintiff had executed the deeds, a conversation arose, in which it was proposed that the defendant Mackreth should become the purchaser of the estate, and Jackman's valuation of 45,000*l.* was mentioned by the plaintiff as a fair price, which was objected to by Mackreth, considering the value put thereby upon the houses and lands; upon which the defendant made a calculation of the houses at 14 years' purchase, and the lands at thirty, together with the household furniture, valued at 500*l.*, and the timber at 4,000*l.* (on which last two articles they agreed), amounting to 37,853*l.* 14*s.* The plaintiff afterwards offered to sell the estates to the defendant for 42,000*l.*, upon which the defendant said he would split the difference, and give 39,500*l.* for the same, but would not give more; and the plaintiff not agreeing to accept the terms, the trust deeds were then executed by the plaintiff.

After the deeds were executed, the conversation was renewed, and the plaintiff expressing some concern with respect to his mother's jointure, in case he should accept the defendant's terms, the defendant offered the 39,500*l.*, and to subject himself to the payment of the plaintiff's mother's jointure, in case she should survive him; upon which the parties agreed, and the defendant Garforth (who had been absent during the greater part of the treaty) was called in, and drew up a memorandum of such agreement, by which the money was to be paid on or before the 25th of March next, till which time the plaintiff was to receive the rents and profits, and then convey the estate to the defendant Mackreth; and about twelve o'clock at night this memorandum was signed by the plaintiff, upon which the trust deed was cancelled.

On the 28th of the same month, articles for the purchase were executed by both parties. On the 24th April following, the plaintiff, and Anna Fox his mother, on the 2nd of May, executed conveyances of the estates to the defendant, in consideration of 39,500*l.*, 11,097*l.* of which was retained by the defendant, in payment of the above mortgage of 3,000*l.*, the 7,000*l.* secured by the deed-poll, and some other sums charged by the defendant, as advanced to the plaintiff; and the defendant gave the plaintiff, as a security for the residue (being 28,403*l.*), a common accountable receipt; and afterwards, on the objection of the plaintiff to this as the only security for the money, the defendant wrote, on the same piece of paper which contained the accountable receipt, the following charge:—"25th April, 1778. I do hereby charge all my estates in the county of Surrey with the payment of the above sum of 28,403*l.* and interest." At the time of signing the above, the defendant had no estates in the county of Surrey but those purchased by him of the plaintiff; and the defendant gave to the plaintiff no other security for the residue of the money than the receipt and charge.

In the interval between the execution of the articles and that of the conveyances, Mackreth had treated with Thos. Page, Esq., for the sale of the whole of the said estate; and on the 21st March, Mr. Page agreed to give 50,500*l.* for the same, but no article was entered into between him and the defendant till the 30th of April following. Immediately after, Page was let into possession, and was to receive the rents and profits from Lady-day then last. The treaty with Page was totally unknown to the plaintiff, when he executed the conveyance to the defendant.

The plaintiff drew upon the defendant for several sums on account of the purchase-money; and in October, 1778, having sent for an account, the defendant drew one out, by which he made a balance remaining in his hands of 773*l.* 18*s.* 9*d.*; but admitted in his answer that he had therein charged moneys unpaid, as the supposed amount of two annuities and the arrears thereof then unredeemed; and afterwards in May, 1779, having then settled the said annuities, he sent the plaintiff another account, in which he made the balance 616*l.* 17*s.* above the other balance of 773*l.* 18*s.* 9*d.* In June, 1779, the plaintiff, being again in distress, applied to the defendant, when he advanced him 2,100*l.* upon an annuity of 350*l.* a year for plaintiff's life, secured by a bond in the penal sum of 4,200*l.*, and warrant of attorney to enter up judgment on the same.

Upon discovery of the sale to Page, under the circumstances as stated above, the plaintiff filed his bill [1781], insisting that the defendant Mackreth, being a trustee for him under the trust-deed for payment of debts, it was his duty to sell the same for the advantage of the plaintiff: and if he purchased for himself (which the plaintiff was advised he could not) it should be for a fair and adequate consideration; that the plaintiff, having been imposed upon, ought to have the benefit of the sale; and that the sum of 700*l.*, mentioned in the articles as due to Mackreth, on mortgage, or the part thereof estimated to be due to the defendant as the value of the annuities granted to Dawes, was a much greater sum than they were really worth on a fair valuation; that no greater allowance ought to be made out of the purchase-money than the sums really advanced, with interest from the time of advancing the same; that Mackreth had not discharged the annuities granted by the plaintiff, but the plaintiff continued liable to the same; and that at the time he granted the last annuity of 350*l.*, there was money in the defendant's hands, or the defendant was accountable to the plaintiff for larger sums, as he then had in his hands the sums for which he sold the plaintiff's estate, beyond the sum of 39,500*l.*, and therefore prayed as is before stated.

The defendant Mackreth, by his answer, insisted on the fairness of the transaction, and that the price at which he bought the estate was an adequate price, though he expected to have some benefit by selling it out in parcels ; but that the purchaser, Mr. Page, having an estate in the neighbourhood, gave a larger price than it was worth to other persons. He admitted that he had in his hands a balance of 617*l.* 13*s.* of the purchase-money, which he claimed to retain, on account of the plaintiff being only tenant for life in a small part of the estate conveyed to the defendant, and 773*l.* 18*s.* 9*d.* the balance of the accounts sent to the plaintiff in October, 1778 ; and the defendant Mackreth further said, that on the 30th of August, 1779, part of the estate being discovered to be copyhold, the defendant applied to the plaintiff to execute a letter of attorney, to surrender such copyhold premises to the defendant, which he readily agreed to, and signed such letter of attorney ; and that Mr. Page, the purchaser, in November, 1779, having raised a sum of money by mortgage of part of the said estates, and afterwards having occasion to raise money by mortgage of other parts of the said estates, and the solicitor for the person advancing the money requiring to have the original deeds of the 22nd and 23rd December, 1777, and the conveyance from the plaintiff to the defendant or duplicates thereof, the defendant applied to the plaintiff to execute other parts of the deeds, which he agreed to, and, together with his mother, executed the same without expressing himself dissatisfied with the purchase made by the defendant (but it was in evidence that Mr. Farrer only consented to the plaintiff's executing the same under a proviso that the same should not be considered as a confirmation), which acts of the plaintiff the defendant insisted would operate as confirmations of the transactions.

The cause was heard at the Rolls, before his Honor Sir *Lloyd Kenyon,* the then Master of the Rolls, on the 26th, 27th, and 29th of June, and on the [4th], 13th, 14th, and 26th of July, 1786, on which last day his Honor was pleased to make his decree, whereby he declared that undue advantage was taken by the defendant Mackreth of the confidence reposed in him by the plaintiff Fox, and that therefore the defendant Mackreth ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of the 23rd and 24th days of April, 1778, for the said plaintiff Fox, after the execution of the said deeds ; and ordered it to be referred to the Master to take an account of the money received by the defendant Mackreth from Page, and to compute interest thereon at 5*l.* per cent.

from the time of receiving the same, and to take an account of the money paid by defendant Mackreth to Dawes on account of the annuities of 500*l.* and 350*l.*; and also an account of the money advanced by Mackreth on account of the annuity of 350*l.* in 1779 (*a*): and an account of money advanced or paid by Mackreth on account of the mortgage in 1778, and under the contract for the purchase of the estate (*b*) and compute interest on the same; and that the defendant Mackreth should pay the plaintiff the costs of the suit in respect of his insisting on the conveyance of the 23rd and 24th of April, 1778, as a conveyance for his own benefit: and granted an injunction against the defendant Mackreth, to restrain him from proceeding at law touching any matter in question in the cause (*c*); and reserved further consideration.

From this decree there was an appeal, by the defendant Mackreth only, to the Lord Chancellor, which came on to be heard in Michaelmas Term, 1787.

Mr. *Mansfield*, Mr. *Scott*, Mr. *Lloyd*, Mr. *Campbell*, and Mr. *Mitford* were heard for the respondent in support of his Honor's decree.

Mr. *Ambler*, Mr. *Madocks*, Mr. *Selwyn*, Mr. *Ainge*, and Mr. *Hargrave* were heard for the defendant and appellant Mackreth, and their argument and Mr. *Mansfield's* reply are set out, 2 R. R. pp. 62, 64.

Lord Chancellor Thurlow.—The great and only doubt which I have had from the beginning to the end of this case is, whether the ground upon which I must go, if I affirm this decree, will not by necessary implication extend to many other cases, in which I shall run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure. I do not agree with those who say, that, wherever such an advantage has been taken in

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(*a*) "And the particular times when, and in what manner, such sums were advanced." Reg. Lib.

(*b*) "Or the conveyance thereof, and to state the particular times when, and to whom such sums were paid, and the account in which the same were included respectively." Reg. Lib.

(*c*) This injunction was dissolved by Lord *Thurlow*; but, as he afterwards confessed, by mistake: see *Ex p.* Lacey, 6 V. 627, 6 R. R. 9.

the course of a contract by one party of another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case :—Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a Court of equity set aside this bargain? No; but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but *because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge;* for, if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is, therefore, not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information, *but it is also necessary to show some obligation binding the party to make such a disclosure.* Therefore the question is, not whether this transaction be such as a man of honour would disclaim and disdain, but it must fall within some settled definition of wrong recognized by this Court; for, otherwise, the general transactions of mankind would be too much in hazard and uncertainty. In this view, and in this view only, I have entertained considerable doubts on this case.

The Master of the Rolls has referred a great variety of accounts, subsisting between the parties, to the Master; and it is not quite a fair argument to consider this part of the case as altogether decided. If these points are material, the only consequence is, that, as to them, the judgment must be suspended.

In the present appeal I shall consider the case entirely on the transaction of the 16th of January. I shall also consider certain terms necessary to be found, in analogy to the finding of a jury. First, it is necessary to find the real value to be what Page gave for the estate, or much more at least than the price given by Mackreth; for, unless there be great inadequacy of value, the case comes to nothing. The fraud or imposition of the one party affords no ground of relief, unless *damage* be sustained by the other (*a*); and, on the

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(*a*) This opinion Lord *Thurlow* changed, for he refused an inquiry as to the value of the estate.

other hand, it does not follow, though the real value should be found such as now represented on the part of the plaintiff, that it will put an end to the contract, unless such advantage has been obtained by some of those frauds which the policy of this Court has adopted as grounds on which to set contracts aside.

The Master of the Rolls has said that Mackreth shall be a trustee, and so he must be taken *consequentially;* for, if it be true that Mackreth has cheated Fox in this bargain, he did get the estate at law, but he did not get the estate in equity, and then he is reduced to a trustee. It is *only* in consequence of his getting the estate by fraud, that he becomes a trustee. Suppose an estate to be of the value of 50,000*l.*, and Mackreth buys it for 40,000*l.*, committing great fraud in such purchase, but, from the calamities of war and other public distresses, landed property as well as stock sink in value more than one-fifth, and Mackreth then sells the estate for 35,000*l.*, or 30,000*l.* only, would it not be true that Mackreth would be bound to pay the 10,000*l.* as a satisfaction for the fraud committed by him, although he had not made the money he actually gave for it? The money would be due, not in consequence of what Mackreth afterwards sold it for, but what Fox lost by it at the time. The only consequence, in a Court of equity, is, that what one party lost by the undue advantage taken by the other must be answered to him.

The Master of the Rolls went on the fact of the value of the estate being that for which it was sold to Page, and thought, that, this being the value, Mackreth had cheated Fox. Taking this for the present to be so, let us go over shortly the facts of the case.

Fox began to be distressed about three or four years before he came of age. He engaged other young men, with whom he was connected, to become securities for him for sums of money he had borrowed. He had involved himself in annuities. When he came of age he found himself under this imperfect obligation in point of law, but very strong obligation in point of honour, to relieve those who had pledged their names for him. A plan was formed to sell a part of his estate. His situation as to fortune when he came of age was this: his estate in Surrey was about 1,200*l.* per annum. Of this he was tenant in tail. He had an estate in Yorkshire of 1,100*l.* per annum, of which he was tenant for life. He had also an estate in Ireland, of which he was tenant for life in possession, of about 5,000*l.* or 6,000*l.* per annum. Such was his situation when he came of age. He had resorted to a man of character in his profession, Mr. Farrer, for the purpose of settling this business. The 23rd of August, 1777, came, and no step was taken towards taking any account of his debts and annuities, or negotiating with any of his creditors; yet it is most evident that the best time for settling these matters with his creditors was before he came of age.

However, he came of age on the 23rd of August; and on the 23rd of September, it seems, the first conversation was had upon this subject. He had then been introduced to Mackreth. At that time, certainly, there was nothing confidential in their intercourse, or any close connection between them; but Fox applied to Mackreth for about 5000*l.* Mackreth naturally asked what security he had to offer. Fox thereupon told him his real situation, by which it appeared that Fox had no permanent security to offer till Michaelmas Term, when he could suffer a recovery of the Surrey estate. Mackreth then proposed to him, as the ordinary mode of raising money, to buy an annuity of him at six years' purchase, which is, in truth, about half the real value; and, therefore, whoever proposes to deal with another upon this sort of terms, quits at once all idea of delicacy or generosity or propriety of conduct. It is such as cannot be endured out of a Court of justice; and, if a Court does affirm such transactions, it cannot be the heart of a judge which affirms it, but it must be done from a fear of laying down such rules as may tend to make the general transactions of mankind too insecure. There were other modes which might have occurred to a man of different feelings. A contract to make a mortgage when the Term came would have been an effective lien on the estate; and then it would only have been necessary to have insured Fox's life to the end of Michaelmas Term. This would have been the just and honourable way of relieving him. On the other hand, it is observable, that, though Mackreth adopted the other mode of raising the money, it was done in the usual course of his business; for, by profession, he dealt in the distresses of mankind. What he did, he did in his way and business of an annuity-monger. I make neither better nor worse of his conduct than that of a common and professed annuity-monger.

In November the recovery was suffered. Still nothing was done by Fox's friends towards relieving him from the annuities, which were eating him up. On the 24th of December Fox sends word that he was in great distress, in confinement, and wanted money immediately. Mackreth came to him and lent him money on common terms, and took a mortgage for it. A judge cannot impute anything to this part of the transaction, either one way or another. There was no generosity on one side, nor any plot of circumvention on the other. It would be a most extravagant conjecture to suppose that by this Mackreth had in view to get the legal estate in himself. When one once gets beyond the natural result of facts, there is no end to conjecture or its consequences. This was the situation on the 24th.

Mackreth was made acquainted with the plan of the trust deed, and it is certain that he industriously recommended himself and Dawes as trustees for this purpose. It has been said, that Mackreth's forcing himself into the trust was improper, and done for some bad motive ; and that taking the business out of the hands of Mr. Farrer was calculated to give Fox a bad impression of him. I do not agree to this. In whose room were Mackreth and Dawes to be substituted ? The two first were Lord Grantley and Lord Ligonier, who were put in only because they were lords, I believe ; for it was not very probable that they should be active or attentive in executing such a trust as this. As to Mr. Farrer himself, it is only to be said that he had, in fact, done nothing in the affair, nor taken any step towards it. I therefore really believe that Mackreth meant what he said upon that occasion ; and, when he proposed himself and Dawes as trustees, he meant to transact the business to the best advantage. In doing this he undertook a very delicate trust: first he was to make the most of the estate ; then to deal with the several annuitants. This put him into very awkward circumstances, himself and Dawes being both considerable annuitants ; and, therefore, when he undertook to deal with annuitants at large, he undertook a very nice charge, and it was incumbent on him to see with very great attention that he did not show more favour to the annuitants than he ought to do.

I certainly do not approve of Mackreth's conduct, when, after having recommended himself as a trustee for these purposes, he allowed the several annuities to stand as far as they had then gone, redeeming them only from that time. However, in fact, he bought the annuities on behalf of Fox, though with his own money ; but, instead of considering them as discharged on the 24th of December, when he bought them, he considered them as bought for his own use, and treated them as existing annuities. Here, therefore, he has gone beyond the line of delicacy; for this is a transaction that a Court of equity will never permit to stand. Here the Court will say he took an undue advantage of his situation. Yet it seems as if he thought this a fair mode of dealing in this sort of market.

In another instance he charged Fox more than he actually gave for the redemption of an annuity; and this part of the transaction must of necessity be rescinded, as Mackreth has acted *unfairly* in it; and Fox has the advantage of finding that Mackreth, after having recommended himself as a trustee, and undertaken to act faithfully for his *cestui que trust,* has yet been dealing unfairly in this very article.

On the 16th of January it is allowed that Mackreth was a trustee of Fox, and whatever consequences arise from this character must belong to him. Considering him, therefore, as a trustee, see what was done! First, he sent down a surveyor to the estate; but he has so managed this part of the case as to prevent the Court from seeing much into it. The Court will act temperately in its conjectures on this, but at the same time will impute all that it fairly can in point of suspicion. On one side it is said that Hampton was sent down to survey the estate with a view of enabling Mackreth to make the greatest advantage of it for his private benefit; but I do not think so. I think it ought to be taken that he had the estate surveyed as a *trustee,* in order that, in that character, he might know the real value of it, and thereby be better qualified to sell it to advantage. This, then, I consider as a part execution of his trust. But then Hampton's knowledge ought to be Fox's knowledge; and upon this arises a question which I think material—whether a trustee, gaining a knowledge of the subject in the execution of his trust and at the expense of the *cestui que trust* (for I suppose the expenses incurred by the trustees must fall ultimately on Fox), and that knowledge consequently *belonging* to the *cestui que trust,* whether a trustee may not in *this respect* have the hand of justice laid upon him, if this knowledge is made use of by him to circumvent his *cestui que trust,* so as to afford a distinct ground of fraud in a Court of equity? I am rather at a loss to find what the evidence affords to this point. It appears, however, that Hampton stayed on the estate till the 17th of January.

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In these circumstances Mackreth began to deal with Fox, remaining in his character of a trustee. Fox had a valuation of the estate made by Jackman, which, though not very full or particular, yet afforded the general terms for a treaty and agreement; and it went generally to show that the estate was capable of being improved about 100*l.* per annum. On this valuation, lying *in medio,* one party says the estate is worth 47,000*l.* Mackreth reasons on this survey, and says, first, that the houses are valued too high: secondly, that thirty-two years' purchase for the land is too much; next, that forty years' purchase for the lord's rent is out of all sight. Thus running down the valuation made by Jackman, he argued down Fox either from conviction or a sense of his distress, not indeed so low as 36,000*l.*, which Mackreth first proposed, but to a medium price of 39,500*l.*

The first question to be asked is, whether the character of a trustee shall vary the consequence of this transaction from what it would be in the case of a stranger? for it has not been argued, I think, that, in the case of a stranger, this bargain could be rescinded. Now, to what conclusion does the character of trustee go in this case? *If a trustee, though strictly honest, buys an estate himself and then sells it for more, yet, according to the rules of a Court of equity, from general policy and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes.* It is not, therefore, in that view that Mackreth, being called a trustee can operate. It does not rest on the name of a trustee, or on the legal or equitable relation of trustee, but on the familiar intercourse between him and Fox. Now, can I, putting myself in the place of a juryman, pronounce that Fox agreed to the price, *trusting that Mackreth knew the price and represented it fairly to him?* If A. says to B., I know the value of the subject, and if you will trust me, I will fairly tell you what it is worth, and A. at the same time knows the value to be double what he represents it to be, this is such an abuse of confidence as shall be relieved against, not because A. is a trustee, but because he stipulated with B. to tell him fairly the value, and he broke that stipulation; and then, to be sure, it makes full as strong a case as that of a trustee. But was this the express or tacit understanding of the parties here? I have no materials to affirm this fact upon;

at least, I am considerably in doubt how to find any evidence of this, where one party asserts one sum to be the value of the estate, and the other another, and both try to make the best of the bargain. At the same time there are such circumstances respecting the manner in which Mackreth undertook the trust, as make me hesitate. All this makes the question of the real value of the estate extremely material (*a*). I do not think it could have been sold at the time according to the rate of Jackman's valuation; and Mackreth's observations upon this seem to me to be well founded. No evidence has been adduced to show his valuation to be correct.

Now, see what follows on the 16th of January. Garforth was called up and desired to put their agreement into writing. I do not see why it was necessary that this memorandum should be signed by both parties. I at first thought it showed an eagerness to get the bargain made; but it seems it was agreed that more regular articles should be executed afterwards. The execution of these articles carried the transaction one step farther in point of form. Still, however, the conveyance was not executed. It is asked, whether any man of honour would let Fox execute the deeds, after he had actually sold the estate for a much larger price? Many men, perhaps, would do it; but I should never allow it to be the transaction of an honest man. Mackreth had forced himself into the confidence of Fox and was called upon, by every tie of honour and honesty, to consider himself as a trustee; but my doubt is, whether this is not too general a line to lay down in a Court of justice.

As to the manner of Mackreth's paying Fox the purchase-money, it has been much observed upon; but I do not see much in it. He had not the money by him, which may readily be supposed, but he gave an accountable note, with *5l.* per cent. interest; and, to be sure, his note was just as good as a bond—very little danger of losing the money from a man of Mackreth's fortune; besides, it was a sort of lien on the estate. The manner in which the accounts are made up by Mackreth is objected to, and it is said that this shows a confidence reposed in Mackreth by Fox. So it does; but the question is, whether this confidence is *ad idem*—whether it

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(*a*) Not for the purpose of the decision in a case between a trustee and his *cestui que trust.* See *Ex p.* James, 8 V. 353; Coles *v.* Trecothick, 9 V. 247.

shows a confidence on the part of Fox, *that Mackreth would tell him the true value of the estate?*

It is then said, that he was called upon to do several subsequent acts; but these are to be so naturally accounted for by other circumstances, that I do not see how fraud can be inferred from these. They are then spoken of as instances in which Fox has confirmed the original purchase. As to confirmation, it has been considered by the Court in very different ways. In *Lord Chesterfield* v. *Janssen*, the Court did not go on confirmation as it is usually understood, but on this, that Mr. Spencer, with his eyes open, and after the death of the Duchess, and when his situation was totally changed, thought proper to confirm the former bargain. So, the judges assistant relied on this principally, and did not give much opinion on the former part of the case. I wish they had gone further; for, as to the confirmation, he stood at that time under the former bonds. Another way in which confirmation operates is, by showing that the party then thinks himself to have been fairly dealt with. This occurs in the present case on the 28th of January. Again, on the 25th of April, Fox did not see he had had any advantage taken of him. The use that I think is to be made of such confirmations is, as a proof that the party has seen no occasion to complain. In this view the present case is still stronger, for no complaint was made of this transaction till 1781; and, therefore, it is fair to infer that so notorious a disproportion of price as is now insisted upon was not within the suspicion of those who dealt for Mr. Fox; and it certainly would have been better if this suit had been brought earlier, for when are the affairs of mankind to be at rest? Nay, more than this, it is evident, and indeed not denied by the plaintiff's counsel, that the transaction never would have been impeached if Page had not given so large a price for the estate. This very much shakes my idea of the real value (*a*) of it. If this estate, situate near London, had really been sold at a great under-value, the friends of Mr. Fox must have known it by other means. Supposing the transaction with Page to be purely accidental and not springing out of the actual value, it never can affect this question. At the same time it is observable that Mackreth has produced no evidence

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(*a*) The value, as was observed by *Eldon*, C., in *Ex p.* Lacey, 6 V. 627, 6 R. R., p. 11, was immaterial.

of the value of the estate, to show that it is not worth more than what he gave Fox.

I have been desirous of stating my thoughts on this case, that the gentlemen concerned may be apprised of them, as it will very possibly be necessary to have this matter discussed further, even before me. I have conversed with the Master of the Rolls and the judges, with a wish to find some rule of evidence on which I can go in this case without running the hazard of shaking too much the contracts of mankind. It is of very little consequence to the public to lay down *definite* rules of *law*, if you have *indefinite* rules of *evidence*. I shall therefore at present only direct an inquiry into the real value of this estate: and if upon that inquiry the value should turn out to bear a considerable disproportion to what Mackreth gave for it, I shall probably require some assistance in laying down such rules of decision as will set men at ease as to the disposition of their property.

His Lordship, however, did not direct any such inquiry, but after a lapse of a considerable time affirmed the decree, saying only that he had considered the case very much, and that he could not see that his Honor's decree was wrong.

The defendant afterwards petitioned his Lordship for a rehearing of the appeal, but that petition was dismissed (*a*). He then appealed to the House of Lords, assigning the reasons set forth in 2 Cox, 330; but, on the 14th of March, 1791, the appeal was dismissed with costs (*b*).

NOTES.

1. Purchase by a trustee from himself, or his co-trustee.
2. Purchase by a trustee from his *cestui que trust*, p. 742.
3. Where one standing in a position of trust or confidence to another person obtains an advantage from such person, p. 747.
4. Nature of relief granted by Courts of Equity, p. 771.
5. Acquiescence and confirmation, p. 773.

1. Purchase by a Trustee from himself, or his Co-trustee.

This case further illustrates the equitable maxim, that a person in a fiduciary position (for the rule applies to all

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(*a*) See 2 Cox, 158.

(*b*) Id. 339; 4 Bro. P. C. 258.

agents (*a*)), or in a position of confidence towards another (see infra, p. 747), shall not be allowed to make any advantage out of his position (*b*). It is also an instance of the principle that the Court will not allow a person to be placed in a position in which his interest shall pull him one way and his duty the other (*c*). It is usually referred to as having established the rule that a purchase by a trustee for sale, that is, a trustee who is selling (*d*) from *himself* (*e*), although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust*, for "a sale by a person to himself is no sale at all" (*f*). "This doctrine as to purchases by trustees, assignees, and persons having a confidential character stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, *however honest the circumstances;* the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases" (*g*). "It is founded," says the same judge, "upon this: that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the Court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made an advantage or not. Suppose a trustee buys any estate, and, by the knowledge acquired in that character, discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into a contract with the *cestui que trust;* if he chooses to deny it, how can the Court try that against that denial?" (*h*). "The principle is that as the trustee is bound by his duty to acquire all the knowledge possible, to enable

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(*a*) *Ex p.* Lacey, 6 V. 627, 6 R. R. 9.

(*b*) See Keech *v.* Sandford, ante, p. 706.

(*c*) See judgment of *Fry*, J., Boswell *v.* Coaks, 23 C. D. 310.

(*d*) See Lewin (1904), p. 562.

(*e*) See judgment of *Eldon*, C., in *Ex p.* Lacey, supra.

(*f*) Per *Lindley*, L. J. Farrar *v.* Farrars Ltd., 40 C. D., p. 409; Tomlin *v.* Luce, 41 C. D., p. 575; Williams *v.* Scott, (1900) A. C. 499; and see Gibson *v.* Jeyes, 6 V. 266, 5 R. R. 295; Campbell *v.* Walker, 5 V. 681, 5 R. R. 135; *Ex p.* Lacey, 6 V. 625, 6 R. R. 9; *Ex p.* James, 8 V. 353, 7 R. R. 56; Coles *v.* Trecothick, 9 V. 247, 7 R. R. 167; Luddy's Trustee *v.* Peard, 33 C. D. 500.

(*g*) Per *Eldon*, C., *Ex p.* James, 7 R. R., p. 61.

(*h*) *Ex p.* Lacey, 6 V. 627, 6 R. R., p. 11; *Ex p.* Bennett, 10 V. 394; Ingle *v.* Richards, 28 B. 361; Hamilton *v.* Wright, 9 Cl. & Fin. 110; Beningfield *v.* Baxter, 12 A. C. 167; Luddy's Trustee *v.* Peard, 33 C. D. 500; *Re* Postlethwaite, 37 W. R., p. 202.

him to sell to the utmost advantage for the *cestui que trust*, the question what knowledge he has obtained and whether he has fairly given the benefit of that knowledge to the *cestui que trust*, which he always acquires at the expense of the *cestui que trust*, no Court can discuss with competent sufficiency or safety to the parties" (*a*).

"In the case of *Fox* v. *Mackreth*, so much referred to, and now become a *leading authority*, in which I have now Lord *Thurlow's* own authority for saying he went upon a clear mistake in dissolving the injunction, it was never contended that if Fox, in a transaction clear of suspicion (but which must be looked at with the most attentive jealousy), had discharged Mackreth from the office of trustee, he would not have been able to hold the purchase. Why? because, being no longer a trustee, he was not under an obligation not to purchase. But we contended, that it was not in the power of Fox to dismiss him; that the trust was accepted under an express undertaking to the friends of Fox, that the trustees should not be dismissed without their privity; that Fox himself had too much imbecility of mind as to these transactions: and we contended, that between the dates of Mackreth's taking upon himself the character of trustee and purchasing, he had acquired a knowledge of the value of the estate, by sending down a surveyor *at the expense of the cestui que trust, which was not communicated to the cestui que trust* even at the moment of the supposed dissolution of the relation between them; and, under those circumstances, we contended that Mackreth remained a trustee. This was the principle upon which the cause was decided. Either that cause ought to have been decided in favour of Mackreth, or this Court originally, and the House of Lords finally, were right in refusing an issue to try whether the estate was of the value Mackreth gave, or of a greater value at that time. Upon this principle, that was an immaterial fact: for, if the original transaction was right, it was of no consequence at what price he sold it afterwards; if the original transaction was wrong, Mackreth not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstances, still it was gained for the benefit of the *cestui que trust*, not of the trustee" (*b*).

There is no rule that the trustee for sale *cannot purchase*, but *however fair the transaction* the *cestui que trust* may, if he come in

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(*a*) Per *Eldon*, C., *Ex p.* James, supra, at p. 64.

(*b*) Per *Eldon*, C., in *Ex p.* Lacey, 6. V. 627, 6 R. R., 11; Gibson *v.* Jeyes, 5 R. R., p. 305. See also *Ex p.* Bennett, 10 V. 381, 394, 8 R. R. 1.

reasonable time, have it set aside (*a*). The principle is not that a man *shall not sell to himself*, but that the sale shall be *voidable* if he is both seller and has a substantial interest in the purchase-money (*b*).

And it is now clearly established that where a trustee who is selling has purchased from himself for himself, it is quite unnecessary for the *cestui que trust* to show unfairness in the transaction or inadequacy of price, or that the trustee has made some advantage, for without doing so he is at liberty to set aside the sale (*c*). And this is the case, whatever may be the nature of the property, real or personal (*d*), in possession or reversion (*e*). Nor can a third person purchase for him, even at an auction (*f*). And a purchase by him from co-trustees is equally objectionable (*g*); and where trustees sold property to W., and three months afterwards the same property was conveyed by W. to one of the trustees, who twenty years later sold it at a large profit, the circumstance was considered very suspicious, although a suit to set aside the sale, commenced more than thirty years after the sale, did not succeed (*h*).

Nor will a purchase by the trustees at a public auction be sustained; for if persons who are trustees to sell are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present, seeing the sellers there to bid for the estate to or above its value, do not like to enter into that competition (*i*).

Where, however, a trustee has fairly sold an estate, a subsequent *bonâ fide* purchase of the estate from the purchaser is unobjection-

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(*a*) Campbell *v.* Walker, 5. V. 680, 5 R. R. 137; Boswell *v.* Coaks, 23 C. D. 302, 11 A. C. 232.

(*b*) *Ex p.* Moore, 51 L. J. Ch. 72, 45 L. T. 558.

(*c*) *Ex p.* Lacey, 6 V. 625; *Ex p.* Bennett, 10 V. 393; Gibson *v.* Jeyes, supra; Beningfield *v.* Baxter, 12 A. C., p. 179.

(*d*) Killick *v.* Flexney, 4 Bro. Ch. 161; Hall *v.* Hallet, 1 Cox. 134, 1 R. R. 3; Pike *v.* Vigers, 2 Dr. & Wal. 1; Price *v.* Byrn, cited 5 V. 681, 5 R. R., p. 138.

(*e*) *Re* Bloye, 1 Mac. & G. 488, 492, 495; Spring *v.* Pride, 4 De G. J. & S. 395; Aberdeen Ry. Co. *v.* Blaikie, 1 Macq. 472; Costa Rica &c. *v.* Forwood, (1901) 1 Ch. 746; Lewin (1911), p. 569.

(*f*) Campbell *v.* Walker, supra; Randall *v.* Errington, 10 V. 423, 8 R. R. 18; Watson *v.* Toone, 6 Madd. 153; Baker *v.* Carter, 1 Y. & C. Ex. 250; Hardwicke *v.* Vernon, 4 V. 411, 4 R. R. 244; Ingle *v.* Richards, 28 B. 361.

(*g*) Hall *v.* Noyes, 3 Bro. Ch. 483; Whichcote *v.* Lawrence, 3 V. 740.

(*h*) *Re* Postlethwaite, 37 W. R. 200 (C. A.).

(*i*) *Ex p.* Lacey, 6 V. 629, 6 R. R. 11; *Ex p.* James, 8 V. 348, 7 R. R. 61; Whichcote *v.* Lawrence, supra; A.-G. *v.* Dudley, Coop. 146.

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able (*a*). But the trustee cannot repurchase from his own purchaser so long as the first contract is executory only (*b*).

In *Williams* v. *Scott* (*c*), an action for rescission of a contract for the sale of land, it was held that (1) the title disclosed being that of a purchaser from himself as trustee for sale, it was inequitable to force it upon the plaintiff, (2) a defence that, notwithstanding the form of the transaction, the defendant really derived title from the beneficiaries who assented to the transaction with full knowledge of all the circumstances must be proved by clear affirmative evidence to that effect, (3) a further defence that there had been an intermediate sale to a third person and a purchase by the trustee from him will not avail unless that sale were a completed one, (4) following *Parker* v. *McKenna* (*d*), a trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor.

A trustee cannot take a lease from himself (*e*). And with so great jealousy does the Court look upon a trustee becoming a lessee of the trust property, that even where a testator had given a trustee power to become lessee, he was removed, principally upon the ground that he was placed in a position in which his interest necessarily conflicted with his duty (*f*).

2. Purchase by a Trustee from his cestui que trust.

"The rule I take to be this: Not that a trustee *cannot buy from his cestui que trust*, but that he shall not buy from himself. * * * A trustee, who is entrusted to sell and manage for others, undertakes in the same moment when he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as trustee" (*g*).

This discharge may be effected in two ways: First, a trustee or confidential agent "may contract with his *cestui que trust*, that with reference to the contract of purchase they shall no longer stand in

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(*a*) Baker *v.* Peck, 9 W. R. 472; Dover *v.* Buck, 5 Gif. 57; but see *Re* Postlethwaite, 37 W. R. 200.

(*b*) Delves *v.* Gray, (1902) 2 Ch. 606; Cf. Parker *v.* McKenna, dictum of *Mellish*, L. J., L. R. 10 Ch. 96, at p. 125.

(*c*) (1900) A. C. 499.

(*d*) L. R. 10 Ch. 96.

(*e*) A.-G. *v.* Clarendon, 17 V. 500; *Ex p.* Hughes, 6 V. 617, 6 R. R. 1. As to leases by a tenant for life, infra, p. 766.

(*f*) Passingham *v.* Sherborne, 9 B. 424.

(*g*) Per *Eldon*, C., *Ex p.* Lacey, 6 V. 625, 6 R. R. 9.

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the relative situation of trustee and *cestui que trust;* and the trustee having through the medium of that sort of bargain evidently, distinctly, and honestly proved that he had removed himself from the character of trustee, his purchase may be sustained" (*a*). It is not sufficient for the trustee or confidential agent to divest himself of the character of trustee, he must shake off the character altogether, "putting himself altogether out of the trust, and not then without a little more than merely parting with the character," and he must show that this has been done with the consent of the *cestui que trust* freely given, *after full information,* "and that he has bargained for the right to purchase" (*b*). He will not be allowed to purchase if he continue to act as trustee (solicitor) up to the point of the sale, getting during that period all the information that may be useful to him, then discharging himself from his character and buying the property (*c*). In *Luddy's Trustee* v. *Peard* (*d*) P. had acted as solicitor of L., and had in that capacity acquired a full knowledge of his estate and affairs. L. became bankrupt. P. bought of the trustee in bankruptcy property of L.'s, the purchase being made in the name of his brother, but secretly for himself. *Kay*, J., held, after a full examination of the authorities, that P. was a trustee for the trustee in bankruptcy of L. of the property purchased (*e*).

Secondly, a trustee, while retaining his office, may in effect enter into a new contract, under which he may deal with his *cestui que trust.* "A trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (*f*).

But even then, "it is a transaction of great delicacy, and which the Court will watch with the utmost diligence; so much that it is very hazardous for a trustee to engage in such a transaction" (*g*),

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(*a*) Per *Eldon*, C., Sanderson *v.* Walker, 13 V. 601, 9 R. R. 234.

(*b*) *Eldon*, C. *Ex p.* James, 8 V. 337, 7 R. R., pp. 64, 67; *Ex p.* Lacey, 6 V. 625, 6 R. R. 9; *Re* Worssam, 46 L. T. 584.

(*c*) *Ex p.* James, 8 V. 337, 7 R. R. 56 at p. 67; Spring *v.* Pride, 4 De G. J. & S. 395.

(*d*) 33 C. D. 500.

(*e*) And see Carter *v.* Palmer, 8 Cl. & Fin., p. 705.

(*f*) Per *Eldon*, C., Coles *v.* Trecothick, 7 R. R., p. 175; Randall *v.* Errington, 10 V. 423, 8 R. R. 18; *Ex p.* Lacey, 6 R. R. 9; Gibson *v.* Jeyes, 5 R. R. 295; Morse *v.* Royal, 12 V. 373; cf. *Re* Haslam & Hier-Evans, (1902) 1 Ch. 765; Wright *v.* Carter, (1903) 1 Ch. 27.

(*g*) Per *Eldon*, C., in Coles *v.* Trecothick, 9 V. 245, 7 R. R., p. 174.

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and it will be watched with infinite and most guarded jealousy; and for this reason, that the law supposes the trustee to have acquired all the knowledge which may be very useful to him, but the communication of which to the *cestui que trust* the Court can never be sure he has made, when entering into the new contract by which he is discharged (*a*). So, in the principal case, it was fully admitted that Mackreth might have dealt with Fox for the purchase of the trust estate, had he done so without taking an undue advantage of his position as trustee, and the knowledge he had acquired in that character. The burden of proving the propriety of the transaction is thrown upon the purchaser (*b*). And a mere *tendency* to interfere with his duty, or to injure the trust, is enough to invalidate the act of a person standing in a situation of confidence (*c*).

From the strictness with which the Court views such transactions, few sales between trustees and *cestui que trusts* have been supported. In *Coles* v. *Trecothick* (*d*), however, a purchase by one of two trustees under a trust to sell for payment of debts, of the trust property, as agent of his father, both of whom were creditors and in partnership, was sustained, upon the ground that the trustees did not appear to have interfered in the business up to the sale, otherwise than that they sanctioned the acts of the *cestui que trust*, and that the *cestui que trust* had full information, and the sole management of the sale, making surveys, settling the particulars, and fixing the prices of the lots. See also *Morse* v. *Royal* (*e*), where there was confirmative acquiescence; *Clarke* v. *Swaile* (*f*), where everything was fair and open; *Ex p. Watts* (*g*), where the solicitor to the fiat was under peculiar circumstances allowed to purchase part of the bankrupt's estate; the remarks of *Romilly*, M. R., in *Denton* v. *Donner* (*h*), *Luff* v. *Lord* (*i*), *Hickley* v. *H.* (*k*), referred to in *Farrar* v. *Farrars, Ltd.* (*l*).

But a purchaser in a fiduciary position must be prepared to

(*a*) *Ex p.* Lacey, supra.

(*b*) Gibson *v.* Jeyes, 6 V. 266, 5 R. R. 295; Luff *v.* Lord, 34 B. 220; Gray *v.* Warner, 16 Eq. 577; Spencer *v.* Topham, 22 B. 573; Edwards *v.* Meyrick, 2 Ha. 60; Pisani *v.* A.-G. for Gibraltar, L. R. 5 P. C. 516; Farrar *v.* Farrars, Ltd., 40 C. D. 395; Hodson *v.* Deans, (1903) 2 Ch. 647; *Re* Haslam and Hier-Evans, (1902) 1 Ch. 765.

(*c*) Hamilton *v.* Wright, 9 Cl. & Fin. 111; Plowright *v.* Lambert, 52 L. T. 646.

(*d*) 9 V. 234, 7 R. R. 167.

(*e*) 12 V. 355, 8 R. R. 338.

(*f*) 2 Eden, 134.

(*g*) De G. 265.

(*h*) 23 B. 285.

(*i*) 34 B. 220.

(*k*) 2 C. D. 190.

(*l*) 40 C. D., p. 405.

show "*uberrima fides*," "that he has acted with the completest faithfulness and fairness, that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And *although all these conditions have been fulfilled* * * * if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns it and invalidates it utterly" (*a*).

The Court will not ordinarily give a trustee leave to bid, because he must almost necessarily, from his position, have acquired much information relative to the property, and the Court could feel no security that he would do his duty and communicate this information so as to raise the price, if he had a prospect of becoming the purchaser (*b*).

The rule is, that if those interested in the estate insist that a trustee ought not to be allowed to bid, the Court will give so much weight to their wishes as to say that until all other ways of selling have failed, he shall not be allowed to buy (*c*). But if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the plaintiff may be allowed to make proposals and to become the purchaser (*d*). Where a person standing in a fiduciary position purchases at a sale ordered by the Court, the Sale of Land by Auction Act, 1867 (*e*), will not be a bar to its being set aside, although the sale has been confirmed by the Court (*f*). In *Boswell* v. *Coaks* (*g*), leave was given to the solicitor of the defendant executor to bid for property of testator ordered to be sold by auction. The sale was conducted by the plaintiff's solicitor. The property was not sold, and the Court sanctioned a sale to defendant's solicitor and another. Held, that the leave given, and the approval of the contract, entirely put an end to the fiduciary position which

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(*a*) Per Lord *O'Hagan*, McPherson *v.* Watt, 3 A. C., p. 266 (disguised purchase by solicitor from client); and see Lewis *v.* Hillman, 3 H. L. Cas. 607; Randall *v.* Errington, 10 V. 423; Luddy's Trustee *v.* Peard, 33 C. D. 519; Plowright *v.* Lambert, 52 L. T. 646.

(*b*) Tennant *v.* Trenchard, L. R. 4 Ch. 547; Geldart *v.* Ramble, 9 Jur. 1085; Sidny *v.* Ranger, 12 Si. 118.

(*c*) Per *Hatherley*, C., in Tennant *v.* Trenchard, supra.

(*d*) Ibid.

(*e*) 30 & 31 Vict. c. 48, s. 7.

(*f*) Guest *v.* Smythe, L. R. 5 Ch. 551; Delves *v.* D., 20 Eq. 77.

(*g*) 23 C. D. 302.

the solicitor formerly occupied, and placed him in the position of a mere stranger, and that therefore he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property. The decision was reversed by the Court of Appeal (*a*), but restored by the House of Lords (*b*).

Apart from any circumstances of doubt or suspicion, there is no rule of the Court that a person, who has ceased for some years to be a trustee of an instrument which contains a trust for sale, cannot become a purchaser of property subject to the trust (*c*).

A merely nominal trustee, as for instance a trustee who has disclaimed, without ever acting in the trust, may become a purchaser (*d*); so may a person who has the power to become a trustee, as by proving the will, but who in fact neither proves nor administers (*e*); also a mere trustee to preserve contingent remainders (*f*); or a person who is a bare trustee in fee for another in fee, without any duties to perform (*g*); and a mortgagee with a power of sale may sell to a company in which he is a shareholder (*h*). The mere fact, however, that a receiver has been appointed will not reduce a trustee with duties to perform into the position of a mere nominal trustee (*i*).

Under the statutes for the redemption of the land tax, the Lords Commissioners are placed in the position of vendors; and therefore, if trustees should purchase the property of the trust under those Acts, as they would not be purchasing from themselves but from the Lords Commissioners, the transaction would be valid (*k*).

The circumstance that two parties stand towards each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust (*l*); and *semble*, where the circumstances are such that the trustee is precluded

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(*a*) 27 C. D. 424.

(*b*) 11 A. C. 232.

(*c*) *Re* Boles and British Land Company's Contract, (1902) 1 Ch. 244.

(*d*) Stacey *v.* Elph, 1 My. & K. 195; Chambers *v.* Waters, 3 Si. 42.

(*e*) Clark *v.* C., 9 A. C. 733.

(*f*) Parkes *v.* White, 11 V. 209, 226; Sutton *v.* Jones, 15 V. 587; Naylor *v.* Winch, 1 Si. & S. 567.

(*g*) Pooley *v.* Quilter, 4 Drew. 189; Denton *v.* Donner, 23 B. 280, 290.

(*h*) Farrar *v.* Farrars, Ltd., 40 C. D. 395; Tomlin *v.* Luce, 41 C. D. 573, at p. 575; and cf. Kennedy *v.* De Trafford, (1897) A. C. 180.

(*i*) Tennant *v.* Trenchard, L. R. 4 Ch. 537, 546.

(*k*) Beaden *v.* King, 9 Ha. 499. But see and consider Grover *v.* Hugell, 3 Russ. 428; Whidborne *v.* Ecclesiastical Commissioners, 7 C. D. 380.

(*l*) Knight *v.* Marjoribanks, 2 Mac. & G. 10; cf. *Re* Coomber, (1911) 1 Ch. 723.

from taking advantage of his *cestui que trust*, dealings between them will not be set aside (*a*).

A trustee for infants or persons under disability cannot purchase the trust estate unless by leave of a Court of Equity, because persons not *sui juris* cannot enter into any contract with him which would have the effect of removing him from the character of trustee. The terms upon which such trustees might purchase were thus stated, "a bill filed: and the trustee saying so much is bid, and that he would give more. The Court would examine into the circumstances; ask who had the conduct of the transaction; whether there was any reason to suppose the premises could be sold better; and, upon the result of that inquiry, would let another person prepare the particular and let the trustee bid" (*b*). But if all the *cestuis que trust* are *sui juris*, they may consent to the trustees bidding (*c*).

3. Where one Standing in a Position of Trust or Confidence to another Person obtains an Advantage from such Person.

The doctrine which is applicable to purchases by trustees applies also to purchases by persons acting in a fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property.

Committee of lunatic.—The committee of a lunatic's estate will not be allowed to purchase it (*d*).

Directors.—Directors stand in a fiduciary position towards the company, and if they make any profit when acting for the company they must account for it to the company (*e*). They are trustees of the powers of employing the moneys of the company, and cannot, for instance, make an unauthorised purchase of shares in their own company with that company's moneys (*f*). So a director is as such precluded from dealing on behalf of the company, with himself or his firm, and he must account to the company for all profits made by such dealing (*g*). So also must his partner, although he be in

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(*a*) Naylor *v.* Winch, 1 Si. & S. 555; 2 L. J. Ch. 132.

(*b*) Per *Alvanley*, M. R., Campbell *v.* Walker, 5 V. 682, 5 R. R. 141; Mulvany *v.* Dillon, 1 Ball & B. 418; Farmer *v.* Dean, 32 B. 327; Aberdeen Ry. Co. *v.* Blaikie, 1 Macq. 472.

(*c*) *Ex p.* James, 8 V. 352, 7 R. R. 56.

(*d*) Pope (1892), p. 188.

(*e*) See Buckley, Companies (1909), pp. 503, 507, 508.

(*f*) Land Credit Co., &c. *v.* Fermoy, L. R. 5 Ch. 763.

(*g*) Aberdeen Ry. Co. *v.* Blaikie, 1 Macq. H. L. 461; Benson *v.* Heathorn, no way connected with the company; for if the transaction is a partnership transaction, the partners are liable jointly and severally to the company (*a*). But the directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company's undertakings (*b*).

Persons about to become directors of a proposed company will not be allowed to accept money to purchase shares *to qualify them* for office *from a person about to become a vendor to the company*, and with whom it was their duty to deal as trustees for the company, and such money will in contemplation of a Court of Equity be held to belong to the company, and if it were applied by the directors in the purchase of shares, such shares would be considered to be unpaid for, and the directors liable on the winding up of the company to be put on the list of contributories in respect of those shares (*c*). And a gift by a promoter to a director whilst there are any questions open between the company and the promoter must be accounted for by the director to the company, and the company has the option of taking the thing given or its highest value whilst held by the director (*d*). And if promoters find directors and agree to provide them with their qualification shares gratuitously, the director will be liable for misfeasance (*e*). And in short, whenever any person, such as a director, manager, or other officer, &c., standing in a fiduciary position with regard to a company, uses that position for the purpose of obtaining a personal advantage, he will be liable to account for that advantage to the company, either in an action (*f*), or if the company be in liquidation, then under s. 215 of the Companies (Consolidation) Act, 1908, as having been guilty of "misfeasance or breach of trust" (*g*).

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1 Y. & C. Ch. 326; Albion Steel, &c., Co. *v.* Martin, 1 C. D. 580; *Re* Imperial Land Co. of Marseilles, 4 C. D. 566; Imperial Mercantile Credit Asson. *v.* Coleman, L. R. 6 H. L. 189; *Re* Olympia, Ltd., (1898) 2 Ch. 153; cf. Costa Rica Railway Co. *v.* Forwood, (1901) 1 Ch. 746.

(*a*) Imperial Mercantile Credit Asson. *v.* Coleman, ubi supra.

(*b*) Percival *v.* Wright, (1902) 2 Ch. 421; cf. Burland *v.* Earle, (1902) A. C. 83.

(*c*) See Hay's Case, L. R. 10 Ch. 593; Archer's Case, (1892) 1 Ch. 322; *Re* London & S. W. Canal, Ltd., (1911) 1 Ch. 346.

(*d*) Eden *v.* Ridsdale's Ry. Lamp, &c., Co., 23 Q. B. D. 368 (C. A.).

(*e*) De Ruvigne's Case, 5 C. D. 306.

(*f*) Phosphate Sewage Co. *v.* Hartmont, 5 C. D. 394.

(*g*) Nant-y-Glo, &c. Co. *v.* Grave, 12 C. D., p. 747; and see Buckley (1909), pp. 503, 507, 508.

Promoters.—The promoters of a proposed company are under duties towards it, and are accountable to it when it comes into existence for any secret profit just as if the relationship of principal and agent, or of trustee and *cestui que trust* had existed (*a*), and if interested in property which is sold to the intended company they must disclose their interest. When therefore promoters and others, under the name of a syndicate, had suppressed the facts that they were the real vendors, and that they gave for the property less than the price that the company were about to give, and had obtained the acceptance of the contract from a board of their own creation, and had inserted in the prospectus statements contrary to the facts, which would lead intending shareholders to believe that the contract had been approved by all the directors, it was held by the Court of Appeal that there was no contract binding on the company, and that the sale to the company must be set aside, and judgment given against the members of the syndicate for repayment of the purchase-money (*b*). A man may properly purchase, or a body of persons may properly combine to purchase a property, with the object and intention of selling it at a profit, whether to a company or any one else; but if it be shewn that the vendors to the company were promoters of the company, that they in fact *created their own purchaser*, the transaction will, at the instance of the company, be set aside (*c*) unless there has been full disclosure to the company of all material facts which the company ought to know (*d*); or if they were promoters at the date at which they bought, the profit will be ordered to be paid over (*e*) unless the company bought with knowledge of the profit (*f*). The liability in these cases is joint and several (*g*). The Companies (Consolidation) Act, 1908, ss. 84, 215, applies to promoters.

Mortgagees.—It is perfectly well settled that a mortgagee with a

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(*a*) Lydney Co. *v.* Bird, 33 C. D., p. 94.

(*b*) The New Sombrero Phosphate Co. *v.* Erlanger, 5 C. D. 73, 3 A. C. 1218; Emma Mining Co. *v.* Grant, 11 C. D. 918; *Re* Leeds & Hanley Theatres of Varieties, Ltd., (1902) 2 Ch. 809; Gluckstein *v.* Barnes, (1900) A. C. 240. As to how far this fiduciary character extends, see Vol., I. p. 294.

(*c*) Lagunas Nitrate Co. *v.* Lagunas Syndicate, (1899) 2 Ch. 392; Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221; see further, p. 772, infra.

(*d*) Lagunas Nitrate Co. *v.* Lagunas Syndicate, supra.

(*e*) *Re* Leeds and Hanley Theatres of Varieties, Ltd., (1902) 2 Ch. 809; see infra, p. 773.

(*f*) Whaley Bridge Co. *v.* Green, 5 Q. B. D. 109; cf. Salomon *v.* Salomon & Co., (1897) A. C. 22.

(*g*) Phosphate, &c., Co. *v.* Hartmont, 5 C. D. 456.

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power of sale cannot sell to himself (*a*), nor to any one employed by him to conduct the sale (*b*). A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, although such price be the full value of the property (*c*). And such a mortgagee cannot sell to himself indirectly by means of his solicitor, nor to a trustee for himself, nor can two mortgagees sell to one of themselves, nor to one of themselves and another, because in such cases there cannot be an independent bargaining as between opposite parties (*d*). Nor can a solicitor or agent of such a mortgagee, acting for him in the matter of the sale, do so either (*e*).

In *Nutt* v. *Easton* (*f*) the executrix of the mortgagee of a reversion employed E., a solicitor, to obtain probate and, being anxious to realise, asked him to find a purchaser, when he reluctantly agreed to buy himself, if a purchaser could not be found by Christmas, 1887. No purchaser being found in January, 1888, the executrix, in bonâ fide exercise of the mortgagee's power of sale, sold to E., for more than the actuarial value; it was held that the sale could not be set aside, for that on the evidence E. was not acting as solicitor of the mortgagee at the time of the sale to himself.

In *Farrar* v. *Farrars, Ltd.* (*g*), three mortgagees, of whom F. was one, and who acted as solicitor for the others in the sale, sold under their power of sale to a company. F. had promoted this company to some extent, was its solicitor, and had a substantial interest therein as a shareholder. An action was brought by the mortgagors to set aside the sale, as being fraudulent and collusive. The Court held that a sale by a person to a corporation of which he was a member was not, either in form or substance, *a sale by a person to himself*; but such a transaction is suspicious, and there was such a conflict of interest and duty on the part of F., and such notice to the company of that conflict, that the burden of upholding the sale was thrown on the company.

On a sale by a building society as mortgagees, the secretary of the

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(*a*) Downes *v.* Grazebrook, 3 Mer. 200; Robertson *v.* Norris, 1 Giff. 421.

(*b*) Whitcomb *v.* Minchin, 5 Madd. 91; Martinson *v.* Clowes, 21 C. D. 857.

(*c*) Per C. A. in Farrar *v.* Farrars, Ltd., infra, and Tomlin *v.* Luce, 41 C. D., p. 575; and see Warner *v.* Jacob, 20 C. D. 220.

(*d*) See judgment of *Chitty*, J., Farrar *v.* Farrars, Ltd., 40 C. D., p. 404; Martinson *v.* Clowes, 21 C. D., p. 860; Hodson *v.* Deans, (1903) 2 Ch. 647.

(*e*) Martinson *v.* Clowes, ibid.; Orme *v.* Wright, 3 Jur. 19; Ingle *v.* Richards, 28 B. 361.

(*f*) (1899) 1 Ch. 873.

(*g*) 40 C. D. 395 (C. A.).

society purchased at the auction, and although there was no proof of undervalue, the sale was set aside as against the mortgagor (*a*).

A mortgagee, however, does not ordinarily stand in a fiduciary position towards the mortgagor, so as to invalidate a purchase of the equity of redemption by him from the mortgagor (*b*), or from a prior mortgagee selling under a power of sale (*c*), even, it seems although the purchaser be a second mortgagee with a trust for sale (*d*). But where the conveyance with a trust for sale is to a third person, he, being a trustee for both parties, cannot purchase (*e*). And see the position of a mortgagee for sale stated in cases cited below (*f*).

The true rule appears to be that a sale by mortgagor to mortgagee of the equity of redemption can be impeached only for fraud (*g*).

Where, in a deed creating a trust, there are provisions by which the trustees on making certain advances, and paying off part of a mortgage debt, are to become entitled to a charge on the estate; it seems even if a trustee making such an advance were entitled to have such a mortgage on the estate as would empower an ordinary mortgagee to foreclose, the Court would not allow him, by reason of his fiduciary position, to take such a step, it being inconsistent with his duty as trustee to preserve the estate (*h*).

Charity Trustees.—The question has been raised whether one of the trustees of a charity can himself with propriety become a mortgagee of the charity property. It was decided in the affirmative in *A.-G.* v. *Hardy* (*i*), where the trust deed contained a power of raising moneys by mortgage. In the analogous case, however, of *Forbes* v. *Ross* (*k*) *Thurlow*, C., held that trustees having power to lend on personal security, could not lend to one of themselves, so

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(*a*) Martinson *v.* Clowes, 21 C. D. 857, affirmed (1885) W. N. 41, disapproving of Robertson *v.* Norris, 1 Gif. 421; cf. Hodson *v.* Deans, (1903) 2 Ch. 647.

(*b*) Knight *v.* Marjoribanks, 2 Mac. & G. 10; and Waters *v.* Groom, 11 Cl. & Fin. 684; Dobson *v.* Land, 8 Ha. 220; Rushbrook *v.* Lawrence, L. R. 5 Ch. 3; Gibbs *v.* Daniel, 10 W. R. 688.

(*c*) Shaw *v.* Bunny, 2 De G. J. & S. 468.

(*d*) Kirkwood *v.* Thompson, 2 De G. J. & S. 613; Locking *v.* Parker, L. R. 8 Ch. 39.

(*e*) Blennerhassett *v.* Day, 2 Ball & B. 104, 133.

(*f*) Farrar *v.* Farrars, Ltd., 40 C. D., p. 410; Tomlin *v.* Luce, 41 C. D., p. 575; Kennedy *v.* De Trafford, (1897) A. C. 180.

(*g*) Knight *v.* Marjoribanks, ubi supra; Dobson *v.* Land, ubi supra; Melbourne Banking Corporation *v.* Brougham, 7 A. C. 307.

(*h*) Tennant *v.* Trenchard, L. R. 4. Ch. 544; and the observations made by Lord *Brougham* in Hamilton *v.* Wright, 9 Cl. & Fin. 123.

(*i*) 1 Si. (N. S.) 338.

(*k*) 2 Cox, 113.

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that he should benefit thereby, his Lordship observing that "he proceeded upon this single ground that *a trustee cannot bargain with himself so as to derive, through the medium of the contract, any degree of forbearance or advantage whatever to himself.*" Another reason given in the case of ordinary trusts with a like power is that the settlor has the right to rely upon the united vigilance of all the trustees as to the solvency of the borrower (*a*).

Agents.—An agent or solicitor (see p. 760, infra) employed to sell cannot purchase from his principal *unless he make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed* (*b*); and the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent,—that he has made use of another person's name as the purchaser, instead of his own,—however fair the transaction may be in other respects, from that moment it has no validity in equity (*c*).

An annuitant with a power of sale agreed to sell a reversionary interest, on which the annuity was charged, for 900*l.* This purchase fell through. The solicitor of the annuitant, however, obtained from the grantor of the annuity an assignment of the reversionary interest to L. for 900*l.* This was done, it was alleged, from motives of kindness to the grantor, who, however, had no independent advice. L. was, in fact, a clerk of the solicitor's, and a mere trustee for him, but the grantor was not informed of this. The sale was set aside (*d*).

It is, moreover, well settled that it is not necessary to prove that a purchase has been made by the agent at an under-value. "A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever may have been the price obtained for the property" (*e*); and the sale will be set aside if the principal had

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(*a*) See Lewin (1912), p. 347.

(*b*) Lowther *v.* L., 13 V. 103; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C. 42; and see S. C. 3 Paton's Scotch App. Cas. 578, 579, where the judgments of Lords *Thurlow* and *Loughborough* are given at length; Watt *v.* Grove, 2 Sch. & L. 492; Whitcomb *v.* Minchin, 5 Madd. 91; Woodhouse *v.* Meredith, 1 J. & W. 204; Oliver *v.* Court, 8 Price, 127; Martinson *v.* Clowes, 21 C. D. 857, supra; Dunne *v.* English, 18 Eq., p. 534; Hodson *v.* Deans, (1903) 2 Ch. 647.

(*c*) Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Bentley *v.* Craven, 18 B. 75: Lewis *v.* Hillman, 3 H. L. Cas. 607; Walsham *v.* Stainton, 1 De G. J. & S. 678; M'Pherson *v.* Watt, 3 A. C. 254.

(*d*) Lewis *v.* Hillman, 3 H. L. Cas. 607.

(*e*) Per *Sugden*, L. C., in Murphy *v.* O'Shea, 2 Jo. & Lat. 422; and see Dunne *v.* English, 18 Eq., p. 534.

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no competent or disinterested adviser (*a*). "Any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognisable in this Court" (*b*).

An agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry (*c*).

The burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did make such disclosure, if his evidence is contradicted by the plaintiff, and not corroborated (*d*).

An agent employed to sell an estate may, with the consent of his principal, make a profit of the transaction, as, for instance, where the bargain between them was that the agent should have whatever the estate fetched beyond a certain sum (*e*).

And after his agency is terminated by the sale of the property, he may, it seems, buy it from the purchaser. As, for instance, in the case of an auctioneer, when he has knocked the estate down, and made the written contract, when it may be said that his agency has terminated (*f*). But even in that case the Court would look with considerable suspicion on a repurchase by such an agent as an auctioneer, from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them (*g*).

An agent or steward may also take a lease from his employer or principal (*h*), but it must always be difficult to sustain such a lease in a Court of Equity, as it must be proved that full information has

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(*a*) King *v.* Anderson, 8 Ir. R. Eq. 625; Rossiter *v.* Walsh, 4 Dr. & W. 485.

(*b*) Per *James*, L. J., in Panama, &c. Co. *v.* India Rubber, &c. Co., L. R. 10 Ch., at p. 526.

(*c*) Dunne *v.* English, 18 Eq. 524; Imperial Mercantile Credit Association *v.* Coleman, L. R. 6 H. L. 189, 194; *Re* Morvah, &c. Co., McKay's Case, 2 C. D. 1; Fawcett *v.* Whitehouse, 1 Russ. & M. 132; Hichens *v.* Congreve, 1 Russ. & M. 150 (n.). As to auctioneers, see Oliver *v.* Court, 8 Price, 127, 160; Baskett *v.* Cafe, 4 De G. & Sm. 388 Parker *v.* McKenna, L. R. 10 Ch. 126.

(*d*) Dunne *v.* English, supra.

(*e*) Morgan *v.* Elford, 4 C. D. 352; and see *Re* Haslam & Hier Evans, (1902) 1 Ch. 765.

(*f*) Parker *v.* McKenna, L. R. 10 Ch. 126; per *Mellish*, L. J., Hay's Case, L. R. 10 Ch. 593; cf. Delves *v.* Gray, (1902) 2 Ch. 606.

(*g*) Ibid.; see *Re* Postlethwaite, 37 W. R. 200.

(*h*) Selsey *v.* Rhoades, 1 Bli. (N. S.) 1.

been imparted, and that the agreement has been entered into with perfect good faith (*a*).

If an agent employed *to make a purchase* purchases for himself, he will be held a trustee for his principal (*b*), and where the agency extends only to part of the lands included in a purchase, and there is some uncertainty as to which were intended, a reference may be directed to ascertain them, and also the price to be paid (*c*).

Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit by buying and becoming a seller to him. This doctrine is recognised by *Thurlow*, C., in *East India Co.* v. *Henchman* (*d*), where he observes, "If, being a factor, a man buys up goods which he ought to furnish as factor, and, instead of charging porterage duties, or accepting a stipulated salary, he takes the profits and deals with his constituent as a merchant, this is a fraud for which an account is due." In *Kimber* v. *Barber* (*e*), the defendant, Barber, knowing that Kimber, the plaintiff, was anxious to obtain shares in a certain company, on the 19th of January, 1870, called on the plaintiff and informed him that he, Barber, knew of 264 shares at 3*l*. Barber was then authorised by Kimber to buy the shares at 3*l*. The shares were accordingly bought, sixty-four of them were transferred to Kimber, and 200 to his nominee, one T. G. Taylor, a broker, being the transferor, and Kimber paying Barber 795*l*. for the shares and the transfer duty. It appeared subsequently that Barber, being aware of the plaintiff's desire to obtain the shares, on the 13th of January wrote to Jones, asking, as for a friend, whether he would sell his shares, and on the 17th of January concluded an agreement with Jones for the purchase of the shares, at 2*l*. a share, and forwarded him a blank transfer. After the interview between the plaintiff and Barber, on the 19th of January, Barber instructed Taylor to prepare bought and sold notes to the effect that the shares had been bought through Taylor, as the broker, and the shares were afterwards transferred by Jones to Taylor. As Barber had not sufficient money to pay for all the shares, some of them were lent to him by Taylor, for the purpose of being transferred to Kimber. Kimber had transferred ten out of the sixty-four shares to other

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(*a*) Maloney *v.* Kernan, 2 Dr. & W. 31.

(*b*) Lees *v.* Nuttall, 1 Russ. & M. 53; Chattock *v.* Muller, 8 C. D. 177; cf. Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196.

(*c*) Chattock *v.* Muller, ibid.

(*d*) 1 V. 289.

(*e*) L. R. 8 Ch. 56.

persons, so that at the time when the bill was filed, he held only fifty-four shares. *Romilly*, M. R., dismissed the bill without costs, holding that no relief could be given to the plaintiff as he had transferred 210 out of the 264 shares, and had thus rendered it impossible to set aside the transaction, but *Selborne*, C., reversing the decree of the M. R., held that as Barber purchased the 264 shares from Jones, as agent for the plaintiff, the plaintiff was entitled to the benefit of that purchase, and that Barber ought to pay to the plaintiff the sum of 264*l.*, being the difference between the prices paid by the plaintiff and Barber.

As to profits made by commission received by agents for sale or purchase, see ante, p. 612.

In *Morison* v. *Thompson* (*a*), M. authorised defendant T., his broker, to buy a ship for 9,000*l.* T. bought the ship for 9,250*l.* The facts were that the vendor of the ship had arranged with his broker S., that if he, S., sold the ship for over 8,500*l.*, he, S., might retain the excess. T. and S. then arranged between themselves that T. should receive a portion of this excess, but his principal, M., had no knowledge of such arrangement. When it came to the knowledge of M. that T. had made such an arrangement and had received part of the excess, he brought an action for money had and received, and it was held such an action would lie (*b*). The relation between principal and agent established by the receipt of money, the result of a corrupt bargain, is that of debtor and creditor, not of trustee and *cestui que trust* (*c*). But if the agent has received money *from the principal* and misappropriated it, *secus* (*d*). And so if an agent is employed by his principal to obtain another to do work for him, for instance, as a sub-contractor, it would be fraud cognisable in equity if the agent entered into a contract at a preposterous price in order that he and the sub-contractor might divide the profits to accrue from it: see *Holden* v. *Webber* (*e*), in which case, however, under peculiar circumstances, the Court refused to grant any relief. So, also, if an agent is employed to obtain a lease, he shall not take

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(*a*) L. R. 9 Q. B. 480.

(*b*) And see Rothschild *v.* Brookman, 2 Dow & Cl. 188; Hichens *v.* Congreve, 4 Russ. 562; Tyrrell *v.* Bank of London, 10 H. L. Cas. 26; Cavendish Bentinck *v.* Fenn, 12 A. C. 652; Guy *v.* Churchill (No. 2), 60 L. T. 740; *Re* Leeds and Hanley Theatres, &c., (1902) 2 Ch. 809.

(*c*) Lister *v.* Stubbs, 45 C. D. 1; *R* Thorpe, (1891) 2 Ch. 360; Powell *v.* Jones, (1905) 1 K. B. 11, where a sub-agent was held to stand in a fiduciary relation to the principal, and liable to account for secret commission.

(*d*) Hay's Case, L. R. 10 Ch. 593.

(*e*) 29 B. 117, 120.

it for his own benefit (*a*). Nor will an agent employed to settle a debt due from his principal be permitted to derive any benefit from it by purchasing it himself; because it is his duty on behalf of his employer, to settle the debt upon the best terms he can obtain (*b*). And so where an agent employed by one party to a contract, surreptitiously enters into dealings for his own benefit with the other party which conflict with the performance of the duties he has undertaken to perform for his own principal, such dealings will be cognisable as a fraud by the Court of Equity (*c*).

In *Massey* v. *Davies* (*d*), an agent for a colliery, who it was stipulated was to have no emolument beyond his salary, was decreed to account for the profits made by selling to his principal timber belonging to himself and another person, with whom he had clandestinely entered into partnership, under the name of that person. In this case the partner was held to have no knowledge that the agent was acting contrary to his trust; otherwise he would have been held bound, *for not only the agent acting contrary to his trust, but a man who, knowing the agent to be guilty of a breach trust, entered into a transaction with him, will be answerable* (*e*).

Where a person is employed as a stockbroker, if he himself purchase the stock of his employer, or sell his own stock to him, without his knowledge, such sales and purchases will be set aside (*f*). In *Gillett* v. *Peppercorne* (*g*), the plaintiff employed the defendant, a stockbroker, to purchase some canal shares, and he bought them from a person who, though ostensibly owner, was a mere trustee for himself. *Langdale*, M. R., set aside the sale with costs: "It is said," observed his Lordship, "that this is every day's practice in the city. I certainly should be very sorry to have it proved to me that such a sort of dealing is usual; for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his

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(*a*) Taylor *v.* Salmon, 4 My. & C. 134.

(*b*) Reed *v.* Norris, 2 My. & C. 374.

(*c*) Panama, &c. Co. *v.* India Rubber, &c. Co., L. R. 10 Ch. 515; *Re* Etna Insurance Co., 7 Ir. R. Eq. 325, 424; Phosphate Sewage Co. *v.* Hartmont, 5 C. D. 394; Seton (1901), pp. 1377, 2334.

(*d*) 2 V. 317, 2 R. R. 218.

(*e*) And see Turnbull *v.* Garden, 38 L. J. Ch. 331, 334; Mayor, &c. of Salford *v.* Lever, (1891) 1 Q. B. 168; see supra, p. 619.

(*f*) See Brookman *v.* Rothschild, 3 Si. 153; S. C. nom. Rothschild *v.* Brookman, 5 Bli. (N. S.) 165, 2 Dow & Cl. 188.

(*g*) 3 B. 78.

employer, and assuredly not with the notion that the person whose assistance is required as agent has himself in the very transaction an interest directly opposed to that of his principal" (*a*).

Partners, Part Owners.—Upon the same principle, where one of several partners was employed to purchase goods for the firm, and he, unknown to his co-partners, purchased goods of his own at the market price, and made considerable profit thereby: it was held by *Romilly*, M. R., that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made (*b*). So in *Richie* v. *Couper* (*c*), it was held that one of several co-owners of a ship, who acted as a ship's husband, was only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business (*d*).

A partner must not carry on the business of the partnership in his own or another name separate from it, otherwise than for the benefit of the partnership (*e*). Where a partner so acts, the option of the others seems to be to say "That was a business within the scope of the partnership, and although you did it secretly or in connection with some other person, I elect to take the profits of it, because it was part of the business for which the partnership was established, and I elect to say that what you have been doing nominally for yourself, but really for the partnership, was for the benefit of the partnership" (*f*).

So again, if a person from his position as partner gets a business which is profitable, or from his position as partner gets an interest in partnership property, or in that which the partnership requires for the purposes of the partnership, he cannot hold it for himself, because he acquires it by his position of partner, and acquiring it by

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(*a*) See also The Bank of Bengal *v.* Macleod, 7 Moo. P. C. 35, 46; Kimber *v.* Barber, L. R. 8 Ch. 56; Ladywell Mining Co. *v.* Brookes, 35 C. D. 408; Guy *v.* Churchill, 60 L. T. 743.

(*b*) Bentley *v.* Craven, 18 B. 75; Williams *v.* Tyre, ibid., 366, 371; Burton *v.* Wookey, 6 Madd. 367; see Dunne *v.* English, 18 Eq. 524; Dean *v.* M'Dowell, 8 C. D., p. 355; Lindley, Partnership (1905), p. 344.

(*c*) 28 B. 344.

(*d*) See also Beck *v.* Kantorowicz, 3 K. & J. 230; Perens *v.* Johnson, 3 Sm. & Gif. 419.

(*e*) See Somerville *v.* Mackay, 16 V. 382; Lock *v.* Lynam, 4 Ir. Ch. R. 188.

(*f*) Per *James*, L. J., in Dean *v.* M'Dowell, 8 C. D. 351, explained and followed in Aas *v.* Benham, (1891) 2 Ch. 244. As to the position of a director of a company interested in contracts made with the company by another company of which he is also a member, see Costa Rica Co., Ltd. *v.* Forwood, (1901) 1 Ch. 746.

means of that fiduciary position, he must bring it into the partnership account. The first part of this proposition may be illustrated by the case of *Russell* v. *Austwick* (*a*), which was the case of a partnership where two persons having joined in business as carriers under a contract with the *Mint* to carry bullion between London and Falmouth, one of the partners, by virtue of his position as contractor, obtained a further contract in his own name for carrying silver for the *Mint* by another route, and was compelled to share the profits thereof (*b*). The other part of the proposition may be illustrated by those cases where a partner, obtaining behind the back of another partner a renewal of a lease, has been held to be a trustee thereof for the partnership (*c*).

So in *Gardner* v. *M'Cutcheon* (*d*), two persons were part owners of a ship which was employed in trading for the common benefit of the part owners; one of them used the ship for the purpose of a private trading of his own, and it was held that the other part owner was entitled to follow the profits thereby made.

Where, however, a partner, in breach of contract, derives profits from a separate trade not within the scope of the partnership business, which profits were not acquired by him by reason of his connection with the firm or by use of the firm's property, the co-partners, although they may claim damages, are not entitled to an account of the profits made in such separate trade (*e*).

There is no rule which prevents a surviving partner from purchasing the share of a deceased partner from his representatives (*f*), and the trustee in bankruptcy (see p. 760, infra) of surviving partners who have a large claim against the deceased partner's estate may buy from the representatives of the deceased (*g*), nor does the rule prevent one of several residuary legatees from buying the share of another, or purchasing for less than the amount a charge on the share of another (*h*). But inasmuch as the Court will rarely allow

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(*a*) 1 Si. 52.

(*b*) See also Glassington *v.* Thwaites, 1 Si. & S. 124, 133; Imperial Mercantile, &c. *v.* Coleman, L. R. 6 H. L. 189.

(*c*) See Alder *v.* Fouracre, 3 Swans. 489; Featherstonhaugh *v.* Fenwick, 17 V. 311; Clegg *v.* Fishwick, 1 Mac. & G. 294; and cases cited in the notes to Keech *v.* Sandford, ante, p. 716.

(*d*) 4 B. 534.

(*e*) Dean *v.* M'Dowell, 8 C. D. 345; followed and explained in Aas *v.* Benham, (1891) 2 Ch. 244; cf. Cassels *v.* Stewart, 6 A. C. 64; Trimble *v.* Goldberg, (1906) A. C. 494; *Re* Dover Coalfield, Ltd., (1907) 2 Ch. 76, (1908) 1 Ch. 65, and see supra, p. 619.

(*f*) Chambers *v.* Howell, 11 B. 6, 14.

(*g*) Boswell *v.* Coaks, 23 C. D. 302, 11 A. C. 232.

(*h*) Barwell *v.* B., 34 B. 371.

persons conducting a sale to bid at it, where a sale is directed by the Court of partnership property upon a dissolution of partnership, liberty to bid at the sale will only be given to such of the partners as have not the conduct of the sale (*a*).

Executors, Administrators.—Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must account to the utmost extent of the advantage made by them of the subject so purchased (*b*). In *Watson* v. *Toone* (*c*), the purchase was rescinded after 20 years, there being concealment and disguise (*d*).

The purchase of a legacy from a legatee by an executor is voidable, and the burden is on the executor to show the fairness of the transaction, even if the legatee selling be his co-executor (*e*), and if they compound debts or mortgages, or buy them in for less than is due upon them, they will not be allowed to retain any benefit from the transaction for themselves, but for the estate (*f*).

But an executor who has renounced (*g*), or who has not proved, is under no disability to purchase the testator's assets (*h*).

Trustees in Bankruptcy.—Upon principles of general policy and without regard to the fairness of the transaction, assignees, trustees, or commissioners in bankruptcy, or the solicitor thereto, have been held incapable of purchasing the property of the bankrupt (*i*), nor could a creditor of the bankrupt, who had been consulted by the assignees as to the terms upon which the property should be put up, buy it (*k*), nor the partner of the trustee in bankruptcy (*l*), though the sale were by auction, and all the proceedings perfectly proper and

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(*a*) Wild *v.* Milne, 26 B. 504; Seton (1901), 331, 341, 2180.

(*b*) Hall *v.* Hallet, 1 Cox, 134, 1 R. R. 3.

(*c*) 6 Madd. 153; see also Rice *v.* Gordon, 11 B. 269, and Smedley *v.* Varley, 23 B. 358; *Re* Postlethwaite, 60 L. T. 514; Brindley *v.* Partridge, 13 C. D. 654; Beningfield *v.* Baxter, 12 A. C. 167.

(*d*) Kilbee *v.* Sneyd, 2 Moll. 186; Cooke *v.* Collingridge, Jac. 607.

(*e*) *Re* Biel, 16 Eq. 577; Luff *v.* Lord, 34 B. 220.

(*f*) See Anon., 1 Salk. 155; *Ex p.* James, 8 V. 346, 7 R. R. 56; *Ex p.* Lacey, 6 V. 628, 6 R. R. 9; Chute *v.* Lindsay, 6 Ir. R. Eq. 385.

(*g*) Mackintosh *v.* Barber, 7 Moore, 315.

(*h*) Clark *v.* C., 9 A. C. 733; cf. *Re* Boles & British Land Co., (1902) 1 Ch. 244.

(*i*) *Ex p.* Lacey, 6 V. 625, 6 R. R. 9; *Ex p.* Hughes, 6 V. 623, 6 R. R. 1: Campbell *v.* Walker, 5 V. 678, 5 R. R. 135; *Ex p.* James, supra; Owen *v.* Foulkes, 6 V. 330; *Ex p.* Bage, 4 Madd. 459.

(*k*) *Ex p.* Hughes, supra.

(*l*) *Ex p.* Burnell, 7 Jur. 116.

regular (*a*). And a trustee cannot even purchase for another person (*b*), and such a purchase even for the benefit of the bankrupt's estate is disapproved (*c*).

Such a purchase has, however, sometimes been adopted, and in *Ex p. Gore* (*d*), on payment of costs, a purchase by an assignee, on being found beneficial by the Court, was confirmed. An assignee, moreover, has been removed by the Court in order that he might bid at a sale of the bankrupt's estate (*e*); and in a case where the Court refused to allow an assignee to bid, he was allowed to name the price he would give if the property were not sold by auction, and afterwards to buy at that price (*f*). As assignees cannot buy the estate of the bankrupt, so, also, they cannot for their own benefit buy an interest in the bankrupt's estate, because they are trustees for the creditors. In that respect there is no difference between assignees and executors, who cannot for their own benefit buy the debts of the creditors; for although, in a moral point of view, such a transaction may not be blamable, still the Court, on principles of general policy, has held assignees trustees of the debts purchased by them for the benefit of those entitled to the interest in the residue, the creditors, or the bankrupt, as the case may be (*g*).

Rule 316 of the Bankruptcy Rules, 1886, provides that neither the trustee nor any member of the committee of inspection of an estate shall, while so acting, except by leave of the Court, either directly or indirectly, by himself or any partner (*h*), clerk, agent, or servant, become purchaser of any part of the estate, and any such purchase may be set aside by the Court on the application of the Board of Trade or any creditor (*i*). And as to giving leave to trustees to bid, see *Ex p. Molineux* (*k*), *Ex p. Beaumont* (*l*).

Solicitors.—A solicitor is not incapable of contracting with or purchasing from his client; but inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was fair (*m*); that the bargain is, speaking generally, as good as any

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(*a*) *Ex p.* Moore, 30 W. R. 123.

(*b*) *Ex p.* Grylls, 2 D. & C. 90.

(*c*) See Pooley *v.* Quilter, 2 De G. & J. 327.

(*d*) 7 Jur. 136.

(*e*) *Ex p.* Perks, 3 M. D. & De G. 385.

(*f*) *Ex p.* Holyman, 8 Jur. 156.

(*g*) *Ex p.* Lacey, supra. And see Pooley *v.* Quilter, 2 De G. & J. 327; Adams *v.* Sworder, 2 De G. J. & S. 44.

(*h*) See *Re* Gallard, (1897) 2 Q. B. 8.

(*i*) See Wace, Bankruptcy (1904), 501.

(*k*) 4 D. & C. 460.

(*l*) 3 D. & C. 549.

(*m*) Montesquieu *v.* Sandys, 18 V. 302; Cane *v.* Allen, 2 Dow, 289;

that could have been obtained with due diligence from any other purchaser (*a*); and that the client knew that the real purchaser was his *law agent* (*b*).

In *Gibson* v. *Jeyes* (*c*), Jeyes, an attorney, sold an annuity to his client. "An attorney," says *Eldon*, C., "buying from his client, can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand. The principle so stated may bear hard in a particular case; but I must lay down a general principle that will apply to all cases; and I know of none short of that, if the attorney of the vendor is to be admitted to bargain for his own interest, where it is his duty to advise the vendor against himself." And in another part of his judgment his Lordship observes: "If he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given against a third person. It is asked, where is that rule to be found? I answer, in that great rule of the Court, *that he who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else*" (*d*). "Solicitors who deal with their clients must take care, not only that the transaction is fair, but that they are in a condition to

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Champion *v.* Rigby, 1 Russ. & M. 539; Edwards *v.* Meyrick, 2 Ha. 60; Gibbs *v.* Daniel, 4 Gif. 1; Balch *v.* Symes, T. & R. 92; Wright *v.* Carter, (1903) 1 Ch. 27; *Re* Haslam and Hier-Evans, (1902) 1 Ch. 765.

(*a*) Pisani *v.* A.-G. for Gibraltar, L. R. 5 P. C. 516.

(*b*) Lewis *v.* Hillman, 3 H. L. Cas. 607; M'Pherson *v.* Watt, 3 A. C. 254.

(*c*) 6 V. 266, 5 R. R. 295.

(*d*) See also Austin *v.* Chambers, 6 Cl. & Fin. 1, 37, 5 R. R., p. 306; Casborne *v.* Barsham, 2 B. 76; Trevelyan *v.* Charter, 9 B. 140; Savery *v.* King, 5 H. L. Cas. 627, 656, 665; Bellamy *v.* Sabine, 2 Ph. 425; Holman *v.* Loynes, 4 De G. M. & G. 270; Salmon *v.* Cutts, 4 De G. & Sm. 125; Barnard *v.* Hunter, 2 Jur. (N. S.) 1213; Waters *v.* Thorn, 22 B. 547; Pearson *v.* Benson, 28 B. 598; Popham *v.* Exham, 10 Ir. Ch. R. 440; Gresley *v.* Mousley, 3 De G. F. & J. 433; Rudd *v.* Sewell, 4 Jur. 882; Gibbs *v.* Daniel, 10 W. R. 688; Beale *v.* Billing, 13 Ir. Ch. R. 250; *Re* Haslam and Hier-Evans, (1902) 1 Ch. 765.

prove that it was fair" (*a*). In *Montesquieu* v. *Sandys* (*b*), the purchase of a reversionary interest, viz., a second presentation to a living, after the death of the then incumbent, by an attorney, from his client, though advantageous in the end, was sustained, no fraud or misrepresentation being proved, and the proposal coming from the client, both the attorney and client being ignorant of the real value (*c*). The objection to a transaction of its being a purchase by a solicitor from his client, cannot be maintained by third parties (*d*). It is always advisable that a solicitor, purchasing from his client, should insist upon the intervention of another professional man to act on behalf of his client (*e*). But the intervention must be shown to have been effective (*f*).

The rule laid down by *Eldon*, C., will not apply, if the solicitor does not act in such capacity *in hac re* (*g*); or where he has acted for the first time as solicitor to the client and the confidence which is the basis of the rule did not therefore exist (*h*). A sale of an equity of redemption to solicitors who had acted for the vendor until shortly before the purchase and had then retired, was set aside, as it appeared that they were aware of a neglect of duty on the part of the new solicitor, and withheld from him information of importance acquired when they acted as solicitors (*i*). As to the disability remaining after the confidential employment ceases, see *Luddy's Trustee* v. *Peard* (*k*) and *Carter* v. *Palmer* (*l*). For though a person may have ceased to act as attorney for another, if by means of former transactions, while holding that character, he had acquired, at the expense of his client, a knowledge of the value of his property which the client had not, he will not be able to sustain any contract relative to such property, if he concealed from his former client the knowledge so obtained (*m*). If, however, such

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(*a*) Per *Turner*, L. J., in Gresley *v.* Mousley, supra.

(*b*) 18 V. 302.

(*c*) See Clanricarde *v.* Henning, 9 W. R. 912; Hesse *v.* Briant, 6 De G. M. & G. 623.

(*d*) Knight *v.* Bowyer, 23 B. 609; cf. Nutt *v.* Easton, (1899) 1 Ch. 873.

(*e*) Gibson *v.* Jeyes, 5 R. R., p. 306; Pisani *v.* A.-G. for Gibraltar, L. R. 5 P. C. 516; Wright *v.* Carter, (1903) 1 Ch. 27.

(*f*) Gibbs *v.* Daniel, 10 W. R. 688.

(*g*) Cane *v.* Lord Allen, 2 Dow, 289; Edwards *v.* Meyrick, 2 Ha. 68.

(*h*) Edwards *v.* Williams, 32 L. J. Ch. 763, questioned in Williamson *v.* Moriarty, 19 W. R. 818, and see Pisani *v.* A.-G. for Gibraltar, L. R. 5 P. C. 516.

(*i*) Gibbs *v.* Daniel, 4 Giff. 1.

(*k*) 33 C. D. 500, cited supra, p. 743.

(*l*) 8 Cl. & Fin. 657; M'Pherson *v.* Watt, 3 A. C. 254.

(*m*) Cane *v.* Lord Allen, 2 Dow, 294; Montesquieu *v.* Sandys, 18 V. 308; *Ex p.* James, 8 V. 352.

Fox v. Mackreth—Pitt v. Mackreth.

knowledge were communicated to the former client by the attorney, the parties would be placed upon an equality, and such communication being proved, the difficulty, *quoad hoc*, would be removed (*a*). A beneficial purchase by a solicitor from his client pending that relation cannot be supported, but the solicitor may insist on and obtain a mortgage from his client for what is justly due to him (*b*).

Nor will a solicitor or a clerk acting in such capacity, be allowed to derive any benefit by reason of any information acquired during the course of his employment which it was his duty to have communicated to his employer: *Hobday* v. *Peters* (*c*), in which case a mortgagor consulted a solicitor, who turned her over to his clerk to assist her gratuitously. The clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount. It was held by *Romilly*, M. R., that he was a trustee of the benefit for the mortgagor. A solicitor *employed in making a purchase* is accountable to his clients for the benefits which he may have derived clandestinely from a sale to them of his own property. Thus in *Tyrrell* v. *The Bank of London* (*d*), a solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking-house on a joint speculation. After its establishment the company (the solicitor acting for it), purchased part of the premises for the banking-house, not knowing that the solicitor was interested in the property. It was held that the solicitor ought to account to the company for all the profit made by him in the transaction, but that the stranger was under no such liability (*e*). A solicitor having, under a decree, the conduct of a sale, is under an absolute incapacity to purchase at it (*f*). As to his obtaining leave to bid, see *Boswell* v. *Coaks* (*g*), and *Popham* v. *Exham* (*h*).

And the better opinion seems to be that, although a solicitor may not under a decree actually have the conduct of the sale, yet if he has

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(*a*) Edwards *v.* Meyrick, 2 Ha. 69.

(*b*) Johnson *v.* Fesenmeyer, 3 De G. & J. 13; Pearson *v.* Benson, 28 B. 598.

(*c*) 28 B. 349.

(*d*) 10 H. L. Cas. 26.

(*e*) See also Chaplin *v.* Young, 33 B. 414.

(*f*) Sidny *v.* Ranger, 12 Si. 118; Atkins *v.* Delmege, 12 Ir. R. Eq. 1; *Re* Bloye's Trusts, 19 L. J. Ch. 89. And see *Re* Romayne's Estate, 13 Ir. Ch. R. 444.

(*g*) 23 C. D. 302; 11 A. C. 232.

(*h*) 10 Ir. Ch. R. 440.

intervened on behalf of parties interested in the sale so as to render it his duty towards them to assist in procuring the best price for the property offered for sale, then, a purchase by him can only be sustained on clear proof by him that no loss of price resulted from his purchasing. The cases show how great the difficulties are in applying the general principle (*a*). And a solicitor who has purchased securities given by his client for smaller sums than the amounts secured, will not be allowed to hold the purchased securities as a security to himself for a larger sum than the amount which he had expended in making the purchase, even although he had inserted a clause in a deed executed by his client, that he was to be entitled to claim the full amount due on the securities (*b*), but as the Court has a discretion with regard to the allowance of interest in such cases (*c*), the solicitor may be allowed 5 per cent. on the sum he had expended in making the purchases (*d*).

Although as an ordinary rule the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale, except upon the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, such rule will not apply to a case where the mortgagee at the time of taking the mortgages was the solicitor of the mortgagor, for in such a case the Court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression, without injuring the security of the mortgagee (*e*).

The obligations on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client: see *Luddy's Trustee* v. *Peard* (*f*), in which case P., the solicitor of the bankrupt L., had in that capacity acquired an intimate knowledge of the nature and value of his property. He was employed by the bankrupt L. to negotiate with the trustee in the bankruptcy of L. for the purchase of certain property, part of the estate. He bought it for a small sum in the name of his brother,

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(*a*) Guest *v.* Smythe, L. R. 5 Ch. 551; approved in Farrar *v.* Farrars, Ltd., 40 C. D. 395, at p. 415; Hickley *v.* H., 2 C. D. 190; and see also Grover *v.* Hugell, 3 Russ. 428.

(*b*) Macleod *v.* Jones, 24 C. D. 289 (C.A.).

(*c*) *Re* Unsworth's Trusts, 2 Dr. & Sm. 337; Douglas *v.* Culverwell, 4 De G. F. & J. 20; Carter *v.* Palmer, 8 Cl. & Fin. 657.

(*d*) Macleod *v.* Jones, 32 W. R. 660, per *Pearson*, J., on application after payment into Court under order of the Court of Appeal, 24 C. D. 289.

(*e*) Macleod *v.* Jones, 24 C. D. 289 (C. A.).

(*f*) 33 C. D. 500.

but in fact for himself, and he concealed this fact from the trustee. It was held by *Kay*, J., after a full examination of all the cases, that the solicitor could not be allowed to hold, as against the trustee in bankruptcy, an advantage obtained by him in the purchase by means of knowledge gained whilst acting as solicitor of the bankrupt (*a*).

Receivers.—On the same principle receivers or managers who have by virtue of their position acquired special knowledge of the value of property will not be allowed to purchase the property without the sanction of the Court (*b*).

Counsel.—The employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate (*c*).

Arbitrator.—A person chosen as arbitrator cannot buy up the unascertained claims of any of the parties to the reference; for, to use the words of Lord *Manners*, "that he should purchase an interest in those rights upon which he was to adjudicate, could not be endured. It would indeed be to corrupt the fountain and contaminate the award" (*d*).

Judge.—Upon the same principle, a judgment delivered by a judge, who has an interest in the subject-matter of the suit, will be set aside: *Dimes* v. *Proprietors of the Grand Junction Canal* (*e*), where it was held that a judgment of *Cottenham*, C., assisted by *Langdale*, M. R. (*f*), in which, affirming the decision of the Court below, he had decided in favour of a company *in which he was a shareholder to the amount of several thousand pounds*, ought to be reversed. "No one," said *Campbell*, C., "can suppose that Lord *Cottenham* could be in the remotest degree influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. . . . This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to

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(*a*) See Lewis *v.* Hillman, 3 H. L. Cas. 607; McPherson *v.* Watt, 3 A. C. 254.

(*b*) Alven *v.* Bond, Fl. & K. 196, 213, followed in Nugent *v.* N., (1908) 1 Ch. 546 (C. A.).

(*c*) See Carter *v.* Palmer, 8 Cl. & Fin. 657; and Brown *v.* Kennedy, 4 De G. J. & S. 217; Pisani *v.* A.-G., L. R. 5 P. C. 516; McPherson *v.* Watt, 3 A. C. 254.

(*d*) Blennerhassett *v.* Day, 2 Ball & B. 116.

(*e*) 3 H. L. Cas. 759.

(*f*) 2 Mac. & G. 285.

avoid the appearance of labouring under such an influence" (*a*). And the rule does not stop at pecuniary interest, but applies wherever a person acting as a judge has any *real bias* in the matter before him (*b*).

Bishop.—In *Greenlaw* v. *King* (*c*) an Act of Parliament empowered a rector, with the consent of the bishop, who was patron of the living, to raise money by annuity for building a new rectory-house, the plan and accounts of which were to be approved of by the bishop. The bishop advanced the necessary money, and obtained a grant of the annuity charged on the living. The bishop being placed in the position of a trustee to protect the interests of the rectory, *Langdale*, M. R., held that he could not become the purchaser of the annuity; and that the transaction, *although there was no unfairness in it*, could not stand, because it was a clear violation of those rules which have been established for the defence of those whose interests and property have been committed to the protection of persons placed in a fiduciary situation.

Tenant for Life.—It may, however, be laid down as a general rule that a *tenant for life* may purchase or take in exchange lands from trustees, in whom they are vested with a power of sale and exchange, *with his consent and direction* (*d*), but this case has been put entirely upon the practice of conveyancers (*e*). But in another case *James*, L. J., says, that "the ground of the rule is, that the power of consenting to or requesting an exercise of a power of sale is given to the tenant for life for his own benefit, *and that he is not in a fiduciary position as to it.* He has, therefore, the same right to buy from the trustees that any one else has" (*f*); but each case must "depend upon the circumstances under which and the purposes for which the power was given" (*g*). In the absence of any indication of intention by the settlor or testator (*h*) it is not considered that there is an "impropriety or conflict of interest, as regards the time for sale or the necessity for a sale, between the position of tenant for life and the

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(*a*) See Commissioners, &c., for Fobbing *v.* The Queen, 11 A. C. 449.

(*b*) Reg. *v.* Farrant, 20 Q. B. D. 58; Reg. *v.* Cumberland, 58 L. T. 491.

(*c*) 3 B. 49; Grover *v.* Hugell, 3 Russ. 428, cited by *Romilly*, M. R., in Guest *v.* Smythe, L. R. 5 Ch., p. 554 (n.). But see Boyd *v.* Barker, 4 Drew. 582.

(*d*) Howard *v.* Ducane, T. & R. 81.

(*e*) Grover *v.* Hugell, 3 Russ. 432; and see Forster *v.* Abraham, 17 Eq., p. 354.

(*f*) Dicconson *v.* Talbot, L. R. 6 Ch. 32, 37; see *Re* Laing's Settlement, (1899) 1 Ch. 593, as to loans.

(*g*) Per *Turner*, V.-C., in Beaden *v.* King, 9 Ha. 519.

(*h*) *Re* Tempest, L. R. 1 Ch. 485.

position of other parties claiming under a settlement or will." Hence, when a tenant for life under a will was appointed one of the trustees, and as surviving trustee sold the property, it was held by *Jessel*, M. R., that he could make a good title to the property which the Court would enforce upon a purchaser (*a*). A tenant for life, with power to lease, might *at law* grant a lease to a trustee for himself (*b*). Whether by an anomalous exception such a lease is valid *in equity* is very doubtful (*c*). The only distinct authority for the proposition that it is valid is the statement of *Page-Wood*, V.-C., in *Bevan* v. *Habgood* (*d*). In that case, under a mortgage, power was reserved to the mortgagor until entry by the mortgagee to grant building leases, and the Vice-Chancellor held that a lease to a trustee for the mortgagor was good. The authorities alleged to support the exception (*e*) were examined by *Farwell*, J., in *Boyce* v. *Edbrooke* (*f*), and were shown not to establish its existence.

By sect. 53 of the Settled Land Act, 1882, a tenant for life is, in relation to the exercise of his statutory powers, to be deemed to be in the position of a trustee for all parties entitled under the settlement. In *Sutherland* v. *S.* (*g*) a lease granted by the tenant for life with the intention of benefiting his wife at the expense of the remaindermen was held invalid. In *Gilbey* v. *Rush* (*h*), however, a lease to the wife of the tenant for life at a full rack rent on proper conditions was held valid.

Tenants in Common.—No fiduciary relation arises simply from the fact of joint tenancy or tenancy in common of real estate (*i*).

(*a*) Per *Jessel*, M. R., Forster *v.* Abraham, 17 Eq. 351, at p. 355.

(*b*) Taylor *v.* Horde, 1 Burr. 124; Wilson *v.* Sewell, 4 Burr. 1975; Lord Cardigan *v.* Montague, 2 Sugd. Pow., 7th ed., App., p. 551.

(*c*) See Boyce *v.* Edbrooke, (1903) 1 Ch. 836.

(*d*) 1 John. & H. 222. See this case discussed and questioned in Boyce *v.* Edbrooke, (1903) 1 Ch. 836.

(*e*) Wilson *v.* Sewell, 4 Burr. 1975; Cardigan *v.* Montague, Sugd. Pow. 8th ed. App. 918; Taylor *v.* Horde, supra.

(*f*) (1903) 1 Ch. 836. In this case the lease was made by a tenant for life (under statutory powers) to himself and others with whom he was in partnership. Since there was no legal covenant binding on the lessor, the requirements of the statutes, Settled Estates Act, 1877, s. 46, and S. L. A., 1882, s. 7, ss. 2, 3, were not satisfied; and see Ellis *v.* Kerr, (1910) 1 Ch. 529.

(*g*) (1893) 3 Ch. 169; Chandler *v.* Bradley, (1897) 1 Ch. 315.

(*h*) (1906) 1 Ch. 11; cf. Middlemas *v.* Stevens, (1901) 1 Ch. 574, where a lease made by a tenant for life during widowhood to a man whom she was about to marry was held invalid.

(*i*) Kennedy *v.* De Trafford, (1897) A. C. 180; *Re* Biss, (1903) 2 Ch. 40; and see p. 714, supra.

Execution Creditor.—A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. "The case of trustees," observed *Plumer*, M. R., "is quite different; with respect to them, the principle is, that the same person shall not be buyer and seller; but here the sheriff is the seller" (*a*). And it has been held that a mere creditor, having his debt secured by an agreement from the debtor to convey an estate upon trust for the creditor to sell, and amongst others to pay his own debt, is not in such a fiduciary position as to be disabled from purchasing the estate from the agent of his debtor (*b*). A purchase of an estate in the West Indies by a creditor under his own execution was, *upon the circumstances*, held only a security for the debt (*c*).

Guardian and Ward.—"The relation of guardian and ward is strictly that of trustee and *cestui que trust*" (*d*).

With regard to transactions between guardian and ward, "it is almost impossible (*e*) in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty" (*f*). In *Oldin* v. *Samborn* (*g*), *Hardwicke*, C., observed that it was improper for a guardian to purchase his ward's estate immediately upon his coming of age. But although it had a suspicious look, yet if he were paid the full consideration, it was not voluntary, and could not be set aside (*h*). Lord *St. Leonards*, however, says, with reference to Lord *Hardwicke's* observation in *Oldin* v. *Samborn*, that "it seems clear that such a purchase would now be set aside on general principles, without reference to the adequacy of consideration" (*i*). In *Carey* v. *C.* (*k*), leaseholds belonging to an infant were sold under a decree and purchased by his guardian in the suit, who was also receiver, at their full value, but it was set aside as fraudulent and void.

In *Grosvenor* v. *Sherratt* (*l*), a young lady, two years after she came of age, granted a mining lease as to part of the property in

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(*a*) Stratford *v.* Twynam, Jac. 421.

(*b*) Waters *v.* Groom, 11 Cl. & Fin. 684.

(*c*) Cranstoun *v.* Johnston, 3 V. 170, 3 R. R. 80.

(*d*) *Romilly*, M. R., Mathew *v.* Brise, 14 B. 345.

(*e*) See Hylton *v.* H., 2 Ves. Sen. 547; Cray *v.* Mansfield, 1 Ves. Sen. 379.

(*f*) Per *Eldon*, C., Hatch *v.* H., 9 V. 292, p. 296, 7 R. R. 197.

(*g*) 2 Atk. 15.

(*h*) See Hylton *v.* H., 2 Ves. Sen. 549; Dawson *v.* Massey, 2 Ball & B. 219; Aylward *v.* Kearney, 2 Ball & B. 463; Wright *v.* Proud, 13 V. 136; Hatch *v.* H., 9 V. 292, 7 R. R. 195.

(*i*) Sugd. V. & P. 692, 14th ed.

(*k*) 2 Sch. & L. 173.

(*l*) 28 B. 659; see Mulhallen *v.*

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possession, and as to the rest in reversion to her brother-in-law and uncle, at the suggestion and advice of her father's executor, and with no independent advice. Three months afterwards the executor was taken into partnership with the lessees. It appeared that applications of other persons to become lessees had been discountenanced, and concealed from the knowledge of the lady. *Romilly*, M. R., held, that, in order to support the lease in equity, the lessees were bound to show that no better terms could have been obtained; that the grantor had the fullest information on the subject; that she had separate, independent, and disinterested advice; and that she had deliberately and intentionally made the grant; and, the lessees having failed in proving this, the lease was cancelled.

If a guardian buys up incumbrances upon his ward's estate at an undervalue, he will be held a trustee for his ward, and can only charge him with what he has actually paid (*a*). If the guardian wishes to purchase property belonging to the infant which must be sold, he should apply to the Court to be allowed to bid (*b*).

Enclosure Acts, Statutory Recognition of the Principle.—The principle of these cases has been acted upon by the Legislature, which, under the General Enclosure Act (*c*), has rendered commissioners incapable of purchasing *any* estate in the parish in which an enclosure is made until five years after the date and execution of the award. And under the Commons Enclosure Act (*d*), a similar prohibition prevents valuers from purchasing land until after seven years from the confirmation of the award. And where trustees for sale in proceedings under sections 8 and 9 of the Lands Clauses Act, 1845, appoint one of themselves as surveyor for the purposes of valuation, the sale will be invalid, inasmuch as the valuers are placed in that position for the purpose of being a check on the trustees, and it would be contrary to any principle of right that one trustee should exercise the power by himself (*e*).

Position of Confidence.—Although there be no particular relation between the parties such as that of trustee and *cestui que trust*, principal and agent, solicitor and client, if there exist a *confidence* between them, of such a character as enables the person in whom confidence or trust is reposed to exert influence over the person

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Marum, 3 Dru. & W. 317; Archer *v.* Hudson, 7 B. 560; Low *v.* Holmes, 8 Ir. Ch. R. 53.

(*a*) Henley *v.* ——, 2 Ch. Ca. 245.

(*b*) See Simpson, Infants (1909), p. 293.

(*c*) 41 Geo. 3, c. 109, s. 2.

(*d*) 8 & 9 Vict. c. 118, s. 219.

(*e*) Peters *v.* Lewes and East Grinstead Railway Co., 18 C. D. 429.

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trusting him, the Court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him : *Tate* v. *Williamson* (*a*), in which case Tate, a young man aged twenty-three, entitled to a moiety of a freehold estate, the entirety of which brought in about 440*l.* a year, being pressed for payment of his college debts, amounting to about 1,000*l.*, and being estranged from his father, wrote to his great-uncle for advice and assistance as to the payment of the debts. The uncle deputed the defendant, his nephew, to see Tate on the subject. The defendant met Tate, by appointment, and at this interview Tate refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the defendant offered him 7,000*l.* for it, payable by instalments. Tate, next day, accepted the offer. Before an agreement had been signed, the defendant obtained a valuation by a surveyor, estimating the value of the mines under the entirety at 20,000*l.* The sale was completed without this valuation having ever been communicated to Tate. Tate's heir filed a bill to impeach the sale, and it was held that the defendant had stood in a fiduciary relation to Tate, that made it his duty to communicate to him all material information which he acquired affecting the value of the property ; and that, as he had not communicated the valuation to Tate, the transaction must be set aside (*b*). This class of cases touches nearly upon the principle of those in which gifts or contracts made in favour of persons standing in certain relations to the donor are impeached upon the ground of undue influence (*c*).

There is not much authority upon the question, how far relatives of a trustee can deal with him in respect of the trust property. In *Ferraby* v. *Hobson* (*d*), a lease to a sister of one of two trustees was held good, where the facts which appeared in evidence completely removed all suspicion. *Cottenham*, C., however, in his judgment, said, " that trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove " (*e*).

(*a*) L. R. 2 Ch. 55.

(*b*) See also Hobday *v.* Peters, 28 B. 349 ; Plowright *v.* Lambert, 52 L. T. 652 ; Seton (1906), p. 2321.

(*c*) See notes to Huguenin *v.* Baseley, Vol. I.

(*d*) 2 Ph. 255, 261.

(*e*) See Coles *v.* Trecothick, 9 V. 234 ; *Ex p.* Skinner, 2 Mer. 453, 457.

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4. Nature of Relief granted by Courts of Equity.

Where a person in a fiduciary position has made a purchase which is improper, according to the rules before laid down, any of the *cestuis que trust* (under which term are comprehended the persons entitled to the property before the sale, or their representatives), if they wish it, can insist upon a reconveyance of the property from the trustee who purchased, if it remains in his hands unsold (*a*); or from a person who has purchased from him, with notice (*b*).

But the reconveyance will only be decreed upon the terms of their repaying the purchase-money, with interest at 4*l.* per cent., and all sums which may have been expended in repairs and improvements of a permanent and lasting nature, and also such as have a tendency to bring the estate to a better sale. On the other hand, there must be an allowance for acts that deteriorate the value of the estate, and the trustee must account for all rents received by him, and for all profits, such as money arising from the sale of timber; and he must also pay an occupation rent for such part of the estate as may have been in his actual possession (*c*), but not for interest on rents and profits (*d*). In estimating improvements, old buildings, if incapable of repair, should be valued as old materials, but otherwise as buildings standing (*e*).

Although the purchaser has paid the purchase-money into Court, and it has been invested in the funds, he will not be entitled to any benefit from any advance in the funds, but to his purchase-money and interest only; for, if the stock had fallen, instead of advancing, he could not have been compelled to take it (*f*).

It seems that where a reconveyance by the purchaser is directed, it must, unless a lien be given to him for the balance on taking the accounts, be made at once before the accounts are taken (*g*), and a

(*a*) Hardwicke *v.* Vernon, 4 V. 411, 4 R. R. 244; Randall *v.* Errington, 10 V. 423; Hamilton *v.* Wright, 9 Cl. & Fin. 123; Aberdeen T. C. *v.* Aberdeen University, 2 A. C. 544.

(*b*) A.-G. *v.* Dudley, Coop. 146; Dunbar *v.* Tredennick, 2 Ball & B. 304; Pearson *v.* Benson, 28 B. 598.

(*c*) Hall *v.* Hallet, 1 Cox, 134, 1 R. R. 3, commented upon in Nant-y-glo & Blaina, &c., Co. *v.* Grave, 12 C. D., pp. 747—748; *Ex p.* Hughes, 6 V. 624, 625, 6 R. R. p. 8; Campbell *v.* Walker, 5 V. 682, 5 R. R., p. 137; *Ex p.* Bennett, 10 V. 400, 401; Robinson *v.* Ridley, 6 Madd. 2; *Ex p.* James, 8 V. 351, 7 R. R. 56; *Ex p.* Lacey, 6 V. 630, 6 R. R. 9; Mill *v.* Hill, 3 H. L. Cas. 869; Popham *v.* Exham, 10 Ir. Ch. R. 440; Seton (1901), pp. 2320, 2321.

(*d*) Silkstone, &c. Coal Company *v.* Edey, (1900) 1 Ch. 167.

(*e*) Robinson *v.* Ridley, 6 Madd. 2.

(*f*) *Ex p.* James, 8 V. 351, 7 R. R. 56.

(*g*) Trevelyan *v.* Charter, 9 B. 140.

solicitor, a sale to whom from his clients was set aside, has been compelled to produce the title-deeds before payment (*a*). In *York Buildings Co.* v. *Mackenzie* (*b*), the reconveyance was ordered, without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant *bonâ fide*, and before the commencement of the suit—words which would, it seems, be sufficient to exclude lessees and others who had taken *with notice* of the equity which the plaintiffs had against the defendant, although, as they were not parties to the suit, it would have been necessary to have taken proceedings against them, alleging and proving notice, in order to set aside the leases granted to them by the defendant (*c*).

If the *cestui que trust* does not wish for a reconveyance of the property, an order will be made, that the expense of repairs and improvements not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, after making an allowance for acts that deteriorate the value of the estate, shall be added to the purchase-money, and that the estate shall be put up at the accumulated sum; if any one makes an advance upon that sum, the trustee shall not have the estate; if no one does, he will be held to his purchase (*d*), but where the trustee has bought the estate in one lot, and the *cestuis que trust* are desirous of having it sold in several lots, the *cestuis que trust* must first repay him all the money he has advanced, with interest, he accounting for the rents received by him, or paying an occupation rent, if he actually occupied the estate (*e*).

Where the trustee has *resold* the estate, the *cestui que trust* can, as in the principal case, make him account for what he has received over and above the purchase-money he himself paid, with interest at 4*l.* per cent. (*f*); and no allowance will be made to him for any loss he has incurred in the investment of what he received (*g*).

With regard to the remedy which a principal has against an

(*a*) Shallcross *v.* Weaver, 12 B. 272.

(*b*) 8 Bro. P. C. 42.

(*c*) See 3 Sugd. V. & P. 243, 10th ed.

(*d*) *Ex p.* Reynolds, 5 V. 707, 5 R. R. 143; *Ex p.* Hughes, 6 R. R. 8; *Ex p.* Lacey, 6 V. 627; Lister *v.* L., 6 V. 617, 7 R. R. 56; *Ex p.* Bennett, 10 V. 281; *Ex p.* Hewitt, 2 Mont. & Ayr. 477; Robinson *v.* Ridley, 6 Madd. 2; Stepney *v.* Biddulph, 13 W. R. 576; Tennant *v.* Trenchard, L. R. 4 Ch. 546.

(*e*) *Ex p.* James, 8 V. 351, 7 R. R. 56.

(*f*) *Ex p.* Reynolds, 5 V. 707, 5 R. R 143; Hall *v.* Hallet, 1 Cox, 134, 1 R. R. 3, commented upon in Nant-y-glo & Blaina, &c., Co. *v.* Grave, 12 C. D., p. 747.

(*g*) Armstrong *v.* A., 7 L. R. Ir. 207.

agent employed to purchase property for him where the agent sells to his principal property of his own, acquired *before the agency existed*, concealing the fact that it is his own, it is clear that the principal may rescind the contract (*a*). And there is no general rule that, where rescission has become impossible, the principal is not entitled to call on the agent to account for the profit which he has made by the sale (*b*). If the agent stood in a fiduciary relation when he bought, the *cestui que trust* may rescind, or take the benefit of the bargain (*c*).

The costs of the action, if in the Chancery Division, are in the discretion of the Court (*d*). The general rule acted upon is that if the action succeeds the trustee pays the cost of it (*e*); but this rule yields to special circumstances (*f*), and where there has been great delay on the part of the plaintiff, although he succeed he may be mulcted in costs (*g*) ; and if he fail the trustee may, nevertheless, be refused costs (*h*).

5. Acquiescence and Confirmation.

Acquiescence (see also p. 686, ante).—A *cestui que trust* who wishes to set aside a purchase by a trustee must apply within a *reasonable* period (*i*). But there is no special limit of time as to laches: it depends upon the circumstances of each particular case (*k*), and is a circumstance which, with other circumstances, is to be taken into

(*a*) *Re* Cape Breton Co., 26 C. D. 221; McPherson *v.* Watt, 3 A. C. 272; Rothschild *v.* Brookman, 5 Bli. (N. S.) 165, explained by *Cotton*, L. J., in Ladywell Mining Co. *v.* Brookes, 35 C. D., p. 408, and commented on by *Bramwell*, L. J., in Waddell *v.* Blockey, 4 Q. B. D., p. 680; see also Burland *v.* Earle, (1902) A. C. 83.

(*b*) *Re* Olympia, Ltd., (1898) 2 Ch. 153, (1900) A. C. 240 (sub nom. Gluckstein *v.* Barnes) explaining *Re* Cape Breton Co., supra, which was followed in Ladywell Mining Co. *v.* Brookes, 35 C. D. 400 (C. A.); cf. *Re* Lady Forrest, &c., Ltd., (1901) 1 Ch. 582.

(c) Lydney, &c., Co. *v.* Bird, 33 C. D. 85 (C. A.); Cavendish Bentinck *v.* Fenn, 12 A. C. 652; Buckley (1909), 192.

(*d*) R. S. C., O. LXV., r. 1.

(*e*) Whichcote *v.* Lawrence, 3 V. 740; Sanderson *v.* Walker, 13 V. 601; Crowe *v.* Ballard, 1 R. R. 122; Dyson *v.* Lum, 14 W. R. 788.

(*f*) Baker *v.* Carter, 1 Y. & C. Ex. 250; Downes *v.* Grazebrook, 3 Mer. 209; Clanricarde *v.* Henning, 30 B. 175.

(*g*) A.-G. *v.* Dudley, Coop. 146.

(*h*) Gregory *v.* G., Coop. 201; Champion *v.* Rigby, 1 Russ. & M. 539; Clanricarde *v.* Henning, supra, a case of solicitor and client.

(*i*) Campbell *v.* Walker, 5 V. 680, 682, 5 R. R. 135; Morse *v.* Royal, 12 V. 374.

(*k*) Gresley *v.* Mousley, 4 De G. & J., p. 95; see the cases cited, pp. 688 t seq.

account (*a*). In *Baker* v. *Peck* (*b*), a sale was set aside after forty-three years had elapsed (*c*).

Yet mere lapse of time for a long period, which will of itself be evidence of acquiescence or waiver, in an improper transaction, may disable a person from coming to set a transaction aside (*d*). For long acquiescence under a sale to a trustee ought to be taken as evidence, that as between the trustee and *cestui que trust* the relation had been abandoned in the transaction; and that in all other respects it was fair (*e*).

Where there are other circumstances showing acquiescence beyond the mere lapse of time, a delay for a shorter period will be a bar to relief (*f*).

But "to fix acquiescence upon a party, it should unequivocally appear that he *knew* the fact upon which the supposed acquiescence is founded, and to which it refers" (*g*). And in *Re Postlethwaite* (*h*), where there was no knowledge and therefore no acquiescence, it seems clear that if the facts alleged had been proved the sale would have been set aside, although more than thirty years had elapsed (*i*). But there may be cases in which, from the great lapse of time, the knowledge of such facts ought to be presumed (*k*). And the presumption of law that a particular transaction was done legally and honestly does acquire weight by lapse of time (*l*).

(*a*) Gregory *v.* G., Coop. 201.

(*b*) 9 W. R. 186.

(*c*) And see Murphy *v.* O'Shea, 2 Jo. & Lat. 422; Watson *v.* Toone, 6 Madd. 153.

(*d*) Morse *v.* Royal, 12 V. 355; Price *v.* Byrn, cited with approbation by *Alvanley*, M. R., in Campbell *v.* Walker, 5 V. 681, 5 R. R. 138; Smith *v.* Clay, 3 Bro. Ch. 639; referred to by *Turner*, L. J., in Gresley *v.* Mousley, 4 De G. & J., p. 95; Champion *v.* Rigby, 1 Russ. & M. 539; Roberts *v.* Tunstall, 4 Ha. 257; Beaden *v.* King, 9 Ha. 499, 532; Baker *v.* Read, 18 B. 398; Clanricarde *v.* Henning, 30 B. 175; Wentworth *v.* Lloyd, 10 Jur. (N. S.) 961; King *v.* Anderson, 8 Ir. R. Eq. 625; *Re* M'Kenna, 13 Ir. Ch. R. 239.

(*e*) Per *Eldon*, C., in Parkes *v.* White, 11 V. 226; and see Life Association of Scotland *v.* Siddal, 3 De G. F. & J., p. 72.

(*f*) Wright *v.* Vanderplank, 2 K. & J. 1; Baker *v.* Bradley, 7 De G. M. & G. 597.

(*g*) Per *Grant*, M. R., in Randall *v.* Errington, 10 V. 428; and see judgment of *Turner*, L. J., in Life Association of Scotland *v.* Siddal, 3 De G. F. & J., p. 74; and Chalmer *v.* Bradley, 1 J. & W. 51; Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Savery *v.* King, 5 H. L. Cas. 624, 667; De Bussche *v.* Alt, 8 C. D. 286; Smethurst *v.* Hastings, 30 C. D., p. 497.

(*h*) 37 W. R. 200.

(*i*) See judgment of *Lindley*, L. J., ib., at p. 202.

(*k*) Life Association of Scotland *v.* Siddal, supra; and see and consider Knight *v.* Marjoribanks, 2 Mac. & G. 10.

(*l*) *Re* Postlethwaite, supra.

The distress of the *cestui que trust* may be an excuse for laches (*a*), and the poverty of the vendor, *added to other circumstances*, is a material ingredient in such cases (*b*), and see as to the operation of lapse of time in cases of this description, the judgment of *Turner*, L. J., in *Gresley* v. *Mousley* (*c*) ; see also the circumstances which were held to be a sufficient answer to laches and acquiescence in *Beningfield* v. *Baxter* (*d*); but it has been held that the imputation of laches does not in an equal degree apply to *a body of creditors*, to whom relief will be granted when it would be refused to an individual (*e*). But even creditors have been refused relief when their laches have been gross ; as, for instance, where they acquiesced in a sale for thirty-three years (*f*).

And in considering lapse of time it only commences to run from the discovery of the circumstances giving the title to relief (*g*); and against a person under disability from the time he becomes *sui juris* (*h*). Nor will time in general run against a person so long as his interest is contingent or reversionary (*i*), or dependent on the will of the trustee making the purchase (*k*); but the fact of his interest being reversionary does not prevent a person interested assenting to a breach of trust (*l*).

And where fraud has been established against a party, it is for him, if he alleges laches in the other party, to show when the latter acquired a knowledge of the truth, and prove that he *knowingly* forbore to assert his right (*m*).

Although acquiescence in an improper sale may have the effect of

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(*a*) Gregory *v.* G., Coop. 201.

(*b*) Roberts *v.* Tunstall, 4 Ha., p. 267; Roche *v.* O'Brien, 1 Ball. & B. 330.

(*c*) 4 De G. & J., p. 95; Life Association of Scotland *v.* Siddal, 3 De G. F. & J. 58.

(*d*) 12 A. C. 167, at pp. 173 and 181.

(*e*) See case in the Exchequer, cited 6 V. 632 ; Whichcote *v.* Lawrence, 3 V. 740; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C. 42.

(*f*) Hercy *v.* Dinwoody, 2 V. 87.

(*g*) Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Clanricarde *v.* Henning, 30 B. 175; Vane *v.* V., L. R. 8 Ch. 383.

(*h*) Campbell *v.* Walker, 5 V. 678, 682, 5 R. R. 135 ; Randall *v.* Errington, 10 V. 427 ; Morse *v.* Royal, 12 V. 373.

(*i*) Gowland *v.* De Faria, 17 V. 20 ; Bennett *v.* Colley, 5 Si. 191 ; Leeds *v.* Amherst, 2 Ph. 117 ; Browne *v.* Cross, 14 B. 105 ; Hope *v.* Liddell, 21 B. 183 ; Life Association of Scotland *v.* Siddal, 3 De G. F. & J. 58 ; Bowen *v.* Evans, 1 Jo. & Lat. 178.

(*k*) Roberts *v.* Tunstall, 4 Ha. 257.

(*l*) Life Association of Scotland *v.* Siddal, 3 De G. F. & J. 58.

(*m*) The Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221.

preventing a party injured setting the sale aside, it nevertheless will not be sufficient to induce a Court of Equity to exercise its discretionary power of compelling specific performance of the agreement to sell (*a*).

Confirmation.—A *cestui que trust*, if *sui juris* (*b*), may confirm an invalid sale, so that he cannot afterwards set it aside (*c*). And a *feme covert* as to property to which she is entitled to her separate use, or as her separate property under the Married Women's Property Act, 1882, ss. 2 and 5, if without any fetter upon anticipation, has the same power as a *feme sole* (*d*); and as to real property not so settled, or not her separate estate under the statute, she can by deed executed and acknowledged under the Fines and Recoveries Act (*e*) confirm such sale.

It is not clear whether a restraint on anticipation does or does not exempt a married woman from the ordinary consequences of lapse of time and acquiescence (*f*). Since, however, she cannot release her rights to future income, she cannot apparently by an express confirmation of a breach of trust affect her rights thereto (*g*).

In order to constitute a valid confirmation, there must be a solemn and deliberate act (*h*), done with full knowledge of all material facts, and the confirming party must be aware that the act he is doing will have the effect of confirming an impeachable transaction (*i*).

(*a*) Salmon *v.* Cutts, 4 De G. & Sm. 125.

(*b*) Campbell *v.* Walker, 5 V. 678, 682.

(*c*) Morse *v.* Royal, 12 V. 355; Roche *v.* O'Brien, 1 Ball & B. 353; Dover *v.* Buck, 5 Gif. 57.

(*d*) See notes to Hulme *v.* Tenant, Vol. I., and supra, pp. 632 et seq.

(*e*) 3 & 4 Will. 4, c. 74.

(*f*) Per *Turner*, L. J., in Derbishire *v.* Hume, 3 De G. M. & G. 80, at p. 113; and see Davies *v.* Hodgson, 25 B. 186; Vol. I., ante, at pp. 467, 764, and supra, p. 683; but see Clive *v.* Carew, 1 J. & H. 205; Heath *v.* Wickham, 3 L. R. Ir. 376, 390.

(*g*) See Sprange *v.* Lee, (1908) 1 Ch. 424; and cf. Wilton *v.* Hill, 25 L. J. Ch. 156.

(*h*) Morse *v.* Royal, 12 V. 373.

(*i*) Chesterfield *v.* Janssen, 2 Ves. Sen. 146; Murray *v.* Palmer, 2 Sch. & L. 486; Dunbar *v.* Tredennick, 2 Ball & B. 317; Malony *v.* L'Estrange, 1 Beat. 413; Adams *v.* Clifton, 1 Russ. 297; Cockerell *v.* Cholmeley, 1 Russ. & M. 425; Chalmer *v.* Bradley, 1 J. & W. 51; De Montmorency *v.* Devereux, 7 Cl. & Fin. 188; Salmon *v.* Cutts, 4 De G. & Sm. 129; Stump *v.* Gaby, 2 De G. M. & G. 623; Waters *v.* Thorn, 22 B. 547; Lloyd *v.* Attwood, 3 De G. & J. 650; and see Lyddon *v.* Moss, 4 De G. & J. 104; Kempson *v.* Ashbee, L. R. 10 Ch., p. 20; Re Haslam & Hier-Evans, (1902) 1 Ch. 765; Law *v.* L., (1905) 1 Ch. 140; Barron *v.* Willis, (1900) 2 Ch. 121.

Fox v. Mackreth—Pitt v. Mackreth.

Nor will the act of confirmation be valid, if it be done in distress and difficulties, under the force, pressure, and influence of the former transaction (*a*): and it must be an act separate and distinct from the impeachable transaction, and not, as in the principal case, a conveyance executed in consequence of a contract or covenant connected with it (*b*).

A confirmation of an invalid sale by the majority of the creditors of a bankrupt will not be binding upon the minority: in order to be binding all must join therein (*c*).

(*a*) Crowe *v.* Ballard, 3 Bro. Ch. 139; Wood *v.* Downes, 18 V. 120; Roche *v.* O'Brien, 1 Ball & B. 330; Roberts *v.* Tunstall, 4 Ha. 257; and cf. Beningfield *v.* Baxter, 12 A. C. pp. 173, 181.

(*b*) Morse *v.* Royal, 12 V. 370; Wood *v.* Downes, 18 V. 124, 128; Roche *v.* O'Brien, 1 Ball & B. 338.

(*c*) See *Ex p.* Lacey, 6 V. 628, 6 R. R. 9; Colebrooke's case, cited *Ex p.* Hughes, 6 V. 622, 6 R. R., p. 6; overruling Whelpdale *v.* Cookson, cited in Campbell *v.* Walker, 5 V. 682, 5 R. R., p. 140; *Ex p.* Thwaites, 1 M. & A. 323; Tommey *v.* White, 3 H. L. Cas. 49.

GLENORCHY *v.* BOSVILLE.

1733. Cas. t. Talbot, 3.

Executed and Executory Trusts.

A. devises real estate to his sister B. and C., and their heirs and assigns, upon trust, until his granddaughter D. should marry or die, to receive the profits, and thereout to pay her 100*l.* a year for her maintenance; the residue to pay debts and legacies; and after payment thereof, in trust for the said D.; and upon further trust, that, if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or, if under that age, such marriage be with the consent of the said B., then *to convey the said estate*, with all convenient speed after such marriage, to the use of the said D. for life, *without impeachment of waste, voluntary waste in houses excepted;* remainder to her husband for life; remainder to the issue of her body; with remainders over:—Held, that though D. would have taken an estate tail had it been the case of an immediate devise, yet that the trust, being executory, was to be executed in a more careful and more accurate manner; and that a conveyance to D. for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

Sir Thomas Pershall devises all his real estate to his sister, Anne Pershall, and Robert Bosville, and their heirs and assigns, upon trust till his granddaughter, Arabella Pershall, marry or die, to receive the rents and profits thereof, and out of it to pay her 100*l.* a year for her maintenance; and, as to the residue, to pay his debts and legacies; and, after the payment thereof, then in trust for his said granddaughter; and, upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or if under the age of twenty-one, and such marriage be with the consent of her aunt the said Anne Pershall, *then to convey the said estate* with all convenient speed after such marriage, *to the use of the said Arabella for her life, without impeachment of waste, voluntary waste in houses excepted;* remainder, after her death, to her husband for life; *remainder to the issue of her body;* with several remainders over; and, upon further trust, that if the said Arabella Pershall die unmarried, then to the use of the said Anne Pershall for life; remainder to the son of his other granddaughter, Frances Ireland, in tail; remainder to Mr. Bosville, the defendant, for life; remainder to his first and other sons; remainder to the testator's right heirs; and, upon further trust, if his granddaughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said Arabella for life; remainder to trustees to preserve contingent remainders; remainder to her first and every other son, being a Protestant; with several remainders over; and as to the other moiety, to his daughter Ireland's son, in like manner.

Sir Thomas Pershall died in the year 1722, and Mrs. Arabella Pershall in 1723 attained her full age; and upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life; remainder to her intended husband for life; remainder to the issue of her body; and such conveyance was executed by one of the trustees. But Mr. Bosville, the other trustee, who was also a remainderman, refused to convey. However, she having by this conveyance a legal estate tail in one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730 married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her; and as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life; remainder to the first and every other son of the marriage, in tail male; and, upon failure of such issue, to the survivor of the said husband and wife, in fee.

The bill was, to have a conveyance of the moiety of the said trust estate from Mr. Bosville to such uses as are limited in the said covenant; and the principal question was, whether, under the said will, the Lady Glenorchy was tenant for life or in tail? upon which two other questions arose, viz., first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail? secondly, if so, whether the Court will make any difference between a legal title and a trust estate executory?

The case was first argued before *King*, C., who said that upon the first question he should make no difficulty of determining it an estate tail, had this been an immediate devise; but that when you apply to this Court for the carrying a trust estate into execution, the doubt is, whether it should not vary from the rules of law to follow the testator's intent; which would also bring on another question,—What is the testator's intent in the present case?

The case came on for final argument and decision before *Talbot*, C., who had taken time to advise and to have the opinion of the Judges upon it.

Argument for the Plaintiffs.—The Lady Glenorchy's marrying a Protestant of the Church of England at or after the age of twenty-one, or, if under that age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent; which, when performed, would give her an estate tail. This intent appeared from the different penning of the several clauses in this will; for it provides, in case she should not marry such a person as is before described, that she should have but a moiety for life, and trustees are appointed to preserve contingent remainders; none of which are enjoined in case she should marry a Protestant of the Church of England; which shows a difference was intended in case of performance and non-performance of the condition. Then considering it as a legal devise, no doubt but that a devise to one and the issue of his body will make an estate tail; and so it was held in the case of *King* v. *Melling* (*a*), notwithstanding the proviso there, empowering the devisee to make a jointure; so if in this case the land itself had been devised to the Lady Glenorchy, it would have made an entail at law; and there is no difference between an entail of a legal estate and of an equitable one (*b*).

(*a*) 1 Vent. 214, 225.

(*b*) Wild's Case, 6 Co. 16; King *v.* Melling, *ubi sup.*; Shelley's Case, 1 Co. 88 b; Archer's Case, 1 Co. 66; Backhouse *v.* Wells, 1 Eq. Ca. Abr. 184; Langley *v.* Baldwin, 1 Eq. Ca. Abr. 185; Pelham-Clinton *v.* Newcastle (Duke), 69 L. J. Ch. 875; *Re* Keane, (1903) 1 Ir. R. 215.

The exception of waste is next to be considered; and had it not been for that, this would clearly have passed an entail; but this exception varies not the case, for here the estates must disjoin according to *Lewis Bowles' Case* (*a*), to let in the husband's estate, which must intervene between her estate and that of her issue; and the power of committing waste (*voluntary waste in houses excepted*) was given only to make her dispunishable of waste during the time she should be tenant for life only; which she must be until her husband's death, by reason of the remainder to him, but not at all to restrain the estate, which the words of the will give her, which is plainly an estate tail. The adding the words, "*without impeachment of waste*," can alter nothing; for if she was tenant in tail, she had already in her that power which these words would give her; and the expressing the power which was already in her could no more abridge her estate (according to the maxim of *Expressio eorum quæ tacitè insunt nil operatur*) than the power of making the jointure did in *King* and *Melling's Case.* In *Langley* v. *Baldwin* there were the same words as here; and in that of *Shaw* and *Weigh*, or *Sparrow* v. *Shaw* (*b*), which went up to the House of Lords, the prohibition went not only to voluntary but to all manner of waste, and yet there it was decreed to be an estate tail; which was a much stronger implication to make the sister to be but tenant for life than any in the present case. And in *Baile* v. *Coleman* (*c*), an estate tail was decreed by the Lord *Harcourt*, notwithstanding the power of leasing given to Christopher Baile. Nor can the other words *voluntary waste in houses excepted*, carry the implication further than the former; since this Court will often restrain a tenant for life without impeachment of waste, from committing waste, notwithstanding his power, as was declared by the Earl of *Nottingham* in *Williams* v. *Day* (*d*); *Vane* v. *Lord Barnard* (*e*). If, therefore, these words would create an estate tail at law, the construction will be the same here, since a Court of Equity ought not to go further than the Courts of law (*f*). Nor is there any argument to be drawn from this being an executory trust, since the case of *Baile* v. *Coleman*

(*a*) 11 Co. 79 b.

(*b*) 1 Eq. Ca. Abr. 184.

(*c*) 2 Vern. 670.

(*d*) 2 Ch. Ca. 32.

(*e*) 2 Vern. 738.

(*f*) Legatt *v.* Sewell, 2 Vern. 551; Baile *v.* Coleman, 2 Vern. 670; Sweetapple *v.* Bindon, 2 Vern. 536.

was such; and the case of *Leonard* v. *Earl of Sussex* (*a*) is widely different from ours, for there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

Argument for the Defendant.—It was argued for the defendant by Mr. *Attorney-General*, Mr. *Verney*, and Mr. *Fazakerley*, that the Lady Glenorchy could take but an estate for life; and they took a difference between the present case, being of an executory trust, and those of *Cosens*, and of *Cook* v. *C.*, which were legal estates and executed, citing *Sandy's Case* (*b*), *White* v. *Thornborough* (*c*), *Trevor* v. *T.* (*d*), *Papillon* v. *Voice* (*e*), and referring to those cited by the Plaintiff.

Lord Chancellor Talbot.—Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn; the testator having expressed himself variously in many, if not in all of them. It is plain, that by the first part of this will he intended her but an estate for life till marriage; then comes the clause upon which the question depends. But before I give my opinion of that, I must observe, that the trustee has not done right; for nothing was to vest till after her marrying a Protestant. The trustee therefore by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

But the great question is, what estate she shall take? And *first*, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only; so likewise of the remainder to the husband: But then come the words "*remainder to the issue of her body*," upon which the question arises. The word "*issue*" does, *ex vi termini*, comprehend all the issue; but sometimes a testator may not intend it in so large a sense, as where there are children alive, &c. That it may be a word of purchase is clear, from the case of *Backhouse* v. *Wells*, and of limitation, by that of *King* v. *Melling*; but that it may be both

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(*a*) 2 Vern. 526.
(*b*) 9 Co. 127 b.
(*c*) 2 Vern. 702.
(*d*) 1 Eq. Ca. Abr. 387.
(*e*) 2 P. W. 478.

in the same will has not nor can be proved. The word "*heirs*" is naturally a word of limitation; and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will; but should the word "*issue*" be looked upon as both, in the same will, what a confusion would it breed; for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase? If by purchase, they can take but for life, and so every issue of that issue will take for life; which will make a succession *ad infinitum*, a perpetuity of estates for life. This inconvenience was the reason of Lord *Hale's* opinion in *King* v. *Melling*, that the limitation there created an estate tail. It may be, the testator's intent is by this construction rendered a little precarious; but that is from the power of the law over men's estates, and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it will defeat the estate: No, the power shall be void. But there the power is annexed to the estate for life, which she took first; and therefore I am rather inclined to think it stronger than *King* v. *Melling*, where there was no mediate estate, as there is here to the husband; there, there was an immediate devise, here a mediate one; so the applying this power to the estate for life carries no incongruity with it. As the case of *King* v. *Melling* has never been shaken, and that of *Shaw* v. *Weigh*, or *Sparrow* v. *Shaw*, which went up to the House of Lords, was stronger, I do not think that Courts of Equity ought to go otherwise than the Courts of law; and therefore am inclinable to think it an estate tail as it would be at law.

But there is another question, viz., How far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it, I think, *in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made; but in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and a more accurate manner.* The case of

Leonard v. *The Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but *being an executory trust, the Court decreed according to the intent as it was found expressed in the will, which must now govern our construction.* And though all parties claiming under this will are volunteers, yet are they entitled to the aid of this Court to direct their trustees. I have already said what I should incline to, if this was an immediate devise; but as it is executory, and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in *King* v. *Melling*, and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, viz., to the Lady Glenorchy for life, remainder to her husband the Lord Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the case of *Earl of Stamford* v. *Sir John Hobart* (*a*), it appeared that, for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the Act of Parliament to take effect, might have been avoided; and therefore the Lord *Cowper* did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the case of *Legatt* v. *Sewell*, the words, if in a settlement, would have made an estate tail; and in that of *Baile* v. *Coleman*, the execution was to be of the same estate as he had in the trust, which in construction of law was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon* v. *Voice* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other.

And so decreed the Lady Glenorchy but an estate for life, with remainder, &c.

(*a*) 3 Bro. P. C. 33.

LEGG *v.* GOLDWIRE.

1736. Cas. t. Talbot, 20.

Rectification of Marriage Settlement.

When a marriage settlement will be rectified by marriage articles.

N.B. BY LORD CHANCELLOR TALBOT.—Where articles are entered into before marriage, and a settlement is made *after* marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail whereby he hath it in his power to bar the issue), this Court will set up the articles against the settlement; but where both articles and settlement are *previous* to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles. And although, in the case of *West* v. *Errissey*, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made in *pursuance and performance of the said marriage articles*, whereby the intent appeared to be still the same as it was at the making of the articles (*a*).

NOTES.

1. Distinction between executed and executory trusts.
2. Executory trusts under marriage articles, p. 791.
3. Executory trusts in wills and deeds of gift, p. 796.
4. Rectification of settlements, p. 815.

1. Distinction between Executed and Executory Trusts.

Fifteen years after the hearing of *Glenorchy* v. *Bosville*, Lord *Hardwicke* remarked that it established the distinction between

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(*a*) See, however, Bold *v.* Hutchinson, 5 De G. M. & G. 558; Loxley *v.* Heath, 1 De G. F. & J. 489.

trusts executed and executory (*a*). It had been taken earlier (*b*), and has ever since been recognised (*c*), for the purpose of marking two classes of trusts to which different principles of interpretation are applicable. The terms, however, in which the distinction is defined are inexact, and in the case in which Lord *Hardwicke* noted its establishment, he cast doubt upon its validity, and blurred its outline, by the remark that all trusts are essentially executory (*d*), and by giving to a trust executed an effect which, according to Lord *Talbot* and the now well-settled doctrine, could only be given to it if it had been a trust executory. Lord *Westbury* contributed to the construction of a more accurate definition. The subjects of trusts executed, he said, are property and those of trust executory particular instruments or deeds to be made (*e*). For the purpose of the distinction, however, not every trust to make a deed is a trust executory, but only a trust to make a deed whereby the creator of the trust has left it to the Court to make out from general expressions what his intention is (*f*). The authorites cited below suggest that a trust executory is one to determine within specified limits what interests shall be created and with what administrative powers they shall be accompanied. According to an often repeated expression: if the settlor has been his own conveyancer, the trust (*g*) or contract (*h*), although it be one to make a deed, is not executory.

Executed Trusts.—In the construction of executed trusts, and immediate devises, Courts of equity have from early times followed the rules of law where the settlor or testator has employed words appropriate for the creation of some particular legal interest. So far as wills were concerned, the strict rules of the common law, as to the necessity for the use of technical words of limitation in the creation of estates of inheritance, had been greatly relaxed long before the Wills Act, 1837, and estates in fee simple and in tail could be created

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(*a*) Bagshaw *v.* Spencer, 2 Atk., at p. 582.

(*b*) Stamford *v.* Hobart, 3 Bro. P. C. 31.

(*c*) See Bagshaw *v.* Spencer, 2 Atk. 582; Exel *v.* Wallace, 2 Ves. Sen. 323; Wright *v.* Pearson, 1 Eden, 119; Austen *v.* Taylor, 1 Eden, 367; Newcastle *v.* Lincoln, 3 V. 387, 12 V. 217, 4 R. R. 31; Seton (1901), p. 1723.

(*d*) 2 Atk., at p. 583.

(*e*) Sackville-West *v.* Holmesdale (Viscount), L. R. 4 H. L., at p. 565.

(*f*) Egerton *v.* Brownlow (Earl) 4 H. L. Cas., at p. 210; *Re* Ballance, 42 C. D. 62.

(*g*) Foley *v.* Burnell, 1 Bro. Ch. 285; Egerton *v.* Brownlow (Earl), 4 H. L. Cas. 210; Scarsdale *v.* Curzon, 1 John. & H. 51; Trevor *v.* T., 1 H. L. Cas 239.

(*h*) De Havilland *v.* De Saumarez, 14 W. R. 118.

without the use of the appropriate words of limitation. Equity has followed the construction of the common law Courts, as in, e.g., the construction of a devise to A and his issue.

The early action of equity in this matter is illustrated by the following decisions. Lord *Nottingham* in 1685, in the *Duke of Norfolk's Case* (*a*) laid down that the trust of a term in gross can be limited no otherwise in equity than the estate of a term in gross can be limited in law; *Harcourt*, C., in 1708, in *Bale* or *Baile* v. *Coleman* (*b*), held that in construing a will, the testator's intent must be presumed to be consistent with the rules of law, and that as at law, the words of the will before him would certainly create an entail, the devisee took an estate tail. So in the judgment of *Talbot*, C. in the principal case, it is said, "in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same." In that case if the devises had been *immediate*, Lady Glenorchy would have taken an estate tail under the devise to her for life with remainder to the issue of her body. The only break in the current of authority in support of the rule above stated was the decision of Lord *Hardwicke*, C., in *Bagshaw* v. *Spencer* (*c*), in which he denied that in wills "the words must be taken as they are and cannot be varied from" and refused to give in equity the effect to certain equitable limitations which would, under the rule in *Shelley's Case* (*d*), have been given at law to similar legal limitations. Later, in *Garth* v. *Baldwin* (*e*), he in effect explained away his decision in this matter in *Bagshaw* v. *Spencer* (supra), and stated the principle "that in limitations of a trust either of real or personal estate to be determined in this Court the construction ought to be made according to the construction of limitations of a legal estate," thus restoring the law that trusts were to be construed in the same manner as legal estates (*f*). With the exception of the decision in *Bagshaw* v. *Spencer* (supra), no doubt was ever cast upon the rule, to which full effect was given in subsequent cases (*g*). Accordingly, if an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being an executed trust, A., according to the rule of

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(*a*) 3 Ch. Cas. 28.

(*b*) 1 P. W., at p. 145; 2 Vern. 670.

(*c*) 2 Atk. 577, at p. 582.

(*d*) 1 Rep. 936.

(*e*) 2 Ves. Sen. 646, at p. 655.

(*f*) See per Lord *Thurlow*, C., Jones *v.* Morgan, 1 Bro. Ch., at p. 223.

(*g*) Wright *v.* Pearson, 1 Eden. 119; Austen *v.* Taylor, ibid., 361, Amb. 376; Jones *v.* Morgan, supra.

law in *Shelley's Case* (*a*), will be held to take an estate tail (*b*). To a desire to obviate the consequences of that rule, Lord *Hatherley* attributed the origin of the doctrine of executory trusts stated below (*c*).

In the case of equitable interests arising under deeds, equity, however, has departed from the common law rule that an estate in fee simple can only be created in a deed by the use of appropriate words of limitation. Until recent decisions there was little judicial authority upon the point; several of the most eminent text-book writers had, however, expressed the opinion that the use of technical expressions was never necessary in creating equitable estates (*d*). Judicial decisions, so far as they went, were in favour of the view that the question was one of intention, as shewn by the words of the deed as a whole. It is and always was clear that a mere declaration of trust in favour of a person simply, without anything more, will give him only a life estate (*e*). On the other hand, if the provisions of the deed shewed an intent that the *cestui que trust* was to take absolutely, then he would take the fee simple, for there was no doctrine of the Court that the want of words of inheritance was absolutely fatal in all circumstances (*f*). In *Re Tringham* (*g*) it was decided that a limitation in a deed of a trust of real estate for a person without any words of limitation may give him the fee simple where the intent to do so is shewn by the deed. In *Re Irwin* (*h*) it was held, distinguishing *Re Tringham* (supra), that a grant to trustees by name, without words of limitation, gave them merely an estate in the settlor's equitable freeholds for the lives of the trustees named and the survivor of them.

So, again, equity followed the law in the construction of executed trusts of personalty declared by reference to limitations of realty in strict settlement. Under such trusts the personalty vests absolutely

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(*a*) 1 Rep. 936.

(*b*) Stanley *v.* Lennard, 1 Eden. 87; Wright *v.* Pearson, 1 Eden 119; Austen *v.* Taylor, Ibid. 361; Jones *v.* Morgan, 1 Bro. Ch. 206; *Re* Keane, (1903) 1 Ir. R. 215.

(*c*) Sackville-West *v.* Holmesdale (Viscount), L. R. 4 H. L. 553.

(*d*) Cruise's Digest, 4th ed., tit. 11, c. 2, s. 32; Hayes on Conveyancing, 5th ed., vol. 1., p. 91; Preston on Estates, vol. 2, p. 64; Touchstone, Preston's ed. p. 106; Williams' Real Property, 19th ed., p. 181.

(*e*) Holliday *v.* Overton, 15 B. 480; Lucas *v.* Brandreth, 28 B. 274; Tatham *v.* Vernon, 29 B. 604; *Re* Whiston's Sett., (1894) 1 Ch. 661; Dearbey *v.* Latchford, 72 L. T. 489, 490; *Re* Hudson, 72 L. T. 892, 894; *Re* Thursby's Sett., (1910) 2 Ch. 181.

(*f*) Per James, V.-C. in Pugh *v.* Drew, 17 W. R. 988.

(*g*) (1904) 2 Ch. 487, followed *Re* Oliver's Sett., (1905) 1 Ch. 191, and explained in *Re* Thursby's Sett. (1910) 2 Ch. 181.

(*h*) (1904) 2 Ch. 752.

in the person who first becomes entitled indefeasibly to an estate tail in the realty (*a*). The use, in a referential trust executed of personalty, of the words "so far as the rules of law and equity will permit," do not alter the disposition (*b*), though in an executory trust they might (*c*). A bequest or other limitation in trust for a mother and children, entitles them jointly, though from slight indications an intent to create an executory trust involving a different result may be inferred (*d*).

An exception to the general rule, accounted for by the particular rule having been established before the general one was made (*e*), consisted in the doctrine that wives were not dowable out of trust estates (*f*), a doctrine inapplicable in the cases of wives married since the 1st of January, 1834 (*g*).

The possibility, however, of the consequences of a limitation being varied by its subject being equitable instead of legal, appears in the case of an equitable contingent remainder, which does not need an equitable estate of freehold to support it (*h*).

Executory Trusts.—The above definition of a trust executory may be illustrated and tested by the following judicial expressions. In an executory trust the creator "leaves something to be done, the trusts to be executed in a more careful and more accurate manner" (*i*), "by the preparation, in fact, of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated" by its creator (*k*). "Has the testator left it to the Court to make

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(*a*) Pelham *v.* Gregory, 3 Bro. P. C. 204; Foley *v.* Burnell, 1 Bro. Ch. 274; 4 Bro. P. C. 319; *Re* Angerstein, (1895) 2 Ch. 883; Scarsdale *v.* Curzon, 1 J. & H. 40; Martelli *v.* Holloway L. R. 5 H. L. 532; *Re* Fothergill's Estate, (1903) 1 Ch. 149; *Re* Chesham's Sett., (1909) 2 Ch. 329, and see these decisions further discussed infra, pp. 807, 808; *Re* Parker, (1910) 1 Ch. 581.

(*b*) Vaughan *v.* Burslem, 3 Bro. Ch. 101; Scarsdale *v* Curzon, 1 John. & H. 40, 50, 54, 1 De G. J. & S. 14; Trevor *v.* T., 1 H. L. Cas. 239; *Re* Johnson's Trusts, 2 Eq. 716.

(*c*) Newcastle *v.* Lincoln, see below p. 795.

(*d*) Curtis *v.* Graham, 12 W. R. 998; Newill *v.* N. L. R. 7 Ch. 253, and cases there cited; *Re* Seyton, 34 C. D. 511, and cases there cited; *Re* Davies' Pol. Trusts, (1892) 1 Ch. 90.

(*e*) 1 Rop. H. & W. by Jac. 354 (n.).

(*f*) Ibid. 354—357.

(*g*) 3 & 4 Wm. 4, c. 105.

(*h*) Fearne, C. R., 8th ed. 303; *Re* Eddel's Trusts, 11 Eq. 559; Berry *v.* B., 7 C. D. 657; Abbiss *v.* Burney, 17 C. D. 211, and see Astley *v.* Mickletbwait, 15 C. D. 59; *Re* Freme, (1891) 3 Ch. 167.

(*i*) Lord *Talbot*, supra.

(*k*) Lord *Cairns*, Sackville-West *v.* Holmesdale, L. R. 4 H. L. 571.

out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates"? (*a*) "It is of the essence of an executory trust that it should not be fully expressed in the instrument creating it, but should require some further instrument for its complete legal expression" (*b*). "The intent must be so manifested on the face of the instrument directing the settlement to be made, that the technical words used cannot be followed in the perfect instrument without defeating the manifest intent" (*c*).

Where a trust is executory the Court will decree according to the intent as it is found expressed in that trust (*d*), and if its words are improper or informal, the Court will direct a settlement to be made in a proper manner, so as may best answer the intent of the parties (*e*). What the Court, if applied to, would direct, supposing that to be clear, trustees may do, and often have done, without its direction; but their discretion is, of course, limited by the words of the trust, and where a testator having directed the creation of a settlement containing a shifting clause, also directed the trustees in making the settlement to correct any defect in legal or technical or other incorrect expression in his will, and to form such settlement from what should appear to them to be his real meaning, it was held that they could not so vary the language of the shifting clause from that used in the will as to give effect to what they thought, but the Court did not think, to be the apparent intention of the testator (*f*).

Distinction between Executory Trusts in Wills, &c., and in Marriage Articles.—Executory trusts are said to occur principally in marriage articles and wills. Marriage articles, however, do not create trusts, but are executory contracts to be interpreted and given effect to upon the same principles as executory trusts. Besides marriage articles, other contracts, such as those for the sale and purchase or the letting and hire of land, are, though not often thought of in connection with this doctrine, executory and interpreted on the

(*a*) Lord *St. Leonards*, Egerton *v.* Brownlow (Earl), 4 H. L. Cas. 210.

(*b*) Lord *Westbury*, L. R. 4 H. L. 566.

(*c*) Lord *Hatherley*, C., ib. 555; see also 1 Eden, 368; 1 Bro. Ch. 285; 1 J. & W. 570, 4 H. L. Cas. 61, 181, 188, 12 C. D. 699. In Graham *v.* Stewart, 2 Macq. H. L. C. 295, the doctrine was applied in a Scottish case.

(*d*) Lord *Talbot*, C., supra; Leonard *v.* Sussex, 2 Vern. 526.

(*e*) Lord *Cowper*, C., 3 Bro. P. C. 33; see also Papillon *v.* Voice, 2 P. W., at p. 474 (n.) (1).

(*f*) Stanley *v.* S., 16 V. 491, 494, 511.

principles applicable to the interpretation of an executory trust (*a*). Executory trusts, moreover, may be, and occasionally are, created by deed (*b*). Sir *W. Grant*, M. R., said :—"I know of no difference between an executory trust in marriage articles and in a will, *except* that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision, by the settlement of an estate, for the purpose of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement" (*c*). This statement expresses the substance of all that other Judges have said on the point (*d*).

2. Executory Trusts under Marriage Articles.

If, in articles before marriage, for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the *heirs of the body* or the *issue* of them or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's Case*, give *either* of them an estate tail, and enable *either* of them to defeat the provision for their issue, Courts of equity, considering the object of the articles, viz., to make a provision for the issue of the marriage, will, in conformity with the presumed intention of the parties, direct a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail, as purchasers. Thus, in *Trevor* v. *T.* (*e*), A. in consideration of an intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the

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(*a*) See infra, p. 813.

(*b*) Mayn *v.* M., 5 Eq. 150.

(*c*) Per Sir *William Grant*, Blackburn *v.* Stables, 2 V. & B. 369. See also Jervoise *v.* Duke of Northumberland, 1 J. & W. 574.

(*d*) Lord *Talbot*, supra, *Eldon*, C., Jervoise *v.* Northumberland, supra, explaining his statement in Lincoln *v.* Newcastle, 12 V. 227. *Leach*, V.-C., in Deerhurst *v.* St. Albans, 5 Madd. 260; *Sugden*, L. C. (J.), Rochfort *v.* Fitzmaurice, 2 Dr. & W. 20; Lord *Cairns*, Sackville-West *v.* Holmesdale (Viscount), L. R. 4 H. L. 572.

(*e*) 1 Eq. Ca. Abr. 387, 1 P. W. 622

use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A. for ever. Lord *Macclesfield* said, that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they came to be carried into execution, as to make them effectual; that the intention was to give A. only an estate for life; that, if it had been otherwise, the settlement would have been vain and ineffectual, and it would have been in A.'s power, as soon as the articles were made, to have destroyed them. And his lordship therefore held, that A. was entitled to an estate for life only, and that his eldest son took by purchase as tenant in tail. This decision was affirmed on appeal in the House of Lords (*a*). Lord *Talbot* made a like decision in *Streatfield* v. *S.* (*b*).

Where in marriage articles the words "heirs female," "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well as sons, viz., on first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them (*c*). With reference to a husband's covenant to *settle* land upon his issue by his intended wife subject to a jointure annuity settled by him on her, Lord *Cairns* said, great weight was to be attributed to the term "settle"; it meant make a settlement of the property upon the issue of the marriage, which must be effected by giving successive estates tail to the children of the marriage, the reason being that the rule which the Court of Chancery had laid down for itself in limiting estates by way of purchase, was to go as near as possible to that line of devolution of the property which would have taken place if the father, in the first instance, had remained the proprietor of an estate tail. In that case the estate would have gone first to the sons in succession, and then to the daughters as heirs in tail together (*d*).

But by a husband's covenant to settle to the use of the first, &c.,

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(*a*) 5 Bro. P.C. 122.

(*b*) Cas. t. Talbot, 176. See also Stonor *v.* Curwen, 5 Si. 269; Davies *v.* D., 4 B. 54; Rochford *v.* Fitzmaurice, 1 Con. & Law. 173; Lambert *v.* Peyton, 8 H. L. Cas. 1; Grier *v.* G., L. R. 5 H. L. 688.

(*c*) West *v.* Errissey, 2 P. W. 349; Trevor *v.* T., 13 Si. 108; Mason *v.* M., 5 Ir. R. Eq. 288; Phillips *v.* James, 3 De G. J. & S. 72; Grier *v.* G., L. R. 5 H. L. 688; Vaizey, Settlements, p. 168.

(*d*) Grier *v.* G., L. R. 5 H. L. 688, 707.

son of an intended marriage in tail male successively, with remainder to the heirs male of his own body, with remainder to the heirs of his body by his then intended wife, and if he should die without issue male by her, and there should be a daughter only, to give her 3,000*l.*, it was held, the sole issue of the marriage being a daughter, that she was entitled to 3,000*l.* only (*a*).

Exceptional Cases.—Where articles are so framed that the concurrence of *both* parents is requisite in order to defeat the provision for the issue, it has been inferred that it might have been the intention of the parties to the articles, that the husband and wife should *jointly* have such power. Thus, where the husband has by articles agreed to settle *his own property* upon himself for life, remainder to his wife for life, with remainder to the heirs of the body of the wife by him, as she would in this case be tenant in tail *ex provisione viri*, and consequently could not, by reason of the Statute of Jointures (*b*), if the property were settled upon her previous to the passing of the Fines and Recoveries Act (*c*), bar the entail without the concurrence of her husband, a settlement making the issue take by purchase would not be decreed (*d*). As, however, the statute 11 Hen. 7, c. 20, has been repealed as to estates tail *ex provisione viri* by 3 & 4 Will. 4, c. 74, s. 16, this exception from the general rule has ceased to be part of the law (*e*).

So, also, where it appears on the face of the articles that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of *one* of the parents to bar the issue, a strict settlement will not be decreed. Thus, where by articles part of an estate was limited to the husband for life, remainder to the wife for life, remainder to the first and every other son and daughter in tail, and another part to the husband for life and the heirs male of his body by that wife, Lord *Macclesfield* said, that if the latter had been the sole limitation, he should without scruple decree in strict settlement, according to the common rule; but where the parties had shown they knew the distinction when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation,

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(*a*) Powell *v.* Price, 2 P. W. 535.

(*b*) 11 Hen. 7, c. 20.

(*c*) 3 & 4 Will. 4, c. 74.

(*d*) Whateley *v.* Kemp, cited in Howel *v.* H., 2 Ves. Sen. 358; Honor *v.* H., 1 P. W. 123; Green *v.* Elkins, 2 Atk. 477; Highway *v.* Banner, 1 Bro. Ch. 584; Sackville-West *v.* Holmesdale, L. R. 4 H. L. 571.

(*e*) See Rochford *v.* Fitzmaurice, 2 Dr. & W. 19.

decreeing to the father in tail as to the last, though not as to the first (*a*).

Joint Tenancy.—In *Rossiter* v. *R.* (*b*), a husband agreed to convey to trustees, for himself for life, and if his wife survived, to the use of the " wife and children," if no child, to the wife in fee. A settlement was decreed upon the wife for life with remainder to the children, *Wild's Case* (*c*), being held inapplicable to marriage articles. Where words in articles for a settlement would, if interpreted in their strict legal sense, create a joint-tenancy among the children of the marriage, equity will decree a settlement vesting the fund in all the children as tenants in common, followed by an accruer clause giving the shares of such as died under twenty-one and without issue, and if female without being married, to the others or other (*d*). This principle would now be followed with a variation corresponding with a change in the practice of conveyancing, by making the interests of the children contingent on their attaining twenty-one being sons, or being daughters attaining that age or marrying (*e*).

When articles direct *personal property of the wife* to be settled upon trust for the husband and wife " during their lives," they will be carried into effect by giving the wife the first life interest to her separate use (*f*). As to adding without power of anticipation, see remarks of *James*, L. J., *Teasdale* v. *Braithwaite* (*g*).

Although provisions in marriage articles may be vague, the Court will endeavour to carry them out as well as it can. Thus where in marriage articles there was a trust " to provide suitably " for the settlor's younger children, it was held in a case in Ireland that it was not too vague to be executed, and that the Court ought to direct an inquiry what the provisions should be (*h*).

Where, by a postnuptial agreement for valuable consideration, a settlement was directed to be made upon *a son of the marriage and his issue*, it was held that the same considerations did not apply as

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(*a*) Anon., cited Howel *v.* H., 2 Ves. Sen. 358, at p. 359; and cf. Powell *v.* Price, 2 P. W. 535; Chambers *v.* C., 2 Eq. Ca. Abr. 35, c. 4; Highway *v.* Banner, 1 Bro. Ch. 584.

(*b*) 14 Ir. Ch. R. 247.

(*c*) 6 Rep. 16.

(*d*) Taggart *v.* T., 1 Sch. & L. 84; Roche *v.* R., 2 Jo. & Lat. 561; and see Marryat *v.* Townly, 1 Ves. Sen. 102.

(*e*) Cogan *v.* Duffield, 2 C. D. 48. See as to the supposed inconvenience of a joint tenancy, Lewin (1911), p. 133 (*c*).

(*f*) Cogan *v.* Duffield, 2 C. D. 44.

(*g*) 5 C. D. 632; and cf. *Cotton*, L. J., in *Re* Parrott, 33 C. D. 276; *Re* Dunnill's Trust, Ir. R. 6 Eq. 322.

(*h*) Brenan *v.* B., 2 Ir. R. Eq. 266.

in the case of a similar limitation to an intended husband and his issue by articles before marriage, so as to cut down the interest of the son to a life interest; he was given an estate in tail in possession with remainder to himself in fee (*a*).

Covenants to settle chattels by reference to realty.—In the case of an *executory trust* by settlement, as where a person has agreed or covenanted to settle chattels upon similar trusts to real estate in strict settlement as far as the law will allow, a Court of equity, upon the principle of carrying into effect the intent of the parties as far as possible, will order a clause to be inserted in the settlement of the chattels—that the tenant in tail shall not under the limitations be entitled to the absolute property in the chattels "unless he shall attain the age of twenty-one years," or "unless he shall die under twenty-one, leaving issue:" *Newcastle* v. *Lincoln* (*b*), in which case *Loughborough*, C., stated it to be his decided opinion, that in cases of marriage articles, where leasehold property was covenanted to be settled upon the same limitations as freehold estate and the limitations of the freehold estate were to all the sons successively in tail, the settlement to be made of the leaseholds ought to be analogous to that of the freeholds, so that no child born and not attaining twenty-one should by his birth attain a vested interest to transmit to his representatives, and thereby defeat the ulterior object of the articles, which were not in favour of one son, but equally extended to every son. Lord *Loughborough* accordingly held that the defendant, who was the personal representative of the deceased infant, tenant in tail (a grandson of the covenantor), was not entitled to the leaseholds. The defendant appealed to the House of Lords, but before the appeal was heard (*c*) the next tenant in tail in remainder (a grandson of the covenantor by his second son) attained his majority. It was decreed that the leasehold estate vested absolutely in him, Lord *Ellenborough* and *Erskine*, C., to this extent approving of the decree of Lord *Loughborough*, that the absolute interest did not vest in the deceased first tenant in tail on his birth; but it was unnecessary to decide what was the proper limitation to have been inserted in the settlement, whether a limitation over on "dying under twenty-one," or on "dying under twenty-one without issue male."

(*a*) Dillon *v.* Blake, 16 Ir. Ch. R. 24.

(*b*) (1797) 3 V. 387, 4 R. R. 31.

(*c*) (1806) Lincoln *v.* Newcastle, 12 V. 218. Lord *Eldon* did not concur in this decision. He considered that the case was covered by the decision in Vaughan *v.* Burslem 3 Bro. Ch. 101.

3. Executory Trusts in Wills and Deeds of Gift.

In the case of a will or deed of gift the intention that the very words mentioned in the instrument are not to be used as proper for the more complete conveyance, must be plainly manifested by the first instrument, and will not be assumed merely because the trust is executory (*a*). There is no good sense or reason in trying to modify the frame of a will by reason of what you suppose ought to have been the intention of the testator. The principle to go upon, is to follow the exact meaning of the words in the will (*b*). It must appear, for instance, from the will itself that the testator meant "heirs of the body," or words of similar legal import, to be words of purchase; otherwise the Court will direct a settlement to be made according to the strict legal construction of those words. Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body or words equivalent to heirs of the body; or a devise in trust for A., with a direction to make a proper entail to the heir male by him; as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail, although, as we have already seen, in the case of marriage articles similarly worded, he would take only as tenant for life. Thus, in *Sweetapple* v. *Bindon* (*c*), B. by will gave 300*l.* to her daughter Mary, to be laid out by her executrix in lands and settled to the only use of her daughter Mary and her children, and if she died without issue the land to be equally divided between her brothers and sisters then living; Lord *Cowper* said, that, had it been an immediate devise of land, Mary, the daughter, would have been, by the words of the will, tenant in tail: and in the case of a voluntary devise, the Court must take it as they found it, and not lessen the estate or benefit of the legatee: although upon the like words in marriage articles it might be otherwise (*d*).

In the following cases, however, it has been held that there has been a sufficient indication *of the testator's intention*, that the words

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(*a*) Sackville-West *v.* Holmesdale, L. R. 4 H. L. p. 555.

(*b*) Surtees *v.* S., 12 Eq. 405, 406; Rhodes *v.* R., 7 A. C. 192, 199; Scale *v.* Rawlins, (1892) A. C. 342, at p. 345.

(*c*) 2 Vern. 536.

(*d*) See also Samuel *v.* S., 9 Jur. 222; Harrison *v.* Naylor, 2 Cox, 247; Marshall *v.* Bousfield, 2 Madd. 166; Blackburn *v.* Stables, 2 V. & B. 370; Meure *v.* M., 2 Atk. 266; Jervoise *v.* Northumberland, 1 J. & W. 559; Randall *v.* Daniel, 24 B. 193; Lowry *v.* L., 13 L. R. Ir. 317.

"heirs of the body," or words of similar import, should be considered as words of purchase and not of limitation, viz., where trustees were directed to settle an estate upon A. and the heirs of his body, taking *special care in such settlement that it should not be in the power of A. to dock the entail of the estate given to him during his life* (*a*).

So in *Thompson* v. *Fisher* (*b*), a testator, subject to the life interest of his widow, devised freehold property to trustees "upon trust to convey, assign and assure" the same "unto and to the use of his son T. Fisher, and the heirs of his body lawfully issuing, but in such manner and form nevertheless, and subject to such limitations and restrictions, as that if T. Fisher *shall happen to die without leaving lawful issue*, then that the property *may after his death descend unincumbered* unto and belong to his daughter, Ruth Fisher, her heirs, executors, administrators, and assigns." *James*, V.-C., held that the devise was an executory trust, that the intention was not to give T. Fisher a power of disposition over the estate (*c*), and that it was to be executed by a conveyance to the use of T. Fisher during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to the testator's daughter Ruth in fee (*d*).

So, directions in a will that heirs of the body or issue shall take "in *succession and priority* of birth," or that the settlement shall be made "*as counsel shall advise*" or "*as executors shall think fit*," have been held strongly to indicate an intention that an estate should be settled strictly (*e*).

So, where a testator directed trustees to convey an estate to his daughter for her life, and so as she alone, or such other person as she should appoint, should take or receive the rents and profits thereof, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of her body for ever; Lord *Hardwicke*, considering that it was *plainly the intention* of the testator that the husband should have no manner of benefit from the estate, either in the lifetime of his wife or after her decease,

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(*a*) Leonard *v.* Sussex, 2 Vern. 526.; see as to this case Jarman, 6th ed., vol. 2, 1879.

(*b*) 10 Eq. 207.

(*c*) See Lewin (1911), p. 135, note (*f*).

(*d*) See also Shelton *v.* Watson, 16 Si. 543, infra, p. 801; Duncan *v.* Bluett 4 Ir. R. Eq. 469

(*e*) See White *v.* Carter, 2 Eden, 368; Bastard *v.* Proby, 2 Cox, 6; Rochford *v.* Fitzmaurice, 2 Dr. & W. 1; Read *v.* Snell, 2 Atk. 642; Haddelsey *v.* Adams, 22 B. 276.

held, that the words "heirs of her body" were words of purchase and that the wife was entitled to a life estate only; for had they been construed as words of limitation, and the wife had taken as tenant in tail, the husband, contrary to the intention of the testator, would have had considerable benefit from the estate as tenant by the curtesy (*a*).

Where a testator, as in *Glenorchy* v. *Bosville*, directs an estate to be conveyed to a person for life "*without impeachment of waste*," or to a person for life with a limitation to trustees "*to preserve contingent remainders*," he will be held sufficiently to have indicated his intention, that in a subsequent limitation to the issue or heirs of the body of the person to whom the life interest is given, such issue or heirs should take as purchasers, and a strict settlement will accordingly be directed: see *Papillon* v. *Voice* (*b*), in which case the distinction between executed and executory trusts in wills is most strikingly illustrated. There A. bequeathed a sum of money to trustees, in trust, to be laid out in a purchase of lands and *to be settled* on B. for life, *without impeachment of waste*, remainder to trustees and their heirs during the life of B. to *preserve contingent remainders*, remainder to the heirs of the body of B., remainder over with power to B. to make a jointure; and by the same will A. *devised lands* to B. for his life, *without impeachment of waste*, remainder to trustees and their heirs during the life of B. to *support contingent remainders*, remainder to the heirs of the body of B., remainder over: though it was decreed at the Rolls that an estate for life only passed to B., with remainder to the heirs of his body by purchase as well in the lands devised as in those directed to be purchased, yet upon an appeal from this decree *King*, C., declared as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this last remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty; but as to the other point, he declared the Court had a power over the money directed by the will

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(*a*) Roberts *v*. Dixwell, 1 Atk. 607; Stonor *v*. Curwen, 5 Si. 264; Parker *v*. Bolton, 5 L. J. Ch. 98; Verulam *v*. Bathurst, 13 Si. 386; Shelton *v*. Watson, 16 Si. 543; *sed vide* Samuel *v*. S., 14 L. J. Ch. 222.

(*b*) 2 P. W. 471.

to be invested in land, and that the diversity was where the will passed a legal estate and where it was only executory, and the party must come to the Court in order to have the benefit of the will; that in the latter case the *intention* should take place and not the rules of law, so that as to the lands to be purchased they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over (*a*).

So, where a testator directed his estates and house property to be *settled* on his son, T. F. D., and his heirs male; and if he should have no heirs male, on his grandson, J. B., on his taking the name of D. in addition to his own, within twelve months after his succession; and in the event of his having no heirs male, then the estate to go to his brother, G. A. B., and his heirs male, he taking the name of D.; it was held by the Master of the Rolls of Ireland that an executory trust was created which the Court directed to be carried out by a settlement with limitations to the several devisees for life, and with remainders to their sons in tail male successively (*b*).

"The object of making provision for the children of a marriage, and the object of making provision for the holders of a peerage would appear to be so analogous that it would be the duty of the Court in the latter, as in the former case, to prevent as far as possible the defeat of the object." Per Lord *Cairns*, *Sackville-West* v. *Holmesdale* (*c*), in which case Lady Amherst by a codicil to her will reciting, correctly, the grant of a barony to her sister D. for life, with remainder to the second son of D. and the heirs male of his body, *directed a settlement* to be made to correspond as nearly as possible with the limitation of the peerage, in a "course of entail." Deeds for carrying into effect this settlement were to be prepared, the settlement was to be effected in such manner, &c., as the trustees should consider proper, or as their counsel should advise. Held, *Hatherley*, C., *diss.*, that the estates ought to be limited in strict settlement to the second and other younger sons of D. for their respective lives, without waste, remainder to their sons successively in tail male, as in the patent creating the barony, and that the leaseholds and chattels were to be settled in such manner as should

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(*a*) See also Venables *v.* Morris, 7 T. R. 342; Doe *v.* Hicks, 7 T. R. 433.

(*b*) Duncan *v.* Bluett, 4 Ir. R. Eq. 469; see also Parker *v.* Bolton, 5 L. J. Ch. 98.

(*c*) L. R. 4 H. L., p. 575.

most nearly correspond with such course of strict settlement, and a shifting clause was added in exact accordance with the proviso in the patent, which proviso has, however, been since held to be invalid (*a*). In *Re Johnston* (*b*), the testatrix gave plate and a leasehold house to A. C., Earl of Essex, and "to his successors to be enjoyed with and to go with the title." She also bequeathed to her trustees her furniture, pictures, statuary, &c., upon trust to select and set aside a portion of it for the Earl of Essex, to be "*settled* as heir-looms and go with the title." Held, the plate and leasehold passed to the Earl absolutely; but that the gift to the trustees to select, &c., created an executory trust, and a settlement was directed giving the Earl a life interest with remainder to the next heir to the title for life (*c*).

Where, however, the trusts and limitations of land to be purchased by trustees are expressly declared by the testator, that is to say, where the testator has been, what is called his own conveyancer, it has been decided that the Court has no authority to make them different from what they would be at law. Thus, in *Austen* v. *Taylor* (*d*), land was devised to trustees in trust to pay an annuity; and subject thereto in trust for A. for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainder to the testator's right heirs: and the residue of the testator's personal estate was to be laid out in the purchase of lands which should thereafter *remain, continue, and be,* to the same uses as the land before devised. Lord *Northington* distinguished the case from *Papillon* v. *Voice*, on the ground that the testator *refers no settlement to his trustees to complete, but declares his own uses and trusts,* which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; and he therefore held that A. was entitled to an estate tail in the lands to be purchased. But as to the distinction taken between a direction to trustees to purchase *and settle*, and a direction simply to purchase, the testator being his own conveyancer, see *Meure* v. *M.* (*e*), *Harrison* v. *Naylor* (*f*), *Jervoise* v. *Northumberland* (*g*). And although the trust is held to be *executory*, yet in

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(*a*) The Buckhurst Peerage, 2 A. C. 1. See further Dorchester *v.* Effingham, 3 B. 180; Bankes *v.* Le Despencer, 10 Si. 576.

(*b*) 26 C. D. 538; cf. *Re* Hill, (1902) 1 Ch. 807.

(*c*) And see Bankes *v.* Le Despencer, 10 Si. 576.

(*d*) 1 Eden, 361.

(*e*) 2 Atk. 265.

(*f*) 2 Cox, 247.

(*g*) 1 J. & W. 572.

executing it full legal effect is given to the words used, as in *Marshall* v. *Bousfield* (*a*), where there was a devise to testator's wife for life, and after her decease that the estate *should be settled by counsel* and go amongst his grandchildren of the male kind *and their issue in tail male*, the Court, following *Blackburn* v. *Stables* (*b*), gave the grandchild an estate tail (*c*).

The word "issue" is, in wills, both a word of purchase and of limitation: but the word "heirs" is naturally a word of limitation. In *executory* trusts in wills, therefore, it will be seen, upon examining the cases, that where the word "issue" is made use of, the Court will more readily decree a strict settlement, than where the words "heirs of the body" have been used (*d*).

Where in *executory trusts in wills*, the words "heirs of the body" or "issue," are construed as words of purchase, they will be held to include *daughters* as well as sons, and the settlement, as in *Glenorchy* v. *Bosville*, will be decreed to be made in default of sons and their issue upon daughters, as tenants in common in tail general, with cross remainders between them (*e*).

In *Trevor* v. *T.* (*f*), a testator devised his estates to trustees, in trust, *to settle and convey* the same to the use of or in trust for G. R. for life, without impeachment of waste, with remainder *to his issue in tail male in strict settlement*, and in default of issue, over. G. R. had no son, but had daughters born after testator's death. Held, the words "in tail male" were descriptive, not of the issue, but of the estates they were to take, and that the estates ought to be settled upon G. R. for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in tail male with cross remainders in tail male.

In *Shelton* v. *Watson* (*g*), the executory trust was that an estate should be *purchased and settled* on testator's nephew W. S., his heirs and successors in the direct male line, which the Court carried out by directing a settlement on W. S. for life, with remainder to his first and other sons in tail male, remainder to his brothers and their first and other sons in like manner, the testator having declared his

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(*a*) 2 Madd. 166.

(*b*) 2 V. & B. 367.

(*c*) See Seale *v.* S., 1 P. W. 290; Samuel *v.* S., 14 L. J. Ch. 222; Vaizey, Settlements, p. 163; but see Jervoise *v.* Northumberland, 1 J. & W. 559.

(*d*) See Glenorchy *v.* Bosville, supra; Meure *v.* M., 2 Atk. 265; Horne *v.* Barton, Coop. 257; Dodson *v.* Hay, 3 Bro. Ch. 405; Stonor *v.* Curwen, 5 Si. 264; Crozier *v.* C., 2 Con. & Law. 311; Haddelsey *v.* Adams, 22 B. 266.

(*e*) Bastard *v.* Proby, 2 Cox, 6; Dodson *v.* Hay, 3 Bro. Ch. 404.

(*f*) 1 H. L. Cas. 239.

(*g*) 16 Si. 543.

intention that no person should hold the estate under any other name than his own.

In *Surtees* v. *S* (*a*), a testator directed his trustees to purchase lands in certain counties *to be settled* (in the event which happened of the death of the eldest son of J. S.) to the use of every son of J. S. then living, or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders, but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs. *Romilly*, M. R., *going on the exact meaning of the words in the will*, held that the younger sons of J. S. took as tenants-in-common for life with remainder as to each son's share to his first and other sons in tail male with cross remainders over.

Formerly, whenever a strict settlement was decreed, limitations to preserve contingent remainders were inserted if necessary (*b*). But now, in consequence of the statute 8 & 9 Vict. c. 106, s. 8, preserving contingent remainders from destruction through the premature determination of the precedent estate, such limitations are unnecessary. They may be inserted, with the object of the trustees interposing to prevent wilful waste and destruction on the part of the tenant for life before any remainderman comes *in esse*, &c., &c.; but such considerations have not availed to induce practitioners generally to continue to introduce them (*c*).

The Court has refused to appoint a protector to the settlement (*d*).

Lands held in gavelkind (*e*), or borough English (*f*), may be decreed to be settled strictly.

For the manner in which a direction to *entail* real and personal estate will be carried into effect, see *Blackburn* v. *Stables* (*g*), *Tennent* v. *T.* (*h*), *Jervoise* v. *Northumberland* (*i*), *Graves* v. *Hicks* (*k*), *Randall* v. *Daniel* (*l*), *Sealey* v. *Stawell* (*m*). As to an entail

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(*a*) 12 Eq. 400.

(*b*) Stamford *v.* Lord Hobart, 3 Bro. P. C. 31; Woolmore *v.* Burrows, 1 Si. 512.

(*c*) Vaizey, Settlements (1887), Vol. II., p. 1166; Carson's Real Property Statutes, 2nd ed., p. 525.

(*d*) Bankes *v.* Le Despencer, 11 Si. 508, 527. See Vaizey, Settlements p. 167.

(*e*) Roberts *v.* Dixwell, 1 Atk. 607.

(*f*) Starkey *v.* S., 7 Bac. Abr. 179.

(*g*) 2 V. & B. 367.

(*h*) 1 Dru. 161.

(*i*) 1 J. & W. 559.

(*k*) 11 Si. 536.

(*l*) 24 B. 193.

(*m*) 9 Ir. R. Eq. 499.

directed to be made of land in Scotland, see *Graham* v. *Stewart* (*a*). As to an entail to correspond as nearly as may be with the limitations of an ancient barony in *Bankes* v. *Le Despencer* (*b*), and with those of a modern barony, the patent conferring which contained a shifting clause upon the holder of the barony becoming entitled to an earldom, see *Sackville-West* v. *Holmesdale,* p. 799, supra.

Where real and personal property were by will directed to be settled upon the same trusts, the Court did not think itself authorised, through the medium of a trust for sale, to settle the real estate as personalty (*c*). For a form of settlement directed where a testator had devised real and personal estate to his son, with a direction that if he married the properties were to be put into strict settlement, see *Wright* v. *W.* (*d*).

Joint Tenancy.—Where, in a will or deed, there are directions for a settlement, in terms which are ordinarily construed to create a joint tenancy, the Court will, if to do so is needed in order to effectuate the intent shown, carry them out by giving a tenancy in common in the settlement. Though, as has been stated, a trust executed for a parent and children entitles them jointly (*e*), yet slight circumstances have been relied on as grounds for inferring an intent to declare an executory trust (*f*), which must be executed by one for the parent for life, with remainder in the case of personalty for the children, including those after born, as tenants in common (*g*), and ordinarily, it is submitted, contingently on their attaining twenty-one, or, being girls, marrying, and in the case of realty as tenants in common, in tail or in fee, as the language of the executory trust may indicate (*h*).

In *White* v. *Briggs* (*i*), the testator declared that after the death of his wife, his nephew, C. W., should "be considered heir to all his property not otherwise disposed of," and he directed "that whatever portion of his property might thereafter be possessed by him, should be *secured by his executors for the benefit of his family.*" *Cottenham,* C., held that as regards the real estate, "family" meant heir-at-law,

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(*a*) 2 Macq. H. L. Cas. 295.

(*b*) 11 Si. 508, 527. See Vaizey, Settlements, p. 167.

(*c*) Turner *v.* Sargent, 17 B. 515, 520.

(*d*) (1904) 1 Ir. R. 360.

(*e*) Supra, p. 794.

(*f*) Newill *v.* N., L. R. 7 Ch. 257.

(*g*) Vaughan *v.* Headfort, 10 Si. 639; Ogle *v.* Corthorn, 9 Jur. 325; Combe *v.* Hughes, 14 Eq. 415; Mayn *v.* M., 5 Eq. 150.

(*h*) Mayn *v.* M., supra; Marryat *v.* Townly, 1 Ves. Sen. 102; Synge *v.* Hales, 2 Ball & B. 499.

(*i*) 2 Phil. 583.

and that in the gift of the personal property it meant "next of kin," and that the real estate should be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee; and that the personal estate should be settled upon the nephew for life, with remainder to all his children as joint tenants, with a proviso that, in the event of all the children dying under twenty-one, and in the case of daughters unmarried, and in the case of sons without lawful issue, the personalty should be held in trust for the nephew absolutely.

A direction to trustees to settle property upon a wife of the testator's son, should he marry, has been held, in the absence of words indicating an intention to restrict the jointure to the wife of a first marriage, to authorise the settlement of a jointure upon the wife of a second marriage (*a*).

Where a testator directed that his daughters' shares *of personalty* under his will should be "settled upon themselves *strictly*" (*without any mention being made of children*) (*b*), it was held by *Romilly*, M. R., that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life, to her separate use, without power of anticipation; and if she died in the life of her husband, then her share should go as she should by will appoint, and in default of appointment, to her next of kin, exclusively of her husband; and if she survived her husband, then to her absolutely (*c*).

But although there may be no mention of *children* in a direction to settle, it seems that the settlement will be extended to them when such appears to be the *intention* of the testator (*b*). Thus, in *Duckett* v. *Thompson* (*d*), where a bequest of 2,000*l.* was made for the benefit of a *feme sole*, "to be paid upon her marriage, and to be settled upon her by her settlement," it was held that a settlement should be made of the legacy upon the legatee and her children. A child has been excluded to effectuate the intent shewn (*e*). As to excluding the *jus mariti* only where money was bequeathed to be settled on testator's daughters "independent of their coverture," see *Eustace* v. *Robinson* (*f*).

(*a*) Mason *v.* M., 5 Ir. R. Eq. 288. See *Re* Parrott, 33 C. D. p. 277; Nash *v.* Allen, 42 C. D. 54.

(*b*) See *Re* Spicer, 84 L. T. 195.

(*c*) Loch *v.* Bagley, 4 Eq. 122; distinguished in *Re* Spicer, 84 L. T. 195.

(*d*) 11 L. R. Ir. 424.

(*e*) *Re* Ballance, 42 C. D. 62.

(*f*) 7 L. R. Ir. 83.

But where a testator gave a share of his property to each of his two daughters, with a mere general direction that it was "to be settled on themselves at their marriage," *Bacon*, V.-C., thought these words imported an absolute gift to the daughters, and that they were entitled to their shares absolutely (*a*).

When, however, the Court does come to the conclusion that the testator's intention is shown that the children of the legatee should take under a settlement which he directs to be made of the legacy, the Court will *ordinarily* direct a settlement upon the legatee for life, with a power to appoint among his children, with limitations in default of appointment to children who being sons attain twenty-one, or being daughters attain that age or marry, as tenants in common (*b*). But the Court will exercise a certain discretion in modifying the trusts indicated by the general directions in the will, so as to give effect to the intention (*c*).

The settlement may be made by the judgment, but it should bear the usual settlement stamp (*d*). As to the powers which may be introduced therein, see infra, p. 811.

Chattels Directed by Will, &c. to go in Strict Settlement (see supra, p. 795).

Where chattels are settled by an *immediate bequest*, or by a *trust executed* upon the same trusts as have been declared of real estate in strict settlement, viz., upon first and other sons successively in tail, if there is no restriction as to the attainment of twenty-one years or the fulfilment of any other condition, such chattels will vest absolutely in the first tenant in tail at his birth, whether the limitation of the chattels be expressed *in extenso*, or created by reference to the limitations of the realty (*e*), and such reference may be made effectually either by declaring that the chattels are to go upon the limitations of the realty or by saying that they are to be treated as heirlooms (*f*).

(*a*) Magrath *v.* Morehead, 12 Eq. 491; Laing *v.* L., 10 Si. 315; Kennerley *v.* K., 10 Ha. 160; Munt *v.* Glynes, 41 L. J. Ch. 639.

(*b*) Taggart *v.* T., 1 Sch. & L. 84; Young *v.* Macintosh, 13 Si. 445; Turner *v.* Sargent, 17 B. 515; Charlton *v.* Rendall, 11 Ha. 296; Stanley *v.* Jackman, 23 B. 450; Cogan *v.* Duffield, 2 C. D. 44; Oliver *v.* O., 10 C. D., 765; *Re* Gowan, 17 C. D. 778; Eustace *v.* Robinson, 7 L. R. Ir. 83.

(*c*) *Re* Parrott, 33 C. D. 274; and see Nash *v.* Allen, 42 C. D. 54.

(*d*) *Re* Gowan, 17 C. D. p. 780.

(*e*) Doncaster *v.* D., 3 K. & J. 26; Rowland *v.* Morgan, 6 Ha. 463.

(*f*) Scarsdale *v.* Curzon, 1 John. & H. 40; *Re* Johnson's Trusts, 2 Eq. 716; *Re* Fothergill, (1903) 1 Ch. 149; and see cases cited pp. 788, 789, supra.

The addition of the words "so far as the rules of law or equity will permit," or the circumstance that the legal estate is left in executors, will not alter the general rule, or make the trusts executory (*a*). And even where the future interest of such tenant-in-tail is contingent, it is transmissible on his death to his personal representatives (*b*), unless the being in existence when the contingency happens is an essential part of the description of the person who is to take (*c*). But if a tenant for life of the estate lower in the settlement has issue before the tenant for life in possession, the chattels will not vest indefeasibly in such issue (*d*).

Where chattels are directed to go to the person entitled in possession to real estate, in the absence of an intention expressed that they are to go with the real estate, or if there is no direction that they are to go as heirlooms with a title, the chattels will vest in the first taker, whether he be tenant for life or tenant-in-tail (*e*). Where, however, there is such intention, the tenant for life of the real estate, or the first possessor of the title, when the chattels are to go with the title, will take only an estate for life in the chattels (*f*).

Where chattels are bequeathed as heirlooms, and directed to go to such person as shall first attain twenty-one and be entitled to an estate tail in possession in the settled estate, they will vest absolutely in a tenant-in-tail in remainder who attains twenty-one (*g*), and if the will contains no limitation as to attaining twenty-one, the tenant-in-tail in remainder will take a vested interest in the chattels immediately on his birth (*h*).

Where, however, the directions are "executory," the Court will carry them into effect in a proper and legal manner, so as to give effect to the intention—if it appear to be the intention—that no person shall take the chattels absolutely, who does not live to

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(*a*) Tollemache *v.* Coventry, 2 Cl. & Fin. 611; *Re* Exmouth, 23 C. D. 158; Harrington *v.* H., L. R. 5 H. L. 87; Scarsdale *v.* Curzon, 1 John. & H. 40; where the cases to that date are considered; Christie *v.* Gosling, L. R. 1 H. L. 279; *Re* Johnston, 26 C. D. 538; *Re* Johnson's Trusts, 2 Eq. 716; Mackworth *v.* Hinxman, 2 Keen, 658; *Re* Angerstein, (1895) 2 Ch. 883; *Re* Hill, (1902) 1 Ch. 807; *Re* Fothergill, (1903) 1 Ch. 149.

(*b*) *Re* Cresswell, 24 C. D. 102.

(*c*) Ib. 107, and the cases there cited.

(*d*) Hogg *v.* Jones, 32 B. 45.

(*e*) Trafford *v.* T., 3 Atk. 347, 348, 349.

(*f*) Ibid.; Montagu *v.* Inchiquin, 23 W. R. 592.

(*g*) *Re* Johnson's Trusts, 2 Eq. 716; Martelli *v.* Holloway, L. R. 5 H. L. 532; *Re* Fothergill, (1903) 1 Ch. 149.

(*h*) Foley *v.* Burnell, 1 Bro. Ch. 274, 4 Bro. P. C. 319; *Re* Fothergill, ubi sup.

become entitled in fee simple or tail to the possession of the real estate (*a*).

In order to prevent the separation of the chattels, real or personal, from the real estate, which takes place on the death of a tenant-in-tail in whom they have vested absolutely, the chattels then passing as his personal estate, while the freeholds go to those entitled under the limitations in the settlement, it is usual to limit over the chattels, in case any such tenants-in-tail (being the sons of persons *in esse*) should die under twenty-one and without inheritable issue, to the person who in that event would succeed to the freeholds. According to another form more frequently used, the personalty is subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in any tenant-in-tail by *purchase* until twenty-one, or death under that age leaving issue inheritable under the entail.

But even under these provisions a separation of the chattels from the freeholds would take place in the event of the tenant-in-tail dying under twenty-one, leaving inheritable issue, for in such case the tenant-in-tail would take the chattels absolutely, while the freeholds would go to the heir-in-tail. The best form to adopt in order to prevent this result is a declaration that the chattels should not vest absolutely in any tenant-in-tail by *purchase*, who may die under twenty-one, but shall at his death devolve as nearly as possible in the same manner as the freeholds (*b*).

The conveyancer in framing a clause providing for the settlement of chattels has two objects in view: first, he desires to prevent any tenant-in-tail from obtaining an absolute interest in the chattels before he attains his majority; secondly, he desires to make a resettlement of the chattels possible as soon as the first tenant-in-tail in remainder immediately expectant on the life estate in possession reaches the age of twenty-one. If the vesting of an absolute interest in that tenant-in-tail is made contingent upon the fulfilment of some further condition, *e.g.*, his becoming entitled to actual possession of the settled properties, as was the case in *Scarsdale* v. *Lord Curzon* (*c*),

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(*a*) Potts *v.* P., 1 H. L. Cas. 671; Trafford *v.* T., 3 Atk. 347; Foley *v.* Burnell, supra; Scarsdale *v.* Curzon, 1 John. & H. 40; Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543; Montagu *v.* Inchiquin,, 23 W. R. 592; *Re* Johnston, 26 C. D. 538; *Re* Angerstein, (1895) 2 Ch. 883; *Re* Fothergill, ubi sup.

(*b*) 3 Davidson's Convey. 3rd ed., 600, 624, and see Christie *v.* Gosling, L. R. 1 H. L. 279; *Re* Dayrell, (1904) 2 Ch. 496; Harrington *v.* H., L. R. 5 H. L. 87, 102.

(*c*) 1 J. & H. 40; and see Potts *v.* P., 3 J. & Lat. 353; 1 H. L. Cas. 671; *Re* Fothergill's Estate, (1903) 1 Ch. 149.

then a re-settlement of the land and chattels together of the usual character becomes practically impossible, for it would be defeated by the failure of the condition: as in the case named by the death of the tenant-in-tail in the lifetime of the tenant for life. In order to avoid this difficulty, made obvious by the decision in *Scarsdale* v. *Lord Curzon* (supra), Mr. *Davidson* suggested that the form of the trust of chattels should be "to allow them to devolve as heirlooms with the freeholds" (*a*). The form in common use provides that the chattels shall be permitted to devolve and *be enjoyed with* the settled hereditaments, with a further provision against the chattels vesting absolutely in any tenant-in-tail by purchase dying under the age of twenty-one (*b*).

Until the recent decision in *Re Chesham* (*c*) it was generally assumed that the clause as so drawn attained both the desired objects. In that case, however, the Court of Appeal construed a clause in a settlement, providing that the settled chattels should be "*used, held and enjoyed with*" a certain mansion-house by the person who for the time being should be entitled to that mansion under the limitations of the settlement, as rendering the title of the tenant-in-tail in immediate remainder contingent upon his becoming entitled to the actual possession of the mansion-house, so that the chattels might be enjoyed *in situ* where alone they were intended to be enjoyed (*d*). It was accordingly held that the personal representatives of the first tenant-in-tail under the settlement, who, after attaining his majority had predeceased his father, the tenant for life, were not entitled to the chattels (*e*). *Re Chesham* (supra) was distinguished by *Parker*, J., in *Re Parker* (*f*), where, under the trust chattels were to pass with a certain mansion-house as if they were land appendant or appurtenant thereto, and to continue annexed thereto as long as the law would permit, and be inherited or enjoyed by the several persons who should succeed thereto under the limitations. The learned judge pointed out that the form of gift was distinct from that in *Re Chesham* (supra), for there was no reference to use and enjoyment of the chattels with the mansion-house. The chattels

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(*a*) Davidson, Precedents, Vol. III., Pt. I., pp. 625 et seq.

(*b*) See, e.g., Key & Elphinstone, 9th ed., Vol. II., p. 719.

(*c*) (1909) 2 Ch. 329. It is to be observed that the clause had already been construed by *Chitty*, J., in 31 C. D. 466, see Vol. I., supra, at pp. 446, 448.

(*d*) Ibid., see per *Farwell*, L. J., at p. 337.

(*e*) See this decision discussed by Mr. Sweet in Jarman on Wills, 6th ed., at p. 698.

(*f*) (1910) 1 Ch. 581.

"are merely directed to pass with the mansion-house, words which refer to the interests created rather than the conditions of user" (*a*).

The vesting of the chattels must not be suspended for such a period as to offend against the rule of perpetuities (*b*). Violation of the rule may be avoided where personalty is settled with reference to the limitations of real estate, by a direction to the effect that the personalty shall not vest in any tenant-in-tail by *purchase* until he shall attain twenty-one, inasmuch as a *tenant-in-tail by purchase* must come into *esse* during the life of the parent tenant for life (*c*). And it seems that the words "tenant-in-tail" alone may from the context have the same meaning as tenant-in-tail *by purchase* (*d*). The effect of the words "as far as the rules of law and equity permit" in restraining such gifts within the rule against perpetuities is not clear (*e*). But although these words will not make a devise or bequest executory (*f*), or correct a gift which in terms infringes the rule against perpetuity (*g*), they may be fairly referred to when a construction warranted by the words used is impugned on the score of inconsistency with the intention of the testator (*h*). And as to the effect of the words "as far as the law allows," see *Pownall* v. *Graham* (*i*). As to limitations which are to take effect by way of postponement or defeasance of an absolute interest, see *Re Exmouth* (*k*).

Where chattels are by will creating an *executory trust* directed to be settled as heirlooms to go with a title, the Court will mould the

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(*a*) (1910) 1 Ch. p. 587.

(*b*) Ibbetson *v.* I., 10 Si. 495; affirmed 5 My. & C. 26; Dungannon *v.* Smith, 12 Cl. & Fin. 546; Ker *v.* Dungannon, 1 Dr. & War. 509; Harvey *v.* H., 5 B. 134; Wainman *v.* Field, Kay, 507; Harding *v.* Nott, 26 L. J. Q. B. 244; Ferrand *v.* Wilson, 4 Ha. 344; Hancock *v.* Watson, (1902) A. C. 14.

(*c*) Christie *v.* Gosling, L. R. 1 H. L. 279; Harrington *v.* H., supra; Martelli *v.* Holloway, L. R. 5 H. L. 532; *Re* Fothergill, (1903) 1 Ch. 149.

(*d*) Christie *v.* Gosling, supra, *dissentiente* Lord *St. Leonards*.

(*e*) See Trafford *v.* T., 3 Atk. 347; *Wood*, V.-C., Scarsdale *v.* Curzon, 1 John. & H. 50; Lords *Hatherley* and *Cairns;* Harrington *v.* H., L. R. 5 H. L. 100, 107; cf. Davies *v.* D., 36 C. D. 359. See above, and cf. *Re* Finch and Chew's Contract, (1903) 2 Ch. 486.

(*f*) Foley *v.* Burnell, 1 Bro. Ch. 274; Vaughan *v.* Burslem, 3 Bro. Ch. 101; Fordyce *v.* Ford, 2 V. 536; Rowland *v.* Morgan, 6 Ha. 463, 2 Ph. 764; Doncaster *v.* D., 3 K. & J. 26; *Re* Johnston, 26 C. D. 538; Hill *v.* H., (1897) 1 Q. B. 483, and see Jarman on Wills, 6th ed., pp. 695 et seq.

(*g*) Tollemache *v.* Coventry, 2 Cl. & Fin. 611, 8 Bli. 547; cf. *Re* Hill, (1902) 1 Ch. 807.

(*h*) Harrington *v.* H., L. R. 5 H. L. 102, 107.

(*i*) 33 B. 242.

(*k*) 23 C. D. 158.

settlement so as to avoid any infringement of the rule against perpetuities, and will give life interests successively to the holder of the title, and his successors living at the death of the testator (*a*). And the same will be done where leaseholds are by *executory trust* devised upon trusts *corresponding* with those of real estates in strict settlement (*b*).

In *Shelley* v. *S.* (*c*), jewels were bequeathed to the testatrix's nephew, John Shelley, "and to be held as heirlooms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, *as far as the rules of law or equity will permit. And I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heirlooms as aforesaid.*" There was here no real estate to guide the limitations: *Wood*, V.-C., held that a valid *executory* trust was created for John Shelley for life, with remainder to Edward Shelley, his eldest son, for life; and upon the death of Edward Shelley, in trust for Edward Shelley's eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in his, Edward Shelley's lifetime, or after Edward Shelley's death, without having attained twenty-one, leaving an eldest son born before Edward Shelley's death, in trust for such last-mentioned eldest son to be a vested interest when he should attain twenty-one; and in case the jewels should not become vested in any persons under the limitations aforesaid, then (subject to the life interest of Edward Shelley) in trust for John Shelley absolutely. The doubt expressed by *Hardwicke*, C., in *Green* v. *Ekins* (*d*), as to whether he could limit a sum of *money* in the same way as real estate, was not shared by *Wood*, V.-C. (*e*).

The execution by a remainderman in tail of a disentailing deed was held when the estate fell into possession to have defeated the title of the person, who, but for the deed, would have been entitled in possession to chattels bequeathed to the person for the time being in actual possession under the will (*f*).

In *Re Bute* (*Marquis of*) (*g*), chattels were bequeathed to executors to hold as heirlooms to be used by the person entitled to the possession

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(*a*) *Re* Johnston, 26 C. D. 538; Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543; Montagu *v.* Inchiquin, 23 W. R. 592.

(*b*) Miles *v.* Harford, 12 C. D. 691.

(*c*) 6 Eq. 540, and see *Re* Johnston, 26 C. D. 538; *Re* Hill, (1902) 1 Ch. 537.

(*d*) 2 Atk. 473, at p. 476.

(*e*) Shelley *v.* S., supra, at p. 546.

(*f*) Hogg *v.* Jones, 32 B. 45.

(*g*) 27 C. D. 196.

of a mansion-house, under a deed of entail (which was non-existent). The testator died absolutely entitled to the house; it was held that the heirlooms passed to the heir-at-law of the testator as the person entitled in possession to the house.

It may here be mentioned that by sect. 37 of the Settled Land Act, 1882 (*a*), "where personal chattels are settled on trust so as to devolve with *land* until a tenant-in-tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them" (sub-s. 1); the money arising from the sale is "capital money" (sub-s. 2), and the sale is not to be made without an order of the Court (sub-s. 3). Thus a remainderman who would have been absolute owner of heirlooms if there had been no sale may find the heirlooms sold, and the purchase-money applied in paying-off incumbrances, &c., without any special reservation in his favour (*b*). It has been held that a dignity or title of honour descending to heirs general or heirs of the body is an incorporeal hereditament, and therefore "land" within this section (*c*).

Doctrine of Cy-près.—Where an *executory trust*, if carried literally into effect, would be void for illegality, as where it would infringe the rule against perpetuities, the Court, in order to carry the testator's intention into effect as far as possible, or *cy-près*, will direct a settlement to be made as strictly as the law will permit (*d*).

Powers in Settlements by Court.—In considering the following cases it must be remembered that a distinction has been drawn between administrative powers, *e.g.* powers of leasing, sale and exchange, &c., which are for the benefit of all parties, and powers which confer personal privileges on particular parties, *e.g.* powers of jointuring, charging, &c. (*e*); but still these latter powers are "for

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(*a*) 45 & 46 Vict. c. 38.

(*b*) Lord *Macnaghten*, Bruce *v.* Ailesbury, (1892) A. C. at p. 365; *Re* Houghton, 30 C. D. 102; *Re* Stafford's (Lord) Settlement, (1904) 2 Ch. 72. For the principles on which the Court acts in giving or withholding its consent, see *Re* Beaumont, 58 L. T. 916; *Re* Radnor's (Earl of) Trusts, 45 C. D. 402; *Re* Hope's Settlement, 9 T. L. R. 506, (1899) 2 Ch. 691 (n.); *Re* Hope, (1899) 2 Ch. 679.

(*c*) *Re* Rivett-Carnac, 30 C. D. 136; see *Re* Earl of Aylesford's Settled Estate, 32 C. D. 162; and see these cases discussed in Hood & Challis' Conveyancing, &c., Acts, 7th ed., pp. 294 and 298.

(*d*) Miles *v.* Harford, 12 C. D. 691; see Hampton *v.* Holman, 5 C. D. 183, where the doctrine is considered by *Jessel*, M. R., at p. 190.

(*e*) Hill *v.* H., 6 Si. 136, 144.

the honour of the whole settlement" (*a*). Where in marriage articles or a will, a settlement is directed to be made with the *usual powers* or *proper powers*, the Court have ordered the following powers to be inserted in the settlement. Powers of sale and exchange (*b*); of maintenance and advancement (*c*); of varying securities (*d*); powers of partition where there is any joint property (*e*); powers of appointing new trustees (*f*); a power to cut timber for benefit of all persons interested in the estate (*g*); a power of advancement (*h*). But not a power to raise portions (*i*), nor to jointure a future wife (*k*). As to powers of leasing see *Hill* v. *H.* (supra); *Bedford* v. *Abercorn* (supra); *Scott* v. *Steward* (*l*).

But where the insertion of certain powers is specifically directed, the expression "and other *usual powers*" coming afterwards may be considerably narrowed (*m*), unless it is contained in a separate and distinct sentence (*n*), and such an expression will be construed with reference to the object of the settlement, and the situation of the subject-matter of it (*o*).

It seems to have been formerly supposed (*p*) that where no direction as to the insertion of powers was given, a Court of equity would not, in the absence of any expression from which the intention to include any powers might be inferred, authorise their introduction into a settlement. But where a testator by his will directed a settlement of real and personal property to be made, but *gave no direction as to powers*, *Romilly*, M. R., was of opinion that the testator, by simply directing a settlement, ought to be held to have intended all the *usual* powers to be included, *e.g.* usual powers of leasing, sale

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(*a*) See judgment of Lord *Cairns*, Sackville-West *v.* Holmesdale, L. R. 4 H. L. p. 577.

(*b*) Hill *v.* H., 6 Si., 145; Bedford *v.* Abercorn, 1 My. & C. 312; Peake *v.* Penlington, 2 V. & B. 311; Horne *v.* Barton, Jac. 439; Sug. Pow., 8th ed., p. 839.

(*c*) *Re* Parrott, 33 C. D. 274; Mayn *v.* M., 5 Eq. 150.

(*d*) Sampayo *v.* Gould, 12 Si. 426.

(*e*) Hill *v.* H., supra.

(*f*) Lindow *v.* Fleetwood, 6 Si. 152; Sampayo *v.* Gould, supra.

(*g*) Davenport *v.* D., 33 L. J. Ch. 33.

(*h*) Mayn *v.* M., 5 Eq. 150.

(*i*) Higginson *v.* Barneby, 2 S. & S. 518; Grier *v.* G., L. R. 5 H. L. 688.

(*k*) Bedford *v.* Abercorn, 1 My. & C. 312; but see judgment of Lord *Cairns* in Sackville-West *v.* Holmesdale, supra.

(*l*) 27 B. 367.

(*m*) Hill *v.* H., 6 Si. 141; Brewster *v.* Angell, 1 J. & W. 625; Pearse *v.* Baron, Jac. 158.

(*n*) Lindow *v.* Fleetwood, 6 Si. 152.

(*o*) Breadalbane *v.* Chandos, 2 My. & C. 711; Vaizey, Sett. 179.

(*p*) See Wheate *v.* Hall, 17 V. 80, at p. 85; Brewster *v.* Angell, 1 J. & W. 628.

and exchange, for the appointment of new trustees, together with a receipt clause, and provisions for maintenance, education, and advancement for the children or issue living at the death of the tenant for life, during their minority (*a*). As to insertion of powers in a deed to give effect to a wife's equity to a settlement, *Spirett* v. *Willows* (*b*), *Croxton* v. *May* (*c*). As to the mode of settling a wife's fortune approved by the Court, *Cogan* v. *Duffield* (*d*), *Re Gowan* (*e*), *Re Parrott* (*f*), *Nash* v. *Allen* (*g*). As to giving the wife a power of appointing a life estate to her husband, *Charlton* v. *Rendall* (*h*). As to giving her a power of appointment by will in default of issue, *Stanley* v. *Jackman* (*i*). As to inserting a hotchpot clause, *Lees* v. *L.* (*k*). As to a clause for separate use with restraint on anticipation, *Turner* v. *Sargent*, supra; *Stanley* v. *Jackman*, supra; *Re Dunnill's Trusts* (*l*), *Symonds* v. *Wilkes* (*m*), *Clive* v. *C.* (*n*). As to inserting a power of revocation, *Bankes* v. *Le Despencer* (*o*). As to giving by marriage settlement a power to intended husband or wife a general power of appointment, *Bristow* v. *Warde* (*p*), *Minton* v. *Kirwood* (*q*). As to the duplication of charges by referential words, *Hindle* v. *Taylor* (*r*), *Boyd* v. *B.* (*s*).

Where an agreement for a lease stipulates that the lease shall contain all usual and customary covenants or clauses, or where it is silent on the subject, the Court refused to insert covenants to reside on the premises, or against assignment without consent, and limited the proviso for re-entry to non-payment of rent (*t*). The fact that the subject-matter of the lease was a public-house makes no difference (*u*).

In carrying into effect executory trusts, it is now settled that where, in order to give effect to the general intention, an estate of inheritance is cut down to an estate for life, the Court, in order to give the holder of such life estate the utmost power over the

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(*a*) Turner *v.* Sargent, 17 B. 515; Wise *v.* Piper, 13 C. D. 848.

(*b*) L. R. 4 Ch. 407.

(*c*) 9 Eq. 404.

(*d*) 2 C. D. p. 49.

(*e*) 17 C. D. 778.

(*f*) 33 C. D. 274.

(*g*) 42 C. D. 54.

(*h*) 11 Ha. 296.

(*i*) 23 B. 450.

(*k*) Ir. R. 5 Eq. 549.

(*l*) Ir. R. 6 Eq. 322.

(*m*) 11 Jur. (N. S.) 659.

(*n*) L. R. 7 Ch. 433.

(*o*) 11 Si. 508.

(*p*) 2 V. 336.

(*q*) L. R. 3 Ch. 614.

(*r*) 5 De G. M. & G. 577.

(*s*) 9 L. T. 166.

(*t*) *Re* Lander, (1892) 3 Ch. 41, following Henderson *v.* Hay, 3 Bro. Ch. 632, and reviewing all the cases.

(*u*) Ibid.

Glenorchy v. Bosville.—Legg v. Goldwire.

property consistent with his estate, makes him dispunishable for waste (*a*).

Where, however, a settlement has been directed to be made upon persons in succession, expressly for life, with remainders over in tail, the Court will not insert a clause rendering the successive tenants for life dispunishable for waste, although the insertion of usual and proper provisions for giving effect to the intentions of the person directing the settlement be authorised (*b*). Nor will it where an executory trust for the settlement of freehold estates in "strict settlement" directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates (*c*). And so where a settlement of land has been directed to be made upon a woman on marriage, for her life with a restraint upon anticipation, it has been held that no clause should be added to the settlement, making her unimpeachable for waste (*d*). But an intention that successive tenants for life should be made dispunishable for waste, may be implied (*e*).

By Lord Cranworth's Act (*f*), certain powers commonly inserted in settlements, &c., were given to trustees. These sections were repealed by the Conveyancing, &c. Act, 1881, s. 71, sub-s. 1, as restricted by sub-sect. 2, and the remainder by the Settled Land Act, 1882, s. 64, sub-ss. 1 and 2 (*g*).

The Settled Estates Amendment Act, 1877 (*h*) commencing on the 1st of November, 1877, repealing and consolidating similar Acts, was intended to confer, or to enable the Court to confer, on a limited owner the powers ordinarily inserted in a well-drawn settlement (*i*). It gives the Court power to authorise leases of settled estate, sects. 4—12, or to vest such powers in trustees, sects. 13, 14, 15, and also gives the Court power to authorise sales of settled estate, and timber, sect. 16. It also gives power in the case of settlements made after the 1st of November, 1856, to tenants for life, or for a term of years

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(*a*) Leonard *v.* Sussex, 2 Vern. 526; Woolmore *v.* Burrows, 1 Si. 512; Bankes *v.* Le Despencer, 11 Si. 508; White *v.* Briggs, 15 Si. 17, 2 Ph. 583; Stanley *v.* Coulthurst, 10 Eq. 259; Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543.

(*b*) Davenport *v.* D., 1 Hem. & M. 775; Higginson *v.* Barneby, 2 Si. & S. 516; Sackville-West *v.* Holmesdale, supra.

(*c*) Stanley *v.* Coulthurst, 10 Eq. 250, reviewing the cases.

(*d*) Clive *v.* C., L. R. 7 Ch. 433.

(*e*) Sackville-West *v.* Holmesdale, L. R. 4 H. L. 543, 576.

(*f*) 23 & 24 Vict. c. 145, ss. 11 to 30.

(*g*) Sect. 64 is repealed by the Statute Law Revision Act, 1898.

(*h*) 40 & 41 Vict. c. 18.

(*i*) Per Lord *Macnaghten*, in Bruce *v.* Ailesbury, (1892) A. C., p. 364.

determinable with a life or lives or for any greater estate (unless forbidden by the settlement), and to tenant by the curtesy, or in dower, or in right of a wife seised in fee, *without application to the Court to* grant leases for twenty-one years, except of the principal mansion-house and demesnes, sects. 46, 47, 48.

But the Settled Land Acts, 1882 to 1890, are far wider in their scope, and have for their object the well-being of settled land (*a*). By them extensive general powers of sale, enfranchisement, exchange, partition, and leasing, and also special powers are given to tenants for life, amongst whom are included many limited owners of settled estates, and consequently powers for these purposes are not now usually inserted in settlements, and it is conceived that the Court would not insert any of them in a settlement under a direction to insert usual or proper powers (*b*).

4. Rectification of Settlements.

The rectification, setting aside, or cancellation of deeds, is now assigned to the Chancery Division by the Judicature Act, 1873, s. 34. If a settlement directed to be made by a testator is improperly framed, it may, as in *Glenorchy* v. *Bosville*, be rectified by the will; but, with regard to a settlement agreed to be made by articles, if both articles and settlement are made *before* (*c*) marriage, the settlement will not *in general* be controlled by the articles, because, as observed by Lord *Talbot* in the principal case of *Legg* v. *Goldwire*, "when all parties are at liberty, the settlement will be taken as a new agreement" (*c*).

And an agreement of an informal character which would have been binding if the marriage had taken place immediately on the faith of such a document only, will be considered to be superseded by a formal document prepared *before* the marriage, if that does not take place until after a considerable time has elapsed (*d*).

Evidence is, however, admissible to show that articles constituted the final agreement between the parties, and that the discrepancy between the articles and the settlement arose from mistake, and upon

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(*a*) Bruce *v.* Ailesbury, (1892) A. C. 365; *Re* Aldams' Settled Estate, (1902) 2 Ch. 46.

(*b*) Lewin (1911), p. 147: and see Vaizey, Sett. (1887), Vol. I., ch. 9, ss. 28, 32, 33; Vol. II., ch. 16, ss. 2, 4, 8.

(*c*) But see and cf. Bold *v.* Hutchinson, 5 De G. M. & G. 558, at p. 568 and authorities there cited.

(*d*) See *Re* Badcock, 17 C. D. 361; cf. Loxley *v.* Heath, 1 De G. F. & J. 489.

this being proved the Court will rectify the settlement, and make it conformable to the real intention of the parties (*a*); but "in order to justify the Court in taking such a course, it is obvious that a *clear* intention must be proved; it must be shown that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words" (*b*).

"It lies on those who seek to alter the instrument to show why it should be altered, not on those who support it to show why it should not be altered" (*c*).

The Court will only rectify a marriage settlement when the mistake is shown to be common to both parties, and it is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the deed (*d*). And the Court will be guided by what was the intention of the parties *at the time when the deed was executed*, not by a previously expressed intention, for that might have been departed from (*e*): and not by what would have been their intention if, when they executed it, the result of what they did had been present to their minds (*f*). Before relief will be granted the Court must be convinced that a common mistake has occurred. It is not enough to show that the effect of the settlement was not what the plaintiff intended (*g*). It must be shown that the actual contract and intention of the contracting parties was different from that expressed in the deed (*h*). Mere parol evidence is sufficient (*i*). But whether the uncontradicted evidence of the plaintiff is sufficient, "uncontradicted because there was no one to contradict it," quære (*k*); it has nevertheless

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(*a*) Bold *v.* Hutchinson, 5 De G. M. & G. 558, 568.

(*b*) Per *Cottenham*, C., in Breadalbane *v.* Chandos, 2 My. & C. 739.

(*c*) Per *Cotton*, L. J., Tucker *v.* Bennett, 38 C. D. p. 9; Lloyd *v.* Cocker, 19 B. 140; Milner *v.* M., Ir. R. 8 Eq. 488.

(*d*) Bradford *v.* Romney, 30 B. 431; Bentley *v.* Mackay, 31 B. 143, 4 De G. F. & J. 279; Sells *v.* S., 1 Dr. & Sm. 42; Thompson *v.* Whitmore, 1 John. & H. 268.

(*e*) Fowler *v.* F., 4 De G. & J. 250.

(*f*) Wilkinson *v.* Nelson, 9 W. R. 393; Barrow *v.* B., 18 B. 529; Clark *v.* Girdwood, 7 C. D. 9 (C. A.); Tucker *v.* Bennett, 38 C. D. p. 13 (C. A.); Maunsell *v.* M., 1 L. R. Ir. 529.

(*g*) Tucker *v.* Bennett, 38 C. D. 1.

(*h*) Ibid. p. 13.

(*i*) Johnson *v.* Bragge, (1901) 1 Ch. 28, p. 524, supra; Tomlinson *v.* Leigh, 14 W. R. 121.

(*k*) See Tucker *v.* Bennett, supra, disapproving Smith *v.* Iliffe, 20 Eq. 666; and doubting Wollaston *v.* Tribe, 9 Eq. 44.

been considered sufficient in several cases where no other evidence could be obtained (*a*). The Court, however, acts with great caution in rectifying marriage settlements, and in requiring proof of the exact contract which the parties intended to enter into, because it is impossible to undo the marriage or to remit the parties to the same positions they were in before the marriage (*b*).

A settlement will also be rectified when an improper settlement has been prepared by, or at the instance of, one of the parties, who undertook to prepare a proper one, especially if it were made contrary to the intention of the party whose property was settled (*c*); and *à fortiori* where the party who prepared the settlement in his own favour was the solicitor to the other party and the only one employed (*d*).

When the evidence clearly establishes the mistake and the true intention of the parties *at the time*, the Court will give effect to such intention by rectifying the deed in any manner that may be necessary (*e*).

Where the settlement, *though made before* marriage, is expressly mentioned to be made *in pursuance* or *in performance of the marriage articles*, the settlement will be rectified by them, and it will not be necessary to resort to evidence (*f*).

Where the settlement is made *after* marriage it will in all cases, whether it is mentioned to be made in pursuance or performance of articles or not, be controlled and rectified by them. These distinctions as to rectifying settlements by articles (subject to the qualifications laid down by *Cranworth*, C., in *Bold* v. *Hutchinson*, supra) are well stated by Lord *Talbot* in *Legg* v. *Goldwire*, supra, and "though the limitations of the settlement may agree with the words of the article, still, if it does not carry out the *intent*, the Court will reform

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(*a*) Cook *v.* Fearn, 27 W. R. 212; Edwards *v.* Bingham, 28 W. R. 89; Hanley *v.* Pearson, 13 C. D. 545; and see Lovesy *v.* Smith, 15 C. D. 655, at p. 664. In this case there were objections to the settlement arising from the relations of the parties. See further as to the various kinds of evidence upon which rectification has been ordered, Vaizey, Sett., Vol. II., p. 1570; *Re* Daniel's Sett. Trusts, 1 C. D. 375; Cogan *v.* Duffield, 2 C. D. 44; Killick *v.* Gray, 46 L. T. 583; *Re* De la Touche's Sett., 10 Eq. 599.

(*b*) See Harris *v.* Pepperell, 5 Eq. 4.

(*c*) Corley *v.* Stafford, 1 De G. & J. 238; Clark *v.* Girdwood, 7 C. D. 9.

(*d*) Lovesy *v.* Smith, 15 C. D. 655; cf. Tucker *v.* Bennett, supra.

(*e*) See Wilkinson *v.* Nelson, 7 Jur. (N.S.) 480; *Re* Bird's Trusts, 3 C. D. 214; *Re* Daniel's Sett. Trusts, 1 C. D. 375; Vaizey, Sett., Vol. II., p. 1575; Welman *v.* W., 15 C. D. 570; Seton (1901), pp. 2303 to 2307.

(*f*) West *v.* Errissey, 2 P. W. 349; Bold *v.* Hutchinson, 5 De G. M. & G. 568.

it" (*a*). Where there was a mere general recital of the articles, and they were not produced, and the settlement had been long acted upon, the Court *declined to reform it* (*b*), but where a post-nuptial settlement recited an intention to benefit the children, the Court so construed the settlement as to supply the omission to provide for daughters (*c*).

An *executed* trust, in favour of volunteers, is irrevocable by the settlor (*d*). A deed of voluntary settlement may, of course, be set aside on the ground of fraud or undue influence (*e*), and the Court has jurisdiction (now for a long time undoubted (*f*)) to rectify such a settlement on the ground that it did not carry into effect the intention entertained by the settlor at the date of the settlement (*g*). In these cases no question of *common* mistake in the carrying out of a bargain arises.

A settlement will not be reformed to the prejudice of persons who have acted upon the faith of it, such as incumbrancers (*h*). Nor will a settlement be decreed as against purchasers for value without notice of the articles (*i*). But a settlement will be decreed against purchasers with notice of the articles (*k*). But not "after a lapse of time where there is anything so equivocal or ambiguous in the articles as to render it doubtful how they ought to be effectuated" (*l*).

Lapse of time, since it destroys or weakens the evidence, may be a bar to relief (*m*); but if the evidence is clear mere delay is not a bar to reformation (*n*).

(*a*) Cogan *v.* Duffield, 2 C. D. p. 49.

(*b*) Mignon *v.* Parry, 31 B. 211.

(*c*) *Re* Daniel's Sett. Trusts, 1 C. D. 375 (C. A.).

(*d*) Notes to Ellison *v.* E., infra, pp. 882, 883; Paul *v.* P., 20 C. D. 742 (C. A.); Hall *v.* H., L. R. 8 Ch. 430.

(*e*) See notes to Huguenin *v.* Baseley, Vol. I.

(*f*) Walker *v.* Armstrong, 8 De G. M. & G. 531; Bonhote *v.* Henderson, (1895) 1 Ch. 742, at p. 748; for earlier view see per *Romilly*, M. R., in Phillipson *v.* Kerry, 32 B. 628, at p. 637; per Lord *Hatherley*, in Turner *v.* Collins, L. R. 7 Ch., at p. 342.

(*g*) James *v.* Couchman, 29 C. D. 212; Bonhote *v.* Henderson, (1895) 1 Ch. 742; 2 Ib. 202; Lackersteen *v.* L., 30 L. J. Ch. 5; Lister *v.* Hodgson, 4 Eq. 34; Dutton *v.* Thompson, 23 C. D. 278; and see infra, p. 883.

(*h*) Blackie *v.* Clark, 15 B. 595.

(*i*) West *v.* Errissey, 2 P. W. 349; Powell *v.* Price, 2 P. W. 535; Warrick *v.* W., 3 Atk. 291.

(*k*) Davies *v.* D., 4 B. 54, overruling Cordwell *v.* Mackrill, 2 Eden, 344.

(*l*) Thompson *v.* Simpson, 1 Dr. & W. 491; Abbott *v.* Geraghty, 4 Ir. Ch. R. 15, 24, 25.

(*m*) Lloyd *v.* Cocker, 19 B. p. 145; Bentley *v.* Mackay, 31 B. p. 153; Tucker *v.* Bennett, 34 C. D. p. 761, 38 C. D. p. 15.

(*n*) Wolterbeek *v.* Barrow, 23 B p. 431; *Re* Morse's Sett., 21 B. 174.

Misrepresentation, amounting to fraud, on the part of the wife before marriage is no ground for setting aside a settlement, for the marriage was the sole consideration for the settlement, and could not be returned if the settlement were set aside (*a*).

The Court will rectify a settlement upon a petition under the Trustees Relief Act (*b*), or will make a declaration that a mistake has been made (*c*), or will read the settlement as corrected (*d*).

The usual course is to direct the decree or declaration to be indorsed on the settlement, without directing any conveyance (*e*). The costs of all parties will, as a rule, come out of the corpus (*f*). A solicitor cannot be ordered to pay the costs of a suit for rectification, made necessary by his negligence (*g*).

(*a*) Johnston *v.* J., 33 W. R. 239, (C. A.).

(*b*) *Re* Bird's Trusts, 3 C. D. 214; Seton (1901), p. 1713.

(*c*) *Re* De la Touche's Sett., 10 Eq. 599.

(*d*) *Re* Daniel's Sett., 1 C. D. 375 (C. A.).

(*e*) Seton (1901), p. 1714; White *v.* W., 15 Eq. 247; Hanley *v.* Pearson, 13 C. D. 545; Seton (1901), p. 1712, Forms 8 and 9.

(*f*) Stock *v.* Vining, 25 B. 235.

(*g*) Clark *v.* Girdwood, 7 C. D. 9 (C. A.).

TRUSTS (RESULTING).

DYER *v.* DYER.

1788. 2 Cox, 92; 2 R. R. 14 (*a*).

Purchase in the name of a Son.—Advancement.—Resulting Trust (*b*).

> Copyhold granted to A. and B. his wife, and C. his elder son, to take in succession for their lives and the life of the survivor. The purchase-money was all paid by A. C. is not a trustee of his life interest for A.; but takes it beneficially as an advancement from his father. Resulting trust.

In 1737, certain copyhold premises, holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father) and Mary his wife, and the defendant William his other son, to take in succession for their lives and to the longest liver of them. The purchase-money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son. The present bill stated these circumstances, and insisted that the whole purchase-money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a Court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant

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(*a*) In the Exchequer, before Lord Chief Baron Eyre, Baron Hotham, Baron Thompson.

(*b*) As to a trust resulting on failure of the purposes for which conversion has been directed, see Ackroyd *v.* Smithson, Vol. I., p. 394.

operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause.

This case was very fully argued by Mr. *Solicitor-General* and *Ainge*, for the plaintiff; and by *Burton* and *Morris*, for the defendant.

EYRE, C. B., delivered the judgment of the Court:

The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause; and I then indeed entertained very little doubt upon the rule of a Court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case, in addition to those cited, which is that of *Rumboll* v. *R.* (*a*), on the 20th of April, 1761.

The clear result of all the cases, without a single exception, is that *the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successivè, results to the man who advances the purchase-money.* This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of equity, that this resulting trust *may be rebutted* by circumstances in evidence.

The cases go one step further, and prove that *the circumstance of*

(*a*) 2 Eden, 15.

one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides.

In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shows that the father intended an advancement; and, therefore, the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? Lord *Nottingham* (*a*) could not get over this; and he ruled that in such a case the resulting trust was not rebutted; and in *Pole* v. *P.* (*b*), Lord *Hardwicke* thought so too; and yet the rule, in a Court of equity, as recognised in other cases, is, that the father is the only judge as to the question of a son's provision; that distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to (*c*). It is then said, that a *purchase in the name of a son is a primâ facie* advancement (and, indeed, it seems difficult to put it in any other way). In some of the cases, some circumstances have appeared which go pretty much against that presumption: as where the father has entered and kept possession and taken the rents, or

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(*a*) Grey *v.* G., 2 Swans. 600; Commissioner of Stamp Duties *v.* Byrnes, (1911) A. C. 386 (P. C.).

(*b*) 1 Ves. Sen. 76.

(*c*) See Redington *v.* R., 3 Ridg. 190; Sidmouth *v.* S., 2 B. 456.

where he has surrendered or devised the estate, or where the son has given receipts in the name of the father; the answer given is, that the father took the rents as guardian of his son. Now, would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered, that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner; but I own this reasoning does not satisfy me.

In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be, that the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and, therefore, this is not a very solid argument. When the lèssees are to take *successivè*, it is said, that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and, to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea: to be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to lives in succession, the inference is very different. These are difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now, if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

It must be admitted, that the case of *Dickenson* v. *Shaw* is a case very strong to support the present plaintiff's claim. That came on in Chancery on the 22nd of May, 1770. A copyhold was granted to three lives to take in succession, the father, son, and daughter; the father paid the fine; there was no custom stated; the question was, whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine, and the daughter seven years old. It appeared that the father had leased the premises from three years to three years to the extent of nine years. On this case, Lords Commissioners *Smythe* and *Aston* were of opinion that, as the father had paid the purchase-money, the children were trustees for him. To the note I have of this case it is added, that this determination was contrary to the general opinion of the bar, and also to a case of *Taylor* v. *Alston* in this Court. In *Dickenson* v. *Shaw* there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father; if that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the Court was, that the burthen of proof lay on the child; and that the cases, which went the other way, were only those in which the estate was entirely purchased in the names of the children; if so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of *Rumboll* v. *R.* (*a*), before Lord Keeper *Henley*, on the 20th of April, 1761, where a copyhold was taken for three lives in succession, the father, and two sons; the father paid the fine; and the custom was, that the first taker might dispose of the whole estate (and his Lordship then stated that case fully). Now, this case does not amount to more than an opinion of Lord Keeper *Henley*; but he agreed with me in considering a child as a *purchaser* for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor* v. *Alston* in this Court denied the authority of *Dickenson* v. *Shaw*. That cause was heard before Lord Chief Baron *Smythe*, myself, and Mr. Baron *Burland*, and was the case of an uncle purchasing in the names of himself and a nephew and niece: it was decided in favour of the nephew and niece, not on any general idea of their taking as relations, but on the result of much

(*a*) 2 Eden, 15.

parol evidence, which was admitted on both sides; and the equity on the side of the nominees was thought to preponderate. Lord *Kenyon* was in that cause, and his argument went solely on the weight of the parol evidence; indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favour of a trust; however, the Court determined the other way on the parol evidence: that case, therefore, is not material. Another case has been mentioned, which is not in print, and which was thought to be materially applicable to this (*Bedwell* v. *Froome*, before Sir *T. Sewell*); but that was materially distinguishable from the present; as far as the general doctrine went, it went against the opinion of the Lords Commissioners. His Honor there held, that the copyholds were part of the testator's personal estate, for that it was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself; there could be no question about her being a trustee; for it was as a freehold in him for his daughter's life; but, in the course of the argument his Honor stated the common principles as applied to the present case; and ended by saying that, as *between father and child, the natural presumption was, that a provision was meant.* The anonymous case in 2 Freem. 123 corresponds very much with the doctrine laid down by Sir *T. Sewell;* and it observes, that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdon* v. *Bridges* is a strong case to this point: that is, the valuable nature of the consideration arising on a provision made for a wife or for a child; for there the question arose as against creditors.

I do not find that there are in print more than three cases which respect copyholds, where the grant is to take *successivè: Rundle* v. *R.* (*a*), which was a case perfectly clear; *Benger* v. *Drew* (*b*), where the purchase was made partly with the wife's money; and *Smith* v. *Baker* (*c*), where the general doctrine, as applied to strangers, was recognised; but the case turned on the question, whether the interest was well devised. Therefore, as far as respects this particular case, *Dickenson* v. *Shaw* is the only case quite in point; and then the question is, whether that case is to be abided by? With great

(*a*) 2 Vern. 264. (*b*) 1 P. W. 781. (*c*) 1 Atk. 385.

reverence to the memory of those two Judges who decided it, we think that case cannot be followed; that it has not stood the test of time or the opinion of learned men; and Lord *Kenyon* has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must show that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended; and I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies equally in case of a purchase in the name of the child only. Yet that case is admitted to be an advancement; indeed, if anything, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout.

This bill must, therefore, be dismissed; but, after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.

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NOTES.

1. Purchases made in the name of strangers.—Resulting trust. Voluntary conveyance or transfer, p. 834.
2. How resulting trusts may be rebutted, p. 835.
3. Purchase in name of child, wife, &c.—Advancement, p. 837.
4. Evidence to rebut or support the presumption of advancement, p. 844.
5. When purchases in names of third parties are void or voidable, p. 849.
6. Purchase with trust money. Following it, p. 849.

1. Purchases made in the name of Strangers.—Resulting Trust.

The leading case deals with resulting trusts arising on purchases in the names of third persons, and with the exception from the general rule in favour of wives and children. The foundation of the doctrine is the desire of Courts of equity to give effect to the intention of the parties, for "trusts are . . . created, or implied, or held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, express or implied (*a*). Where a trust results merely by implication of law, in cases where no intention to create a trust has been expressed, it may be rebutted by parol evidence (*b*), in other cases of resulting trusts that evidence is inadmissible (*c*).

"The clear result," said *Eyre*, C. B. (*supra in l. c.*), "of all the cases, without a single exception, is, that *the trust* of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or *successivè, results to the man who advances the purchase-money;* and it goes on a strict analogy to the rule of common law, that, where a feoffment is made without consideration, the use results to the feoffor."

And the principle applies to personal as well as real estate, to a bond (*d*), to an annuity (*e*), to a policy of insurance (*f*), to a yacht (*g*), or other chattel interest (*h*). The same rule applies whether the

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(*a*) Per *Lindley*, L. J., Standing *v.* Bowring, 31 C. D. p. 289.

(*b*) See Note 2, infra.

(*c*) Where a person is constituted trustee in terms but no trusts are declared, or when trusts are declared but fail, see Lewin (1911), p. 170.

(*d*) Ebrand *v.* Dancer, 2 Ch. Ca. 26.

(*e*) Mortimer *v.* Davies, cited Rider *v.* Kidder, 10 V. 365.

(*f*) *Re* A Policy etc., (1902) 1 Ch. 282.

(*g*) The Venture, (1908) P. 218, 229 (C. A.).

(*h*) Loyd *v.* Read, 1 P. W. 607; Sidmouth *v.* S., 2 B. 447; Garrick *v.* Taylor, 29 B. 79; Beecher *v.* Major, 2 Dr. & Sm. 431; *Ex p.* Houghton, 17 V. 253; James *v.* Holmes, 4 De G. F. & J. 470.

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conveyance is taken in one name or several jointly (*a*), or *successivè* (*b*); and a custom of a manor that a nominee should take beneficially will not hold good, as being unreasonable and contrary to the principles of resulting trusts (*c*).

The doctrine is applicable also to cases where two or more persons advance the purchase-money jointly, and take a conveyance to one of them (*d*); for "what is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances"? (*e*). But the doctrine, being founded upon equitable presumption, may be rebutted, so that on a joint conveyance to A. the purchaser and B., if there is clear evidence of A.'s intention, B. surviving A. will take beneficially (*f*).

As to joint purchasers taking a conveyance to themselves as joint tenants, see notes to *Lake* v. *Gibson*, and *Lake* v. *Craddock*, post.

If on a grant of copyholds to B., C., and D., *successivè* for their lives, the fine be paid by A., the equitable interest therein would result to A.; and it was ultimately decided that upon his death intestate, the personal representative of A. was entitled thereto (*g*). It is to be observed that there never was a general occupancy of a *trust* either of freeholds or copyholds (*h*). Neither s. 12 of the Statute of Frauds nor s. 9 of 14 Geo. II. c. 20 applied to legal estates in copyholds (*i*), but by the Wills Act, 1837 (*k*), it is enacted that if there be no special occupant of any estate *pur autre vie*, whether freehold or copyhold, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant.

Cases in which no Trust will Result.—Lord *Hardwicke* in *Crop* v.

(*a*) See *Ex p.* Houghton, 17 V. 253, 11 R. R. 73; Rider *v.* Kidder, 10 V. 360.

(*b*) See Howe *v.* H., 1 Vern. 415; Withers *v.* W., Amb. 151; Smith *v.* Baker, 1 Atk. 385.

(*c*) Lewis *v.* Lane, 2 My. & K. 449, overruling Edwards *v.* Fidel, 3 Madd. 237; Jeans *v.* Cooke, 24 B. 513.

(*d*) Wray *v.* Steele, 2 V. & B. 388.

(*e*) And see *Re* Ryan, 3 Ir. R. Eq. 237.

(*f*) Garrick *v.* Taylor, 4 De G. F. & J. 159; 10 W. R. 49.

(*g*) See Howe *v.* H., 1 Vern. 415; Rundle *v.* R., 2 Vern. 252, 264; Withers *v.* W., Amb. 151; Goodright *v.* Hodges, Watk. Cop. 227; Rumboll *v.* R., 2 Eden, 15.

(*h*) Penny *v.* Allen, 7 De G. M. & G. 409, at p. 422; Castle *v.* Dod, Cro. Jac. 200.

(*i*) Withers *v.* W., Amb. 152; and see Zouch d. Forse *v.* F., 7 East, 186.

(*k*) 1 Vict. c. 26, s. 6. See Reynolds *v.* Wright, 25 B. 100, 2 De G. F. & J. 590; Croker *v.* Brady, 4 L. R. Ir. 653; Lewin (1904), p. 181.

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Norton (*a*) held, that since the consideration for the renewal, taken in the name of X., of a lease for lives, was partly the surrender of the old lease by X., and only partly a sum of money advanced by Y., there was no resulting trust for Y. (*b*). There will be no resulting trust if the policy of an Act of Parliament would be thereby defeated. Thus, it was held that no trust resulted in favour of a person advancing the purchase-money of a ship registered in the name of another; for the register, according to the policy of the old Registry Acts, was conclusive evidence of ownership, both at law and in equity. "The Registry Acts," says *Eldon*, C., "were drawn upon this policy: that it is for the public interest to secure evidence of the title to a ship, from her origin to the moment in which you look back to her history, how far throughout her existence she has been *British* built and *British* owned; and it is obvious, that, if where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these Acts may be defeated" (*c*). There were, however, some exceptions to the rule under the old Registry Acts, for instance, where a member of a firm registered a ship in his own name, he was a trustee for the firm (*d*); and where a person having no interest in a ship transferred it to a person, in whose name it was registered by mistake, the rightful owner was not deprived of his property therein (*e*). So, if letters of administration were obtained to the estate of a shipowner, and the administrator transferred the ship into his own name, and afterwards a will was discovered, and probate granted to the executor, it could not be contended that the executor was precluded from obtaining the ship, because another person had *bonâ fide*, but by mistake, been registered as owner (*f*).

Under the Merchant Shipping Act, 1894 (*g*), as under the repealed Acts, 1854—1880 (*h*), equities are recognised and may be enforced (*i*). So also are they under the Patents and Designs Act, 1907 (*k*). And by the Companies Act, 1862, s. 30, it was provided, and is

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(*a*) 9 Mod. 233, 235.

(*b*) Cf. Aveling *v.* Knipe, 19 V. 445.

(*c*) *Ex p.* Yallop, 15 V. 68, 10 R. R. 24; see also *Ex p.* Houghton, 17 V. 251, 11 R. R. 73; Curtis *v.* Perry, 6 V. 739, 4 R. R. 28; Slater *v.* Willis, 1 B. 354.

(*d*) Holderness *v.* Lamport, 29 B. 129.

(*e*) Ib.

(*f*) Ib. See also and consider Armstrong *v.* A., 21 B. 71, 78.

(*g*) 57 & 58 Vict. c. 60, ss. 56 & 57.

(*h*) 17 & 18 Vict. c. 104, s. 37, amended by 25 & 26 Vict. c. 63, s. 3; 43 & 44 Vict. c. 18, s. 2.

(*i*) See Chasteauneuf *v.* Capeyron, 7 A. C. p. 132. The Venture, (1908) P. 218, 229 (C. A.).

(*k*) 7 Edw. 7, c. 29, s. 71 (3).

now provided by the Companies (Consolidation) Act, 1908, s. 27, that no notice of any trust is to be entered in the register; nevertheless, as between the registered owner and third parties the equitable title will be duly recognised (*a*).

Illegality (p. 848, infra).—A trust will not, it seems, result in favour of a person who has purchased an estate in the name of another in order to give him a vote in electing a member of Parliament (*b*). But in all these cases in which the illegality of the transaction is set up in order to deprive a person of relief in equity, there must be such a degree of illegality in the transaction as to be free from all doubt. Thus in *Barton* v. *Muir* (*c*), a trust was held to result in favour of a person who had purchased lands in New South Wales in the name of a third party, such transaction being neither immoral nor contrary to public policy nor to the policy of the particular Act. But if the transaction is illegal or against conscience, then the Court may refuse to move in the matter, and the maxim *melior est conditio possidentis* will prevail (*d*). Thus, in *Worthington* v. *Curtis*, supra, a father insured the life of his son for 500*l.*, alleging that it had been agreed between himself and his son that he should make such assurance in consideration of his paying a legacy to his son. The policy was taken on the life of the son in favour of his executors and administrators. All the premiums on the policy were paid by the father out of his own money. The son died intestate; administration was granted to the father. The insurance company paid the 500*l.* to the father. Creditors then commenced an action against him for administration, claiming that this policy money was an advancement to the son, or that if he claimed it for himself it was illegal, under 14 Geo. 3, c. 48. The Court of Appeal held that the evidence rebutted the presumption in favour of advancement, and that the statute was a defence which was available to the company only; but that if that were not so, and there was any illegality in the matter, then the maxim, *melior est conditio, &c.*, applied, and the father who had their money must keep it (*e*). But if property is produced by the payments of A. of which he has declared a trust in

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(*a*) Shropshire Union, &c. Co. *v.* The Queen, L. R. 7 H. L. 496; G. E. Ry. Co. *v.* Turner, L. R. 8 Ch. 149.

(*b*) Groves *v.* G., 3 Y. & J. 163, 175. Cf. Crichton *v.* C., 13 R. 770.

(*c*) L. R. 6 P. C. 143.

(*d*) Brackenbury *v.* B., 2 J. & W. 391; *Ex p.* Yallop, 15 V. 71, 10 R. R. 24; Worthington *v.* Curtis, 1 C. D. 419; *Re* Great Berlin, &c. Co., 26 C. D. 616.

(*e*) And see *Re* A Policy, (1902) 1 Ch. 282; A.-G. *v.* Murray, (1904) 1 K. B. 165.

favour of B., and the trust in favour of B. fails because by reason of B.'s criminal act it would be against public policy to enforce it, a resulting trust will arise in favour of A. (*a*). And as to the effect of illegality upon the presumption of advancement, see *Rider* v. *Kidder* (*b*), *Soar* v. *Foster* (*c*). If, however, a father takes a policy on his own life in the name of his son, paying the premiums thereon out of his own money, it will be, in the absence of evidence of a contrary intention, held to be an advancement (*d*). In *Field* v. *Lonsdale* (*e*), which is not inconsistent with the principle of *Ex p. Yallop* (*f*), a person having deposited moneys in his own name in a savings bank to the full extent allowed by Act of Parliament (*g*), made further deposits to an account in his own name "in trust for" his sister, but no notice of the investment was given to her. By the terms of the Act he retained a control over the whole fund. *Langdale*, M. R., held that the only intention was to evade the provisions of the Act, and that on the death of the depositor his sister was not entitled. That is to say, it being the manifest intention of the depositor, as the Court held, not to create a trust, no trust could be presumed (*h*); or if there was anything against public policy in the transaction, which does not seem to have been suggested, then the Court held its hand, and left the money where it was.

Proving Payment of the Purchase-Money.—If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made. Thus, if A. sold an estate to C., and *the consideration was expressed to be paid by B.*, and the conveyance made to B., the Court would allow parol evidence to prove the money paid by C. (*i*). We may, therefore, consider that these authorities overrule the older cases in which it was held that parol evidence could not be admitted to prove payment of purchase-money so as to raise a resulting trust, on the ground that the admission of such evidence would be contrary to the Statute of Frauds (*k*), for the trust which results to the

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(*a*) Cleaver *v.* The Mutual, &c. (the Maybrick Insurance Case), (1892) 1 Q. B. p. 158.

(*b*) 10 V. 360.

(*c*) 4 K. & J. 152.

(*d*) *Re* Richardson, 47 L. T. 514.

(*e*) 13 B. 78.

(*f*) 15 V. 71, 10 R. R. 24.

(*g*) 9 Geo. 4, c. 92.

(*h*) Lewin (1904), p. 85.

(*i*) Knight *v.* Pechey, Dick. 327; Sug. V. & P., 910, 11th ed.; Lench *v.* L., 10 V. 517; see also Ryall *v.* R., 1 Atk. 59; S. C. Amb. 413; Willis *v.* W., 2 Atk. 71; Lane *v.* Dighton, Amb. 409; Groves *v.* G., 3 Y & J. 163.

(*k*) 29 Car. 2, c. 3.

person paying the purchase-money and taking a conveyance in the name of another, is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute (*a*).

Where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly (*b*). Lord *Hardwicke*, however, in *Willis* v. *W.* (*c*), thought that parol evidence might be admitted to show the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which made it impossible for him to be purchaser (*d*). It is said by Mr. Sanders, in his Treatise on Uses and Trusts (*e*), "that, after the death of the supposed nominal purchaser, parol proof can in no instance be admitted against the express declaration of the deed." It does not, however, appear that the Statute of Frauds is violated by admitting parol proof of the advance of the purchase-money after the death of the nominal purchaser, any more than it is by allowing such proof in his lifetime (*f*).

If the nominal purchaser admits the payment of the purchase-money by the real purchaser, a trust will doubtless result (*g*); and even although he, by answer to a bill, denied such payment, parol evidence is, it appears, admissible in contradiction to it (*h*).

In *Bartlett* v. *Pickersgill* (*i*) parol evidence was held inadmissible to prove a verbal agreement of an agent to purchase an estate for his principal, where the agent having purchased the estate for himself, *with his own money*, had, by his answer, denied the agreement. In that case Lord Keeper *Henley*, clearly drawing the distinction between the admission of evidence to prove the advance of purchase-money, where the trusts result by operation of the law, and are exempted from the Statute of Frauds (*k*), and the admission of

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(*a*) See 29 Car. 2, c. 3, s. 8.

(*b*) Newton *v.* Preston, Pr. Ch. 103; Gascoigne *v.* Thwing, 1 Vern. 366; Willis *v.* W., 2 Atk. 71; Goodright *v.* Hodges, Watk. Cop. 227; Groves *v.* G., 3 Y & J. 163.

(*c*) 2 Atk. 72.

(*d*) See also Lench *v.* L., 10 V. 518; Heard *v.* Pilley, L. R. 4 Ch. 552.

(*e*) Vol. I. p. 354, 5th edit.

(*f*) See Lench *v.* L., 10 V. 511, 517; Sugd. V. & P. 910, 11th ed. Its admissibility cannot be affected, although its weight may be: Lewin (1911), p. 190; cf. Mercier *v.* M., (1903) 2 Ch. 98.

(*g*) Ryall *v.* R., 1 Atk. 58; Lane *v.* Dighton, Amb. 413.

(*h*) See Gascoigne *v.* Thwing, 1 Vern. 366; Newton *v.* Preston, Pr. Ch. 103; Edwards *v.* Pike, 1 Eden, 267; Cooth *v.* Jackson, 6 V. 39, 10 R. R. 10, 190, nom. Innes *v.* I.; *sed vide* Skett *v.* Whitmore, 2 Freem. 280.

(*i*) 1 Eden, 515, 1 R. R. 1; Rochefoucauld *v.* Boustead, infra.

(*k*) 29 Car. 2, c. 3, s. 8.

parol evidence to prove an agreement, said, that to allow parol evidence in the latter case would be to overturn the statute (*a*). This case, however, has been overruled by *Rochefoucauld* v. *Boustead* (*b*). There the plaintiff's case was that the defendant had purchased estates as trustee for her subject to a lien for his advances. The defendant pleaded, *inter alia*, that the estates were conveyed to him as beneficial owner, and that the alleged trust was not evidenced by any writing signed by the defendant, and that the Statute of Frauds was a defence. *Kekewich*, J., held that no trust was proved, and dismissed the action on the first ground. The Court of Appeal were of opinion that the evidence completely proved that the defendant purchased as a trustee for the plaintiff, and held that even if certain letters signed by the defendant did not contain enough to satisfy the Statute of Frauds, parol evidence was admissible; and as the whole of the evidence taken together established that the defendant had purchased as a trustee, the plaintiff succeeded. *Lindley*, L. J., in delivering the judgment of the Court, said, "It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself." His Lordship then expressly declared that *Bartlett* v. *Pickersgill* could no longer be regarded as law (*c*).

Voluntary Conveyances and Transfers.—On a voluntary conveyance or transfer of the legal estate or interest in any property, whether real or personal, to a stranger (*d*) a resulting trust of the whole beneficial interest is *presumed* in favour of the grantor or transferor in the absence of any expression of intention that the grantee or transferee is to take beneficially. It is submitted that this is the

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(*a*) See Chadwick *v.* Maden, 9 Ha. 188; see, however, Fell *v.* Chamberlain, Dick. 484.

(*b*) (1897) 1 Ch. 196.

(*c*) And see Heard *v.* Pilley, L. R. 4 Ch. 548; Cave *v.* Mackenzie, 46 L. J. Ch. 564; Chattock *v.* Muller, 8 C. D. 177; Nicholson *v.* Mulligan, 3 Ir. R. Eq. 308.

(*d*) I.e. to a person other than the wife or a child of the transferor.

law as to both real and personal estate; but as appears below, there is a conflict of judicial opinion as to the existence of the presumption in both species of property.

Real Estate.—In *Duke of Norfolk* v. *Browne* (*a*), *Somers*, L. K., held that on a voluntary grant of the next avoidance of a benefice there was a resulting trust to the grantor. No trusts were declared, and the grantee did not even know of the making of the grant. This decision is in accordance with the earlier decision of *Nottingham*, C., in *Elliot* v. *E.* (*b*), with his clearly expressed dicta in *Grey* v. *G.* (*c*), and with the decisions that contrary to the general rule a resulting trust would not arise when the voluntary conveyance was to a child unprovided for (*d*). On the other hand there are emphatic dicta to the contrary in the judgments of *Hardwicke*, C., in *Young* v. *Peachey* (*e*) and *Lloyd* v. *Spillet* (*f*). The former case was decided on the ground of fraud. In the latter case the reservation of a power of revocation by the donor was relied on by *Hardwicke*, C., as inconsistent with a resulting trust to the donor. It is however clear that he based his decision not solely upon this; but mainly on the ground, not necessary for his decision, that since the Statute of Frauds the Court was bound to hold that a trust did not by implication of law result on every voluntary conveyance of land to a stranger. This view receives further support from a dictum of *James*, L. J., in *Fowkes* v. *Pascoe* (*g*).

Personal Estate.—It is clear that a voluntary transfer of stock into the names of the transferor and a stranger makes that stranger a trustee by implication for the transferor. In *Standing* v. *Bowring* (*h*) the plaintiff *transferred* Consols into the joint names of herself and her godson, to whom she was not *in loco parentis*. It was held that the godson was a trustee for the plaintiff.

(*a*) (1697) Pr. Ch. 80; and see (1735) Rex *v.* Williams, Bunb. 342 (leaseholds).

(*b*) (1677) 2 Ch. Cas. 231.

(*c*) (1677) 2 Swans. at p. 598, extracted from Lord Nottingham's MSS.; and see also per *Jessel*, M. R., in Strong *v.* Bird, 18 Eq. 315, at p. 318, cited infra, p. 867.

(*d*) Elliot *v.* E., ubi supra; Jennings *v.* Selleck (1687), 1 Vern. 467 (leasehold); and see infra, p. 845.

(*e*) (1741) 2 Atk. 254.

(*f*) (1740) 2 Atk. 148; Barn. C. 384.

(*g*) L. R. 10 Ch. 343, at p. 348. Text book writers differ greatly upon this question; see for the view adopted in the text, Lewin (1911), p. 164; Williams, R. P., 21st edit., pp. 183, 184; against Sanders, Uses, 5th edit., 365, whose statement was accepted by the late Mr. Joshua Williams, see Williams, R. P., 15th edit., p. 195.

(*h*) 31 C. D. 282; see Batstone *v.* Salter, L. R. 10 Ch., 431, and cf. *Re* Howes, 21 T. L. R. 501.

The same result would apparently follow where the transfer is made to a stranger alone. This has, however, been doubted. In *George* v. *Howard* (*a*), *Richards*, C. B., said, "if I deliver over money or transfer stock to another, even although he should be a stranger, it would be *primâ facie* a gift." In that case an intestate had transferred stock into the joint names of himself and the husband of one of his nieces, and, as it was found, with an expressed intention to give. In *Fowkes* v. *Pascoe* (*b*) a lady purchased stock in the names of herself and the son by a second marriage of her deceased son's widow. *Jessel*, M. R., (*c*) held that there was a resulting trust, and said that he "did not understand that the law of the Court made any difference between a transfer and a purchase—a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favour of the beneficial owner." The Court of Appeal reversed the decision of *Jessel*, M. R., on the facts, holding that the evidence rebutted any resulting trust, *James*, L. J., assuming for the purpose of his judgment that there was no distinction between a transfer and a purchase of stock.

2. How Resulting Trusts may be Rebutted.

All resulting trusts which arise simply from equitable presumption, may be rebutted by parol evidence: thus it may be shewn that it was the *intention*, at the time of the purchase, of the person who advanced the purchase-money, that the person to whom the property was conveyed or transferred either solely or jointly with such person should take beneficially (*d*). And the person who paid the money cannot alter such intention at a subsequent period (*e*).

(*a*) 7 Price, 646, at p. 651.

(*b*) L. R. 10 Ch. 343.

(*c*) Ibid., at p. 345.

(*d*) Goodright *v.* Hodges, 1 Watk. Cop. 227; Rider *v.* Kidder, 10 V. 364; Rundle *v.* R., 2 Vern. 252; see Order, n. (1) Ib; Redington *v.* R., 3 Ridg. P. C. 181; Deacon *v.* Colquhoun, 2 Dr. 21; Wheeler *v.* Smith, 1 Gif. 300; Nicholson *v.* Mulligan, 3 Ir. R. Eq. 308; *Re* Rowe, 58 L. J. Ch. 703; Fowkes *v.* Pascoe, supra; Standing *v.* Bowring, supra.

(*e*) Groves *v.* G., 3 Y. & J. 163; Redington *v.* R., 3 Ridg. P. C. 106; Gooch *v.* G., 62 L. T. 384.

Dyer v. Dyer.

These trusts may be rebutted as to part, and prevail as to the remainder. Thus, where a person has advanced the purchase-money, and has taken a transfer of stock or the conveyance of an estate in the name of a stranger, upon proof of the intention of the person advancing the money to confer upon the nominee a life interest in the stock or estate, the resulting trust will be rebutted as to the life interest, but will prevail as to the remainder (*a*). And the resulting trust may prevail as to a life interest, but be rebutted as to the remainder. This is often the case when a purchase or transfer of stock has been made by the purchaser in or to the joint names of himself and a stranger (*b*). And in such cases, where the presumption in favour of a resulting trust is either wholly or partially rebutted by evidence, any subsequent purchase or transfer in the same name or names will be considered as made for the same purpose (*c*).

The mere receipt of the income of the property transferred is not of itself sufficient to show that the transferor did not intend to confer a beneficial interest on the transferee (*d*).

It seems that statements on the part of the person making the purchase, evidencing an intention to confer some undefined benefit not shown to be acted on, will not be sufficient to rebut a resulting trust (*e*), and *à fortiori* if the actual enjoyment of the property is inconsistent with the intention expressed. But parol evidence of interested parties is admissible to rebut a resulting trust, for "where the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say, 'listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances'" (*f*).

The presumption of a resulting trust will not be raised, after acquiescence for a great length of time in the enjoyment of the

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(*a*) Lane *v.* Dighton, Amb. 409; Rider *v.* Kidder, 10 V. 368; Benbow *v.* Townsend, 1 My. & K. 501.

(*b*) See Fowkes *v.* Pascoe, Standing *v.* Bowring, supra, p. 834.

(*c*) See Fowkes *v.* Pascoe, L. R. 10 Ch., at p. 354, judgment of *Mellish*, L. J.

(*d*) George *v.* Howard, 7 Price, 646; Christy *v.* Courtenay, 13 B. 96; Batstone *v.* Salter, 19 Eq. 250, L. R. 10 Ch. 431.

(*e*) Nicholson *v.* Mulligan, 3 Ir. R. Eq. 308, 323.

(*f*) Per *James*, L. J., in Fowkes *v.* Pascoe, L. R. 10 Ch., at p. 349; cf. *Re* Scott, (1903) 1 Ch. 1.

property by the person in whose name it was purchased, by the person advancing the purchase-money (*a*).

Where there is an express trust declared, upon a purchase made in the name of strangers (*b*), though but by parol, there can be no resulting trust; for resulting trusts, though saved by the Statute of Frauds (*c*), are only saved and left as they were before the statute, and a bare declaration by parol, before then, would have prevented any resulting trust (*d*).

3. Purchase in Name of Child, Wife, &c.—Advancement.

A purchase by a father in the name of his child (*e*), of a husband in the name of a wife (*f*), is a *circumstance of evidence* (see the principal case) which displaces the equitable presumption of a resulting trust. It is evidence of an *intention* to benefit the wife or child, and of course may be met with other evidence tending to show a contrary intention, see infra, p. 844. If this be so, it would seem more accurate to say that such a relationship between the donor and the donee is *evidence primâ facie* of an intention to make a gift, rather than that it raises a *presumption* of advancement; for presumption of law, or resulting trust, arises only where there is no other explanation or evidence of what was intended by the transaction (*g*). "I remember," says Lord *Eldon*, "the case of *Dyer* v. *D.*, which was very fully considered; and the Court meant to establish this principle, viz., admitting the clear rule that, where A. purchases in the name of B., A. paying the consideration, B. is a trustee, notwithstanding the Statute of Frauds (*h*), that rule does not obtain where the purchase *is in the name of a son; that purchase is an advancement primâ facie;* and in this sense, that this principle of law and presumption is not to be frittered away by nice refinements.

(*a*) Delane *v.* D., 7 Bro. P. C. 279. See also, Groves *v.* G., 3 Y. & J. 172; Clegg *v.* Edmondson, 8 De G. M. & G. 787.

(*b*) Ayerst *v.* Jenkins, 16 Eq. 275, distinguished in Phillips *v.* Probyn, (1899) 1 Ch. 811.

(*c*) 29 Car 2, c. 3, sect. 8.

(*d*) See Bellasis *v.* Compton, 2 Vern. 294.

(*e*) Dyer *v.* D., l.c.

(*f*) Kingdon *v.* Bridges, 2 Vern. 67; Rider *v.* Kidder, 10 V. 360; *Re* Eykyn's Trusts, 6 C. D. 115.

(*g*) See judgment of *Eyre*, C. B., in the principal case, of *Cairns*, C., in Batstone *v.* Salter, L. R. 10 Ch. 431, at p. 433; and of *Jessel*, M. R., in Bennet *v.* B., 10 C. D., p. 476.

(*h*) 29 Car. 2 c. 3.

Therefore, if the purchase was of a fee simple immediately, *primâ facie* the son would take; so, if it was the purchase of a reversion; and it is very difficult, upon the mere circumstance of the proximity or possible remoteness of possession, to do that away. Nothing could be stronger than the circumstance in *Dyer* v. *D.*, that the purchaser had actually devised it. *He certainly took it to be his own; but he happened to mistake the rule*" (*a*).

The presumption also arises *primâ facie* in favour of any person with regard to whom the person advancing the money has placed himself *in loco parentis* (*b*); and for a definition of this term, see the judgment of *Jessel*, M. R., in *Bennet* v. *B.* (*c*), and of *James*, L. J., in *Fowkes* v. *Pascoe* (*d*). Thus in *Beckford* v. *B.* (*e*) an illegitimate son; in *Ebrand* v. *Dancer* (*f*), a grandchild; and in *Currant* v. *Jago* (*g*), the nephew of a wife, were held entitled to property purchased in their names, on the ground that an *advancement* was intended. In *Standing* v. *Bowring* (*h*), a lady was held not to stand *in loco parentis* to a person who was the nephew of her first husband and her godson, but the resulting trust was there displaced by evidence establishing a gift.

But the mere fact that a grandfather has placed himself *in loco parentis* towards his *illegitimate* grandson during the life of his father, will not of itself alone raise a presumption that a purchase in the name of such illegitimate grandson was intended for his advancement (*i*).

The presumption also arises upon the purchase in the name of a wife (*k*); or when there is a purchase by a husband in the joint

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(*a*) Finch *v.* F., 15 V. 50; see also Murless *v.* Franklin, 1 Swans. 17, 18; Grey *v.* G. 2 Swans. 597; Sidmouth *v.* S., 2 B. 454; Christy *v.* Courtenay, 13 B. 96; Williams *v.* W., 32 B. 370; Tucker *v.* Burrow, 2 Hem. & M. 515, 524; and see Keats *v.* Hewer, 13 W. R. 34.

(*b*) See notes to *Ex parte* Pye, ante, p. 393. *Re* Orme, 50 L. T. 54.

(*c*) 10 C. D., p. 477.

(*d*) L. R. 10 Ch., at p. 350.

(*e*) Lofft. 490.

(*f*) 2 Ch. Ca. 26.

(*g*) 1 Coll. Ch. R. 261.

(*h*) 31 C. D. 282.

(*i*) Tucker *v.* Burrow, 2 Hem. & M. 515; and see Forrest *v.* F., 13 W. R. 380; Hait *v.* H., (1877) W. N., 184; and cf. Powys *v.* Mansfield, 3 My. & C. 359.

(*k*) Kingdon *v.* Bridges, 2 Vern. 67; Christ's Hospital *v.* Budgin, 2 Vern. 683; Back *v.* Andrew, 2 Vern. 120; Glaister *v.* Hewer, 8 V. 199; Rider *v.* Kidder, 10 V. 367; and Lorimer *v.* L., 10 V. 367 (n.); Low *v.* Carter, 1 B. 426; Bone *v.* Pollard, 24 B. 283; Hepworth *v.* H., 11 Eq. 10; and see Gosling *v.* G., 3 Dr. 335; Hoyes *v.* Kindersley, 2 Sm. & G. 195.

names of himself and his wife (*a*); or in the joint names of himself and his wife and child (*b*). And where, as in *Re Eykyn's Trusts* (*c*), E. transferred certain railway debentures and also stock into his own name, his wife's name, and that of a stranger and strangers, both of whom were trustees of her settlement, it was held an advancement to the wife, and not an augmentation of the funds in settlement.

Where the husband makes an investment, such as money or stock, in the names of himself and his wife, it is an advancement for the benefit of the wife absolutely if she survives her husband (*d*), but if he survives her, then it reverts to him as joint tenant with his wife (*e*). Where the investment is in the name of the husband, wife, *and a stranger*, the stranger must be a trustee for the survivor of the husband and wife (*f*). See p. 848, infra.

But although "any moralist would say that a man was bound to make provision for the woman with whom he had cohabited," per *Page-Wood*, V.-C., *Soar* v. *Foster* (*g*), yet equity does not raise the presumption of advancement when the purchaser makes the purchase in the names of himself and a woman with whom he was cohabiting (*h*), or with whom he had gone through the mere form of marriage, as in the case of a marriage with a person within the prohibited degrees (*i*).

It seems formerly to have been held that the *presumption* of advancement will not arise from the mere purchase by a *married woman* out of her separate estate in the names of her children, because a married woman was under no legal obligation to provide for her children (*k*). But it has been held upon proof of the *intention* to advance by married woman making a purchase out of her separate estate in the name of her niece, that the latter was absolutely entitled to the property so purchased (*l*).

A widowed mother is, it seems, a person standing in such a

(*a*) *Re* Gadbury, 11 W. R. 895.

(*b*) Devoy *v.* D., 3 Sm. & Gif. 403, cf. Smith *v.* Warde, 15 Si. 56.

(*c*) 6 C. D. 115.

(*d*) *Re* Young, 28 C. D. 705.

(*e*) *Re* Eykyn's Trusts, 6 C. D. 118; Dummer *v.* Pitcher, 2 My. & K. 262.

(*f*) *Re* Eykyn's Trusts, 6 C. D. 119. See also Fowkes *v.* Pascoe, L. R. 10 Ch. 343.

(*g*) 4 K. & J., p. 161.

(*h*) Rider *v.* Kidder, 10 V. 360.

(*i*) See, e.g., Soar *v.* Foster, 4 K. & J. 152, a case arising after Lord Lyndhurst's Act, 5 & 6 Will. 4, c. 54, and before the Deceased Wife's Sister's Marriage Act 1907.

(*k*) *Re* De Visme, 2 De G. J. & S. 17.

(*l*) Beecher *v.* Major, 2 Dr. & Sm. 431, 13 W. R. 1054.

relation to her child as to raise the presumption in favour of her child : see *Sayre* v. *Hughes* (*a*). There Susannah Barling, widow, after making her will in favour of her two daughters, transferred East India Stock, which had stood in her own name, into the names of herself and her unmarried daughter, and died. *Stuart*, V.-C., held that there was a presumption of intended benefit to the unmarried daughter, which was unrebutted, and that the stock belonged absolutely to her, and after referring to *Re De Visme* (*b*), said :—"But maternal affection, as a motive of bounty is, perhaps, the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation and not a legal one. In *Dyer* v. *D.*, *Eyre*, C. B., shewed that the relationship between parent and child is only a circumstance of evidence * * * The word 'father' does not occur in Lord Chief Baron *Eyre's* judgment, and it is not easy to understand why a mother should be presumed to be less disposed to benefit her child in a transaction of this kind than a father." And see *Garrett* v. *Wilkinson* (*c*), where *Shadwell*, V.-C., assumes that the rule between mother and son is the same as that between father and son.

This case was followed by *Batstone* v. *Salter* (*d*), where a widow had transferred stock into the names of herself, her daughter, and the daughter's husband, and it was held by *Hall*, V.-C., upon the evidence—which consisted of the statement of the defendant in his answer, unsupported by any other evidence, that the transferor intended to benefit him (*e*)—that the son-in-law was entitled to the stock. Upon appeal (*f*), this decision was affirmed by *Cairns*, C., who decided the case upon the ground of a presumption of advancement, for his Lordship in giving judgment says : "Whatever presumption there is in favour of an unmarried daughter in the case of a transfer to her, the same presumption arises in this case, where the transfer was to a married daughter and her husband."

In *Fowkes* v. *Pascoe* (*g*), a testatrix, a widow, purchased stock in the name of herself and the son by a second marriage of her

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(*a*) 5 Eq. 376, commented on in Bennet *v.* B., 10 C. D. 474 ; and discussed in *Re* Orme, 50 L. T. 51.

(*b*) 2 De G. J. & S. 17.

(*c*) 2 De G. & Sm., p. 246.

(*d*) 19 Eq. 250.

(*e*) See L. R. 10 Ch., p. 432.

(*f*) L. R. 10 Ch. 431.

(*g*) L. R. 10 Ch. 343.

deceased son's widow. On evidence which very clearly established the fact that the testatrix looked upon her daughter-in-law and her children as if they were her own, it was held by *James* and *Mellish*, L. JJ., overruling *Jessel*, M. R., that the evidence in favour of gift, and against trust, was conclusive.

In the case, however, of *Bennet* v. *B.* (*a*), a widowed mother who had a jointure of 1,000*l.* a year agreed with her son, who was entitled to the income of the estate upon which the jointure was charged, to apply to an insurance office for a loan of 3,000*l.* upon a mortgage of her jointure and a policy on her life. This loan was made for the son's benefit, and was handed over to him. He predeceased his mother, and she had to pay the premiums. She claimed, as a creditor, against his estate for 3,000*l.* *Jessel*, M. R., held that there was strong evidence to show that a loan, and not a gift, was intended, and therefore the presumption that it was a gift did not exist (*b*). Referring to *Sayre* v. *Hughes* (*c*), the learned Judge said, "I should have had no hesitation in deciding that case in the same way as the Vice-Chancellor did, having regard to the evidence; I should *not* have arrived at the same conclusion *irrespective of the evidence.* We then arrive at this conclusion: that in the case of a mother—this is the case of a *widowed* mother—it is easier to prove a gift than in the case of a stranger; in the case of a mother very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child" (*d*).

In a previous case the same Judge decided that the presumption of a gift does not arise in the case of a *stepmother*, but he seems there to have been of opinion that it did so in the case of a mother (*e*).

The alteration in the law by the Married Women's Property Act, 1882, by which a married woman having separate property is rendered liable to the maintenance of her children (sect. 21), may perhaps (*f*) in case of a purchase by her in the name of a child give rise to the presumption of advancement.

Where a contract is entered into to purchase real property in the name of a wife or child, although the wife or child as volunteers

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(*a*) 10 C. D. 474.

(*b*) Ib. p. 480.

(*c*) 5 Eq. 376, supra, p. 840.

(*d*) Batstone *v.* Salter, supra, was not cited. And see *Re* Orme, l.c., supra.

(*e*) Todd *v.* Moorhouse, 19 Eq. 69, 71.

(*f*) But see *Re* Ashton, (1897) 2 Ch. 574, and ante, pp. 385, 393.

could not file a bill for specific performance of the contract, nevertheless if the vendor enforces, or is entitled to payment out of the husband's estate, the conveyance must be made to the wife or child (*a*). In *Drew* v. *Martin* (*b*), an agreement for the purchase of land was entered into in the names of the husband and wife, and the husband died before the whole of the purchase-money was paid. Upon an inquiry in an administration suit as to the real property of the husband, it was held by *Page-Wood*, V.-C., that it did not include the purchased estate, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate (*c*).

In *Re Whitehouse* (*d*), G. W. during his father's lifetime contracted in March, 1885, with C. to purchase a business for 1,500*l.*; 300*l.* was to be paid in cash down, the residue by instalments, secured by the joint and several promissory notes of G. W. and his father. The father lent G. W. the 300*l.*, and joined with him in giving the notes, all of which were dated January, 1885. G. W. took possession and carried on the business, and the father paid 144*l.* for principal and interest due on the first note, which was payable six months after date. By his will dated October, 1885, the father settled one-fifth share of his estate on G. W. for life, remainder to his children, and directed that before participating in his share under the will G. W. should repay all sums advanced to him during his lifetime, or should have such sums deducted from his share. In May, 1886, the father died, and a claim for the balance of the purchase-money was carried in against his estate and paid. It was contended, *inter alia*, that the sums paid by the father and his executors were "advances" by the father to the son, but the Court held that the case differed from *Redington* v. *R.* (*e*) and *Drew* v. *Martin* (*f*), inasmuch as in these cases there was a contract by the testator himself that the purchase-money should be paid by himself or out of his estate, whereas in this case the testator was not a party to the contract of purchase, as in *Drew* v. *Martin*, nor was there any evidence that there was a contract by the father to indemnify his son, as in *Redington* v. *R.*, and that

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(*a*) Redington *v.* R., 3 Ridg. P. C. 106; Skidmore *v.* Bradford, 8 Eq. 134; Nicholson *v.* Mulligan, 3 Ir. R. Eq. 308.

(*b*) 2 Hem. & M. 130.

(*c*) See Vance *v.* V., 1 B. 605; Bailey *v.* Collett, 18 B. 181; Harrison *v.* Asher, 2 De G. & Sm. 436.

(*d*) 37 C. D. 683.

(*e*) Supra.

(*f*) Supra.

looking at the whole circumstances (*a*), they showed that no gift to the son was intended.

The presumption of advancement also arises where a husband takes a deposit receipt at a bank in the names of himself and his wife, or alters a deposit receipt from his own name to the names of himself and his wife (*b*).

And it seems if a father effects a policy of assurance on the life of his son, a presumption, liable to be rebutted by evidence, would arise, that he intended it to be for his son's benefit: *Worthington* v. *Curtis* (*c*), in which case, however, the evidence showed that the father effected the policy for his own benefit; and compare *Re Richardson* (*d*).

Where a father of a family, upon a purchase of an estate being made by the trustees of his marriage settlements, pays them a further sum in order to enable them to complete such purchase, it will be presumed that he did so for the benefit of all persons interested under the settlements (*e*).

In *Doyle* v. *Cream* (*f*), a father, on his daughter's marriage, paid 800*l.* to her settlement trustees, on trust for the husband and wife for their lives and the survivor for life, with remainder to their children; and if the husband *survived* the wife and there were no children then for the husband absolutely. He also covenanted to leave a share of his residuary estate upon the same trusts. In the event of the husband *not* surviving his wife, the settlor's daughter, and there being no issue (which happened) there was no trust expressly declared in the settlement. *Held*, that the 800*l.* was a marriage portion, given by father to daughter, as a provision for her, and that she took both the 800*l.* and the share of residue absolutely, there being a resulting trust in her favour.

Solicitor and Client.—The circumstances in which the parties stand to each other may of themselves rebut the presumption of advancement, and throw the onus on the child of proving a gift, as where son acted as solicitor of his mother (*g*).

(*a*) See Marshal *v.* Crutwoll, 20 Eq. 328, 329.

(*b*) Talbot *v.* Cody, 10 Ir. R. Eq. 138, 146; Gosling *v.* G., 3 Dr. 335.

(c) 1 C. D. 419, 423. See A.-G. *v.* Murray, (1904) 1 K. B. 165.

(*d*) 47 L. T. 514.

(*e*) Ouseley *v.* Anstruther, 10 B. 461; *Re* Curteis' Trusts, 14 Eq. 217.

(*f*) (1905) 1 Ir. R. 252, following Ward *v.* Dyas, Ll. & G. temp. Sugden, 177; and see Sweetman *v.* Butler, (1908) 1 Ir. R. 517.

(*g*) Garrett *v.* Wilkinson, 2 De G. & Sm. 246.

4. Evidence to rebut or to support the Presumption of Advancement.

Purchase in the name of a child, &c., is, as we have seen (p. 837, supra), merely a *circumstance of evidence* of an intention to make a gift to the child, &c., and *primâ facie*, therefore, it displaces the equitable presumption of a resulting trust. But such evidence may be strengthened or opposed by other evidence, for the object of the Court is to discover, upon a review of all the circumstances, the true explanation of the transaction. Many other circumstances of evidence have, therefore, been taken into consideration by different equity Judges in determining the question of intent, with the result predicted by *Eyre*, C. B., in the principal case, of " getting into a very wide sea without very certain guides." Most of these are however now disregarded. Thus, at one time, it was thought that the *infancy* of a child, in whose name a purchase was made, was a circumstance of evidence against its being considered a gift by way of advancement; it is now, however, considered a strong circumstance in favour of advancement being intended (*a*), nor will a partial provision be considered as evidence against an intention to advance (*b*).

The argument that the property purchased by the parent being *reversionary*, it could not be intended as a proper provision for the child, will not now prevail (*c*).

The objections of *Hardwicke*, C., to a purchase in the joint names of a parent and child (*d*) would now have no weight; for it has been repeatedly held, that a purchase by a parent in the joint names of himself and his child, or by a husband in the joint names of himself and his wife, will be held to amount to evidence of an intention to advance the child or wife to the extent of the interest vested in them respectively, or absolutely if either of them respectively survive him; but if they predecease the husband, he will take as surviving joint tenant (*e*). A stranger, however, on a purchase by a husband, taking jointly with the husband and wife, must hold the

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(*a*) Lamplugh *v.* L., 1 P. W. 111; Mumma *v.* M., 2 Vern. 19; Finch *v.* F., 15 V. 43; Christy *v.* Courtenay, 13 B. 96; Skeats *v.* S., 2 Y. & C. Ch. 9.

(*b*) Redington *v.* R. 3 Ridg. P. C. 106.

(*c*) Rumboll *v.* R., 2 Eden, 17; Finch *v.* F. 15 V. 43, 10 R. R. 12; Murless *v.* Franklin, 1 Swans. 13, 18 R. R. 3; see Pilsworth *v.* Mosse, 14 Ir. Ch. R. 163.

(*d*) See Pole *v.* P., 1 Ves. Sen. 76; Stileman *v.* Ashdown, 2 Atk. 480.

(*e*) See Scroope *v.* S., 1 Ch. Ca. 27; Back *v.* Andrew, 2 Vern. 120; Grey *v.* G., 2 Swans. 599; Lamplugh *v.* L., 1 P. W. 111; Crabb *v.* C., 1 My. & K. 511; Dummer *v.* Pitcher, 2 My. & K. 272; Fox *v.* F., 15 Ir. Ch. R. 89.

estate vested in him in trust for the survivor of the husband and wife (*a*). The principal case, overruling *Dickenson* v. *Shaw* (*b*), decides that a grant of copyholds, taken by a father in the names of himself and his sons, will be an advancement for the sons, although, according to the custom of the manor, grants were made for lives *successivè* (*c*).

A circumstance of evidence in favour of a trust and against a gift has been admitted, namely, that the child has been already *fully advanced:* in that case he *may*, it seems, be held a trustee for the father (*d*); especially if the father also enters into possession and receipt of the property (*e*). The observation, however, of *Eyre*, C. B., in the principal case would, at the present day, probably be considered a sufficient answer to such an objection to the presumption of advancement. "The rule of equity," observes his Lordship, "as recognised in other cases, is, that the father is the only judge on the question of a son's provision; and, therefore, the distinction of the son's being provided for or not is not very solidly taken" (*f*).

Another circumstance is mentioned in the principal case, as evidence against a gift to a child by way of advancement, viz., the father's entering into, and keeping possession, and taking the rents and profits of the purchased property, or the son's giving receipts in the name of the father. If, however, the son is an infant, such acts on the part of the father will plainly not be evidence of any trust for him (*g*). In *Grey* v. *G.* (*h*), the purchase was made by a father in the name of his adult son. Very strong evidence was adduced to show that the purchase was really in trust for the father, namely that the father

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(*a*) *Re* Eykyn's Trusts, 6 C. D. 115, and see Kingdon *v.* Bridges, 2 Vern. 67; Rumboll *v.* R., 2 Eden, 17.

(*b*) Cited in l. c., see supra, p. 824.

(*c*) See Murless *v.* Franklin, supra; Swift *v.* Davis, 8 East, 354 (n.); Finch *v.* F., 15 V. 43; Skeats *v.* S., 2 Y. & C. Ch. 9; Jeans *v.* Cooke, 24 B. 513, decided upon the authority of the principal case.

(*d*) Elliot *v.* E., 2 Ch. Ca. 231; Pole *v.* P., 1 Ves. Sen. 76.

(*e*) Grey *v.* G., 2 Swans. 600; Loyd *v.* Read, 1 P. W. 608; Redington *v.* R., 3 Ridg. P. C. 190.

(*f*) See Redington *v.* R., 3 Ridg. P. C. 190; Sidmouth *v.* S., 2 B. 456. See also Hepworth *v.* H., 11 Eq. 10; Gooch *v.* G., cited infra, p. 847; Bone *v.* Pollard, 24 B. 283; Garrett *v.* Wilkinson, 2 De G. & Sm. 244.

(*g*) Loyd *v.* Read, 1 P. W. 608; Mumma *v.* M., 2 Vern. 19; Alleyne *v.* A., 2 Jo. & Lat. 544; Lamplugh *v.* L., 1 P. W. 111; Stileman *v.* Ashdown, 2 Atk. 480; Taylor *v.* T., 1 Atk. 386; Gorge's Case, cited 2 Swans. 600; and see Devoy *v.* D., 3 Sm. & G. 403; Christy *v.* Courtenay, 13 B. 96; Fox *v.* F., 15 Ir. Ch. R. 89.

(*h*) 2 Swans. 599.

received the profits of the estate purchased in the name of his son for twenty years, made leases, took fines, inclosed part of the estate in a park, built much, and provided materials for more buildings, gave directions for a settlement, and treated for a sale of the estate, yet, after all this, it was decided by Lord *Nottingham*, after much consideration, that the purchase by the father in the son's name was *an advancement* (*a*). Upon the same principle, in *Sidmouth* v. *S.* (*b*), where moneys were invested in the funds by a father in the name of the son, the dividends of which were received by the father during his life, under a power of attorney from his son, it was held, after his death, that this was an advancement, and that the funds belonged to the son.

But where there is an immediate formal and unmistakable act of taking possession on the part of the father, as where, for instance, a man bought a shop in his son's name, and immediately took possession and put his own name over the door, that would be an ostensible taking possession sufficient to show ownership in the father, and trusteeship in the son (*c*).

And where a father, soon after a purchase in the name of his son, called on the tenant and gave him notice to quit, although he ultimately allowed him to remain, it was held by *Wickens*, V.-C., that "although that circumstance could not, perhaps, be taken as an unmistakable act of taking possession by the father, sufficient to establish that he purchased for himself, nevertheless it was a circumstance of great weight, and *looking at that and the rest of the evidence*, he was of opinion that it was a trust and not an advancement" (*d*).

The facts relied upon as evidence of an intention to create a trust must have taken place *antecedently to, or contemporaneously with* the purchase, or else immediately after it, so as to form, in fact, part of the same transaction (*e*).

(*a*) See Commissioners of Stamp Duties *v.* Byrnes, (1911) A. C. 386, at 392.

(*b*) 2 B. 447.

(*c*) Per *Wickens*, V.-C., in Stock *v.* M'Avoy, 15 Eq. 59.

(*d*) Ib. 55, 59.

(*e*) Grey *v.* G., 2 Swans. 594; Redington *v.* R., 3 Ridg. P. C. 106, 177, 194; Murless *v.* Franklin, 1 Swans. 17, 19, 18 R. R 3; Sidmouth *v.* S. 2 B. 447; Scawin *v.* S., 1 Y. & C. Ch. 65; Prankerd *v.* P., 1 S. & S. 1; Christy *v.* Courtenay, 13 B. 96; Collinson *v.* C., 3 De G. M. & G. 409; Bone *v.* Pollard, 24 B. 283; Devoy *v.* D., 3 Sm. & G., 403; Swift *v.* Davis, 8 East, 354 (n.); Childers *v.* C., 1 De G. & J. 482; Dumper *v.* D., 3 Gif. 583; Down *v.* Ellis, 35 B. 578; Stock *v.* M'Avoy, 15 Eq. 55.

In *Gooch* v. *G.* (*a*), a father took shares in his son's name sufficient to qualify him as a director. He also transferred 500 shares of his own into the son's name, and by his will settled the bulk of his property upon him. The dividends were paid to the father by the son, and the certificates of the shares were in the father's keeping, in envelopes indorsed "belonging to me." Held that the shares were taken and placed in the name of the son for the purpose of qualifying him as a director, and that under the circumstances the presumption of advancement was rebutted.

But *subsequent* facts will not be admissible in evidence to show the intention. Thus a devise of the property, as in the principal case (*b*), or a mortgage (*c*), or a demise of copyholds by a licence obtained *subsequently* to the purchase in the name of the child (*d*) will be ineffectual.

Evidence of *parol declarations of the father* contemporaneous with the purchase is also admissible, but not his declarations made subsequent thereto (*e*). And, of course, parol evidence may be given by the son to show the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption, see *Fowkes* v. *Pascoe* (*f*), where the evidence of the donee and his wife was received. The acts and declarations of the father *subsequent* to the purchase may be used in evidence *against* him by the son, although they could not, as we have before seen, be used by the father against the son (*g*); and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father where there is nothing showing the intention of the father, at the

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(*a*) 62 L. T. 384.

(*b*) Mumma *v.* M., 2 Vern. 19; Crabb *v.* C., 1 My. & K. 511; Skeats *v.* S., 2 Y. & C. Ch. 9; Jeans *v.* Cooke, 24 B. 513; Dumper *v.* D., 3 Gif. 583; Williams *v.* W., 32 B. 370.

(*c*) Pack *v.* Andrew, 2 Vern. 110.

(*d*) Murless *v.* Franklin, 1 Swans. 13, 18 R. R. 3.

(*e*) Elliot *v.* E., 2 Ch. Ca. 231; Woodman *v.* Morrell, 2 Freem. 33; Birch *v.* Blagrave, Amb. 266; Finch *v.* F., 15 V. 51; Redington *v.* R., 3 Ridg. P. C. 106; Sidmouth *v.* S., 2 B. 456; Devoy *v.* D., 2 Sm. & Gif. 403; Forrest *v.* F., 13 W. R. 380; see also Stone *v.* S., 3 Jur. (N. S.) 708; and the remarks on these cases in O'Brien *v.* Sheil, Ir. R. 7 Eq. 255. See also Williams *v.* W., 32 B. 370; Worthington *v.* Curtis, 1 C. D. 419.

(*f*) L. R. 10 Ch. 350. See Lamplugh *v.* L., 1 P. W. 113; Redington *v.* R., 3 Ridg. P. C. 182, 195; Taylor *v.* T., 1 Atk. 386. But see Ravenscroft *v.* Jones, 4 De G. J. & S. 228.

(*g*) Redington *v.* R., 3 Ridg. P. C. 195, 197; Sidmouth *v.* S., 2 B. 455; Stock *v.* M'Avoy, 15 Eq.

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time of the purchase, sufficient to counteract the effect of those declarations (*a*).

Illegality (see p. 830, supra).—Where the object of the evidence is to show that the person who made the transfer intended it to take effect in fraud of the law, such evidence will not be received: see *Childers* v. *C.* (*b*), where a father conveyed by registered deed 900 acres of land in the Bedford Level to his son in order to make him eligible as a bailiff. The son shortly afterwards died, without being aware of the conveyance, and without having been elected bailiff. It was held by *Wood*, V.-C., that the gift was irrevocable, and that the heir of the son was entitled to it for his own benefit. "I cannot," said his Honour, "allow the plaintiff to say, 'I intended this deed to operate in fraud of the law';" but upon the discovery of fresh evidence the order of the V.-C. was discharged, and leave was given to amend the bill, whereupon it was held, upon the evidence, that the father had not intended or considered the transaction to have the effect of making the son beneficial owner; that on the construction of the Act, a dry legal estate was a sufficient qualification; that, as there was nothing illegal in the father's design, and no intention to represent the son as beneficial owner, the father was entitled on the ground *of trust or mistake or both* to have a reconveyance from the heir of the son (*c*).

Husband and Wife (see p. 839, supra).—Where it appears from the evidence that a husband has paid money into a bank to an account opened in his wife's name as a mere agency account, for the purpose of convenience, and without any contract or intention to give the wife any interest in such money, it will be the property of the husband and not of the wife (*d*). And the surrounding circumstances may be taken into consideration (*e*). And so in the case of a purchase by a husband of stock in the joint names of the husband and wife, as to which see *Smith* v. *Warde* (*f*); *Hoyes* v. *Kindersley* (*g*).

(*a*) Sidmouth *v.* S., 2 B. 455; Scawin *v.* S., 1 Y. & C. Ch. 65; Pole *v.* P., 1 Ves. Sen. 76; Jeans *v.* Cooke, 24 B. 521; see, however, Murless *v.* Franklin, 1 Swans. 20, 18 R. R. 3.

(*b*) 3 K. & J. 310.

(*c*) 1 De G. & J. 482; and see May *v.* M., 33 B. 81; Davies *v.* Otty, 35 B. 208; Manning *v.* Gill, 13 Eq. 485; Haigh *v.* Kaye, L. R. 7 Ch. 469; Crichton *v.* C. (1895), 13 Rep. 770.

(*d*) See Lloyd *v.* Pughe, L. R. 8 Ch. 88; cf. Smith *v.* Warde, 15 Si. 56; Hoyes *v.* Kindersley, 2 Sm. & G. 195, cases of the purchase of stock.

(*e*) Marshal *v.* Crutwell, 20 Eq. 328; *Re* Young, 28 C. D. 705.

(*f*) 15 Si. 56.

(*g*) 2 Sm. & G. 195.

In *Re Gadbury* (*a*), a sum of money was invested in the funds in the joint names of a husband and wife, and she, by power of attorney from him, sold out a portion, and with his knowledge kept it locked up in her own special custody until his death. *Kindersley*, V.-C., held, that the portion which remained in the funds in the joint names of the husband and wife survived to the wife, but that the other portion, which was sold out by her and kept in her custody, formed, on the husband's death, a part of his general personal estate.

5. When Purchases in names of Third Parties are void or voidable.

Where an advancement is made by a person largely indebted at the time, it will be deemed fraudulent (*b*), and will be void under the 13 Eliz. c. 5, as against his creditors (*c*). See p. 893, post.

It has been made a question whether a purchase by a man in the name of a child, wife, or other person, solely or jointly with himself, is voluntary within 27 Eliz. c. 4 (*d*). See p. 884, post.

A transfer of shares to an infant is not void but voidable only (*e*). Where a father transfers shares in an incorporated company to his infant son, although the son might claim the shares as an advancement, nevertheless the Court will, on the part of the infant, repudiate the shares, if the company be wound up, and the father will be a contributory (*f*).

6. Purchase with Trust-Money. Following it.

Parol evidence is admissible to prove that a purchase of land has been made by a trustee with trust-money, notwithstanding the Statute of Frauds (*g*), because constructive trusts are excepted therefrom by sec. ~~8~~; and upon such a purchase being proved, a 1
trust will result in favour of the *cestui que trust*, the real owner of

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(*a*) 11 W. R. 895.

(*b*) Holmes *v*. Penney, 3 K. & J. 90.

(*c*) Christy *v*. Courtenay, 13 B. 96, 101; Barrack *v*. M'Culloch, 3 K. & J. 110; and see Bankruptcy Act, 1883, s. 4 (B.), s. 47; Wace, Bankruptcy (1904), pp. 18, 244; notes to Ellison *v*. E., post, p. 893.

(*d*) See Worthington on Fraudulent Conveyances (1887), pp. 21 & 200; and Drew *v*. Martin, 2 Hem. & M. 130, 133; and notes to Ellison *v*. E., post, p. 884.

(*e*) Lumsden's Case, L. Ch. 31; Gooch's Case, L. R. 8 Ch. 266.

(*f*) Reid's Case, 24 B. 318; Richardson's Case, 19 Eq. 588; Weston's Case, L. R. 5 Ch. 614; Mitchell's Case, 9 Eq. 363; Simpson, Infants (1909), p. 42.

(*g*) 29 Car. 2, c. 3.

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the money. Thus, *Grant*, M. R., in *Lench* v. *L.* (*a*), speaking of a purchase alleged to have been made with trust-money, says, "All depends upon the proof of the facts; for, whatever doubts may have been formerly entertained upon this subject, it is now settled that money may, in this manner, be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence" (*b*).

The result will be the same where the money, subject to an express or implied trust, has been invested by the trustee, or person standing in a fiduciary position, in the purchase of goods, money, notes, bills, and other chattels, or paid into a bank, *if it can be traced* (*c*).

In such a case the beneficial owner is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust-money (*d*). Where, however, a trustee has mixed the trust-money with his own there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply and purely, but with a mixed fund. He is, however, still entitled to a *charge* on the property purchased, for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee (*e*). To follow trust money, there must be *specific* property, capable of being identified, into which the money has been converted (*f*).

(*a*) 10 V. 517.

(*b*) See also Anon., Sel. Ch. Ca. 57; Ryall *v.* R., 1 Atk. 59; S. C., Amb. 413; Lane *v.* Dighton, Amb. 409; Balgney *v.* Hamilton, cited Amb. 414; Hughes *v.* Wells, 9 Ha. 749; Harford *v.* Lloyd, 20 B. 310; Bridgman *v.* Gill, 24 B. 302; Birds *v.* Askey, 24 B. 618; Trench *v.* Harrison, 17 Si. 111; Wadham *v.* Rigg, 1 Dr. & Sm. 216; Williams *v.* Thomas, ib. 417; Rolfe *v.* Gregory, 13 W. R. 355; Frith *v.* Cartland, 2 Hem. & M. 417; Hopper *v.* Conyers, 2 Eq. 549; Brown *v.* Adams, L. R. 4 Ch. 764; Middleton *v.* Pollock, 4 C. D. 49; G. E. Ry. Co. *v.* Turner, L. R. 8 Ch. 149; *Ex p.* Cooke, 4 C. D. 123; Birt *v.* Burt, 11 C. D. 773 (n.); Crichton *v.* C., (1895) 2 Ch. 853.

(*c*) *Re* Hallett's Estate, 13 C. D. 696; Harris *v.* Truman, 7 Q. B. D. 340; New Zealand &c. Co. *v.* Watson, 7 Q. B. D. 374; Collins *v.* Stimson, 11 Q. B. D. 142; *Re* Murray, 57 L. T. 223; Coburn *v.* Collins, 35 C. D. 373; *Ex p.* Broad, 13 Q. B. D. 740; Smethurst *v.* Hastings, 30 C. D. 490; Taylor *v.* Blakelock, 32 C. D. 560; Lewin (1904), 1019; *Re* Hallett & Co., (1894) 2 Q. B. 237; Jopp *v.* Johnston's Trustee, 6 F. 1028.

(*d*) *Re* Hallett's Estate, 13 C. D. 709; cf. Crichton *v.* C., (1895) 2 Ch. 853.

(*e*) *Re* Hallett's Estate, supra; *Re* Oatway, (1903) 2 Ch. 356; Lewin (1911), 1153.

(*f*) *Re* Hallett & Co., (1894) 2 Q. B

Money also held by a person in a fiduciary (*a*) character, if paid by him to an account at his banker's, may be followed by the person for whom he held the money, who has a charge on the balance in the banker's hands (*b*). Hence if a person who holds money as a trustee or in a fiduciary character, pays it to his account at his banker's, and mixes it with his own money, and draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case* (*c*) attributing the first drawings out to the first payments in does not apply, so that the drawer must be taken to have drawn out his own money in preference to the trust-money (*d*).

It seems, however, that as between two *cestuis que trust* whose money the trustee has paid into his own account at his banker's, the rule in *Clayton's Case* will apply, so that the first sum paid in will be held to have been first drawn out (*e*).

A trustee as well as a *cestui que trust* may follow property in which a trust fund has been wrongly invested, though he has actively concurred in the breach of trust (*f*).

The Partnership Act, 1890, s. 13, provides that if a partner being a trustee improperly employ trust property in the partnership business, the other partners who have no notice of the breach of trust are not to be affected thereby, but the section is not to prevent trust-money from being followed and recovered if in the possession of the firm.

Trust-money cannot be followed, if paid to a third person *bonâ fide*, as for instance to a tradesman in part payment of a debt (*g*); to an auctioneer as a deposit afterwards forfeited for non-completion of

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p. 244; and see *Ex p.* Hardcastle, 29 W. R. 615; and cf. Sharp *v.* Jackson, (1899) A. C. 419.

(*a*) See infra, p. 852.

(*b*) *Re* Hallett's Estate, 13 C. D. 696, dissenting from *Ex p.* Dale & Co., 11 C. D. 772; cf. New Zealand, &c. Co. *v.* Watson, 7 Q. B. D. 374.

(*c*) 1 Mer. 572; see Deeley *v.* Lloyds Bank, (1910) 1 Ch. 648.

(*d*) *Re* Hallett's Estate, 13 C. D. 696, on this point not following Pennell *v.* Deffell, 4 De G. M. & G. 372; and Brown *v.* Adams, L. R. 4 Ch. 764, which case must be considered as overruled by *Re* Hallett's Estate, supra, see per *Joyce*, J., in *Re* Oatway, (1903) 2 Ch. 356, at p. 360; and see Hancock *v.* Smith, 41 C. D. 456; Mutton *v.* Peat, (1900) 2 Ch. 79.

(*e*) *Re* Hallett's Estate, 13 C. D. 696; *Re* Stenning, (1895) 2 Ch. 433, distinguishing Hancock *v.* Smith, supra; and cf. Blackburn B. B. Soc. *v.* Cunliffe, 22 C. D. 61; Wenlock *v.* River Dee Co., 19 Q. B. D. 155; *Re* Miller, (1893) 1 Q. B. 338.

(*f*) Carson *v.* Sloane, 13 L. R. Ir. 139; Price *v.* Blakemore, 6 B. 507; and see Taylor *v.* Blakelock, 32 C. D. 560.

(*g*) Collins *v.* Stimson, 11 Q. B. D 142, 144; and see Northern Counties, &c. Insurance Co. *v.* Whipp, 26 C. D. at p. 495.

the contract (*a*) ; to a landlord in payment of rent by an uncertificated bankrupt (*b*). So also, if securities belonging to trust X. are, on an appointment of new trustees A. and B. of trust Y. transferred by C., (a trustee of both trusts) to A. and B., who take without notice of the breach of trust, those securities cannot be followed by the beneficiaries under trust X. The transfer in that case is for consideration, for A. and B. by accepting the transfer give up their right to sue C. as a debtor to the trust (*c*). Again, if a person in a fiduciary position pays trust moneys into his banking account which is overdrawn at the time of the payment in, the bankers, if they have no notice of the trust, will be entitled to retain so much of the moneys paid in as may be necessary to discharge the debt due to them (*d*).

The rules as to following trust money have no application where there is no fiduciary relation between the person bound to pay and the person entitled to receive moneys, where they stand simply in the relation of debtor and creditor (*e*). Thus, an agent receiving a bribe from a third person becomes simply a debtor of, not a trustee for, his principal (*f*).

Where a person under an obligation to settle all his *personal estate* afterwards buys land in his own name, partly with borrowed money, although upon his death intestate there will be a resulting trust of the estate which will descend to his heir, all his personal estate which can be traced as having been employed in the purchase of the estate, in paying off the borrowed money, or in lasting improvements on the estate, will be a charge upon it in the hands of the heir for the benefit of the *cestui que trusts* (*g*).

(*a*) Collins *v.* Stimson, supra.

(*b*) *Ex p.* Dewhurst, L. R. 7 Ch. 185; *Ex p.* Payne, 15 Q. B. D. 616; but see *Ex p.* Minor, (1893) 1 Q. B. 175.

(*c*) Thorndike *v.* Hunt, 3 De G. & J. 563; Taylor *v.* Blakelock, 32 C. D. 560; Taylor *v.* L. & C. Banking Co., (1901) 2 Ch. 233.

(*d*) Thomson *v.* Clydesdale Bank, Ltd., (1893) A. C. 282; Coleman *v.* Bucks &c. Bank, (1897) 2 Ch. 243; where the bank, however, had notice that the moneys were affected by some trust.

(*e*) Lister & Co. *v.* Stubbs, 45 C. D. 1; New Zealand, &c. Co. *v.* Watson, 7 Q. B. D., 374, pp. 383, 384; *Re* Hallett & Co., (1894) 2 Q. B. 237.

(*f*) Lister & Co. *v.* Stubbs, supra; Powell *v.* Jones, (1905) 1 K. B. 11; and see *Re* Thorpe, (1891) 2 Ch. 360; Ellis *v.* Goulton, (1893) 1 Q. B. 350; *Re* Stenning, (1895) 2 Ch. 433; cf. Hay's Case, L. R. 10 Ch. 593.

(*g*) Lewis *v.* Madocks, 17 V. 48 ; and see Denton *v.* Davies, 18 V. 499.

ELLISON *v.* ELLISON.

1802. 6 V. 656; 6 R. R. 19.

Voluntary Trusts. Distinction as to Volunteers.

The assistance of the Court cannot be had without consideration, to constitute a party *cestui que trust*, as upon a voluntary covenant to transfer stock, &c.; but if the legal conveyance is actually made, constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, &c., though without consideration, the equitable interest will be enforced.

Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settlor entitled for life, or by the will of the latter; no intention to revoke appearing; and the terms of a power of revocation not being complied with.

By indenture, dated the 1st of July, 1791, reciting a lease, dated the 6th of June preceding, of collieries at Hebburn and Jarrowwood, in the county of Durham, for thirty-one years, to Charles Wren and others; and that the name of Wren was used in trust for Nathaniel Ellison and Wren, in equal shares; it was declared that Wren, his executors and administrators, would stand possessed of the lease, in trust as to one moiety for Ellison, his executors, &c.

By another indenture, dated the 18th of June, 1796, reciting, that Ellison was interested in and entitled to one undivided eighth part of certain collieries at Hebburn and Jarrow, held by two separate leases for terms of thirty-one years, and that he was desirous of settling his interest, he assigned and transferred all his interest in the said collieries, and all the stock, &c., to Wren, his executors, administrators, and assigns, in trust for Nathaniel Ellison and his assigns during his life; and, after his decease, in trust to manage and carry on the same, in like manner as Wren should carry on his own share; and upon further trust, out of the profits, to pay to Margaret Clavering, during the remainder of the term, in case she should so long live, the yearly sum of 103*l.* 2*s.* 8*d.*, which sum is thereby mentioned to be secured to her by an indenture, dated the 14th of May last; and, subject thereto, in trust to pay thereout to Jane Ellison, in case she should survive Nathaniel Ellison, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, the clear yearly sum of 180*l.*; and after the decease of Anne Furye, then the yearly sum of 90*l.*, during the remainder of the term, in case Jane Ellison should so long live; and, subject as aforesaid, upon trust to pay thereout, to each of the children of Nathaniel Ellison that should be living at his decease, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, and the life of the survivor, the yearly sum of 30*l.* apiece; and after the decease of the survivor the yearly sum of 15*l.*; and upon further trust to pay the residue of the profits arising from the collieries to the eldest son of Nathaniel Ellison, who should attain the age of twenty-one; and upon the death of Margaret Clavering, then upon trust to pay to each of the children of Nathaniel Ellison the further yearly sum of 10*l.*; with survivorship, in case any of the children should die before twenty-one, or marriage of daughters, provided none except the eldest should be entitled to a greater annuity than 50*l.*; and upon further trust to pay the residue to the eldest son; provided further, in case all the children die before twenty-one, or the marriage of daughters, upon trust to pay the whole to such only child at twenty-one, or marriage of a daughter; provided further, in case the profits to arise from the collieries should not be sufficient to pay all the annuities, the annuitants, except Margaret Clavering, should abate, to be made up whenever the profits should be sufficient; and upon further trust, in case Wren, his executors or administrators, should think it more beneficial for the family to sell and dispose of the collieries, upon trust to sell and dispose of the same for the most money that could reasonably be got, and to apply the money, in the first place, in payment of all debts due from the collieries, in respect of the share of Ellison; and, subject thereto, to place out the residue on real securities, and apply the interest, in the first place, in payment of the annuity of 103*l.* 2*s.* 8*d.* to Margaret Clavering; then to the annuities of 180*l.* or 90*l.*; then to pay all the children of Ellison, during the life of Margaret Clavering, the yearly sum of 22*l.* 10*s.*, and to pay the residue of the dividends and interest to the eldest son of Ellison, in manner aforesaid; and if the dividends, &c., should not be sufficient for the annuities, the two annuitants, except Margaret Clavering, to abate; and, after her death, to pay to each of the children of Nathaniel Ellison the further yearly sum of 2*l.* 10*s.* for their lives; and, after the decease of Margaret Clavering and Jane Ellison, upon trust to pay to each of the children of Nathaniel Ellison the sum of 500*l.*, in case the money arising from the sale should be sufficient; then upon trust to divide the same equally among all the children, share and share alike; and, subject as aforesaid, to pay over the residue to the eldest son on his attaining twenty-one; and it was declared, that the portions of the children should be paid to the sons at twenty-one, to the daughters at twenty-one or marriage; and in case of the death of any before such period, to pay that share to the eldest son at twenty-one; and if only one child should survive, to pay the whole to such one at twenty-one or marriage, if a daughter; and in case all die before twenty-one, &c., then the said Charles Wren, his executors and administrators, shall stand possessed of the said collieries, and the money to arise by sale thereof, subject as aforesaid, in trust for Nathaniel Ellison, his executors, administrators, and assigns. It was further declared, that the annuities should be paid half-yearly; and that, upon any such sale, the receipt of Wren, his executors or administrators, should be a sufficient discharge to purchasers. Then followed this proviso: "Provided always and it is hereby further declared, that it shall and may be lawful for the said Nathaniel Ellison, by any deed or deeds, writing or writings, to be by him signed, sealed, and delivered in the presence of and *attested by two or more credible witnesses*, to revoke, determine, and make void all and every the uses, trusts, limitations, and powers hereinbefore limited and created, of and concerning the said collieries and coal mines; and by the same deed or deeds, or by any other deed to be by him executed in like manner, to limit any new or other uses of the said collieries and coal mines, as he, the said Nathaniel Ellison, shall think fit."

By another indenture, dated the 3rd of July, 1797, *but not attested by two witnesses*, reciting the leases of the collieries, and that the name of Charles Wren was used in trust for Nathaniel Ellison and himself, in equal shares, and that Ellison had advanced an equal share of the monies supplied for carrying on the collieries, amounting to 9,037*l.* 10*s.*, it was witnessed, that, in consideration of 4,518*l.* 15*s.*, Wren assigned to Nathaniel Ellison one undivided moiety or half part of all the said collieries, demised to him by the said several leases, with a like share of the stock; to have and to hold the said collieries to Ellison, his executors, administrators, and assigns, for the residue of the said terms, subject to the rents, covenants, and agreements in the said leases; and to have and to hold the stock unto Ellison, his executors, administrators, and assigns, to and for his and their own proper use for ever, with the usual covenants from Wren as to his title to assign, &c., and from Ellison to indemnify Wren, his executors, &c.

Nathaniel Ellison, by his will, dated the 22nd June, 1796, after several specific and pecuniary legacies, gave all the rest and residue of his personal estate and effects, of what nature or kind soever, not before disposed of, to his wife, and Wren, and the survivor, and the executors and administrators of such survivor, upon trust to call in and place the same out in the funds, or on real securities; and he directed that all sums of money which should come to the hands of his wife and Wren, or of the executors, &c., of either of them, under the said trusts, should be equally divided between all his children, sons and daughters, born and to be born, share and share alike; the shares to become vested and be payable upon marriage, with consent of their guardians, and not otherwise, until the age of twenty-one; such part of the interest in the meantime, as the guardians shall think proper, to be applied for maintenance; the residue to accumulate; with a direction for payment of part of the principal for advancement, and survivorship upon the death of any before the respective shares should be payable; and, in case of the death of all under age and unmarried, he gave the dividends and interest to his wife for life; and, upon her death, he gave the principal and a sum of 3,000*l.*, charged upon her estates, to his sister, Margaret Clavering, and his nephew. Then, after some further dispositions of stock in favour of his children, he gave a legacy of twenty guineas to Wren, and appointed his wife and Wren executors and guardians.

The testator died in 1798, leaving his widow and ten children surviving; one of whom, Charles Ellison, died in 1799, an infant. Wren also died in that year.

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The bill was filed by the testator's widow and Margaret Clavering, praying, that the trusts of the deed of June, 1796, may be established, and that new trustees may be appointed.

The younger children, by their answer, submitted whether the trusts of that deed were not varied or revoked by the deed of July, 1797.

Mr. *Romilly* and Mr. *Bell*, for the plaintiffs, insisted, that the subsequent deed, not reciting or taking any notice of the prior settlement, could not revoke it; that it was not the object of the latter deed to revoke the former; and that it was not attested by two witnesses, as, in order to effect a revocation, it ought to be.

Mr. *Richards*, for the eldest son, defendant, claiming also under the deed of 1796, declined to argue the case.

Mr. *Steele* and Mr. *W. Agar*, for the other defendants, the younger children,— * * * There is no instance in which a voluntary deed, defective, and not effectual at law, has been aided in this Court; and though this is, in some respects, in favour of a wife and children, one of the parties claiming under it is a volunteer; and it is opposed by nine out of ten children. This deed, like that in *Colman* v. *Sarrel* (*a*), cannot be proceeded upon at law. But if the trust was originally well created, yet if the subject gets back, and is vested in the author of the trust, the objection lies.

Mr. *Romilly*, in reply.

ELDON, C.—I had no doubt, that, from the moment of executing the first deed, supposing it not to have been for a wife and children, but for pure volunteers, those volunteers might have filed a bill in equity, on the ground of their interests in that instrument, making the trustees and the author of the deed parties. *I take the distinction to be, that, if you want the assistance of the Court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust: as, upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this Court will not execute that*

(*a*) 1 V. 50, 1 R. R. 83.

voluntary covenant. But if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court. That distinction was clearly taken in *Colman* v. *Sarrel* (supra), independent of the vicious consideration. I stated the objection, that the deed was voluntary; and the Lord Chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and *cestui que trust*, though voluntary, and without good or *meritorious* consideration; and it is clear, in that case, that, if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the Court would have executed it against the trustee and the author of the trust.

In this case, therefore, the person claiming under the settlement might maintain a suit, notwithstanding any objection made to it as being voluntary, if that could apply to the case of a wife and children; considering, also, that Mrs. Clavering was an annuitant, and not a mere volunteer. But it was put for the defendants thus—that though the instrument would have been executed originally, if the subject got back by accident into the author of the trust, and was vested in him, then the objection would lie in the same manner as if the instrument was voluntary. I doubt that, for many reasons—the trust being once well created, and whether it would apply at all where the trust was originally well created, and did not rest merely in engagement to create it. Suppose Wren had died, and had made Ellison his executor, it would be extraordinary to hold, that though an execution would be decreed against him as executor, yet, happening to be also author of the trust, therefore an end was to be put to the interest of the *cestui que trust*. But it does not rest there; for Ellison clothes the legal estate remaining in Wren with the equitable interests declared by the first deed, making him, therefore, a trustee for Ellison himself first, and, after his death, for several other persons; and he has said, he puts that restraint upon his own power, not only that he shall not have a power of revocation whenever he changes his intention, but that he shall not execute that power, nor be supposed to have that change of intention, unless manifested by an instrument executed with certain given ceremonies. My opinion is, that if there is nothing more in this transaction than taking out of Wren the estate clothed with a trust for others with present interests, though future in enjoyment, and that was done by an instrument with no witness, or only one witness, it is hardly possible to contend that such an instrument would be a revocation according to the intention of the party, the evidence of whose intentions is made subject to restrictions that are not complied with. The only difficulty is, that the declaration of the trusts in the first instrument could not be executed, the second instrument being allowed to have effect. It is said, a power was placed in Wren, his executors and administrators, not his assigns, if in sound discretion thought fit, to sell and to give a larger interest to the younger children than they otherwise would take. If Wren had not, after the re-assignment, that discretion still vested in him, I think it would not be in the executors of Ellison, and it could not be exercised by the Court, though, *in general cases, trusts will not fail by the failure of the trustee.* But, though the effect would be to destroy the power of Wren, which I strongly doubt, attending to the requisition of two witnesses, I do not know that it would destroy the other interests. I think, therefore, upon the whole, this trust does remain, notwithstanding this re-assignment of the legal estate to Ellison. I do not think, consistently with the intention expressed in the first instrument, and the necessity imposed upon himself of declaring a different intention under certain restrictions, that, if a different intention appeared clearly upon the face of the instrument, the latter would have controlled the former. But I do not think his acts do manifest a different intention. Supposing one witness sufficient, the second deed does not sufficiently manifest an intention to revoke all the benefits given by the first deed to the children; and it is not inconsistent that he might intend to revoke some, and not all.

As to the will, it is impossible to maintain that the will is a writing within the meaning of the power, considering how the subject is described. The word "residue" there means that estate of which he had the power of disposing, not engaged by contracts, declarations of trusts, &c. It was necessary for him to describe the subject in such a way that there could be no doubt he meant to embrace that property. Upon the whole, therefore, this relief must be granted; *though I agree, that, if it rested in covenant, the personal representative might*

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have put them to their legal remedies, he cannot, where the character of trust attached upon the estate while in Wren; which character of trust, therefore, should adhere to the estate in Ellison, unless a contrary intention was declared; and the circumstance of one witness only, when the power reserved required two witnesses, is also a circumstance of evidence that he had not the intention of destroying those trusts which had attached, and were then vested in the person of Wren.

The ordering part of the decree, extracted from the Registrar's Book, is thus (*a*): "Whereupon, &c., his lordship doth declare that the trusts of the said deed, bearing date 18th June, 1796, ought to be performed and carried into execution, and doth order and decree the same accordingly. And it is further ordered and decreed, that it be referred to Mr. Ord, one of the Masters of this Court, to appoint a new trustee or trustees of the premises comprised in the said trust deed, and that the share of the said Nathaniel Ellison of and in the said collieries, and the stock and effects belonging thereto comprised in the said deed, be assigned to such new trustee or trustees so to be appointed, upon the trusts and upon and for the intents and purposes declared by the said deed concerning the same, and such new trustee or trustees is or are to declare the trusts thereof accordingly, and the said Master is to settle such assignment; and it is ordered that the said Master do tax all parties their costs of this suit, and that such costs, when taxed, be paid out of the estate of the said testator, and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

NOTES.

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(*a*) Taken from the judgment of *Knight-Bruce*, L. J., in Kekewich *v.* Manning, 1 De G. M. & G. 191.

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1. Voluntary Agreements.

Generally.—Equity will not interfere to perfect or carry into effect a purely voluntary intention, covenant or agreement to give or settle property as against either the settlor (*a*), or his executors (*b*).

And though the voluntary agreement, contract, or covenant to transfer property, be under seal, and, therefore, on the face thereof carrying a consideration such as would support an action at law, it will not be specifically executed in favour of volunteers (*c*).

And mere voluntary promises to release debts, or not to sue upon them (*d*), or to confer a benefit (*e*), will not be enforced.

Cases coming within the doctrine of equitable estoppel are not exceptions to this rule. When that doctrine applies the Court does not enforce a promise. "The doctrine of estoppel by representation is applicable only to representations, as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts." (*f*); "The person making [such] representations shall, so

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(*a*) Milroy *v.* Lord, 4 De G. F. & J., 264, at p. 274; 60 L. J. Ch. 241, and cases in note (*c*).

(*b*) Cotteen *v.* Missing, 1 Madd. 176; Hooper *v.* Goodwin, 1 Swans. 485, 18 R. R. 125; Searle *v.* Law, 15 Si. 95; Callaghan *v.* C., 8 Cl. & F. 374, and see Williams Exors. (1905), p. 1409; as to aiding defective execution of powers see Tollett *v.* T. ante.

(*c*) Colman *v.* Sarrel, 1 V. 50, 1 R. R. 83; Meek *v.* Kettlewell, 1 Ha. 474; Dillon *v.* Coppin, 4 My. & Cr. 647; Jefferys *v.* J., Cr. & Ph. 138; Dening *v.* Ware, 22 B. 184; Cheale *v.* Kenward, 6 W. R. 494, 810; Marler *v.* Tommas, 17 Eq. 8; *Re* Lucan, 45 C. D. 470, infra; *Re* Ellenborough, (1903) 1 Ch. 697; Lewin (1911), 86.

(*d*) Tufnell *v.* Constable, 8 Si. 69; Cross *v.* Sprigg, 6 Ha. 552; Cross *v.* C., 1 L. R. Ir. 389; cf. Flower *v.* Marten, 2 My. & C. 459; Strong *v.* Bird, 18 Eq. 315; Peace *v.* Hains, 11 Ha. 151.

(*e*) Dipple *v.* Corles, 11 Ha. 183; Dashwood *v.* Jermyn, 12 C. D. 776; Alderson *v.* Maddison, 5 Ex. D. 305; reversed, 8 A. C. 467.

(*f*) Per *Selborne*, C., in Maddison *v.* Alderson, 8 A. C. 467, at p. 473.

far as the powers of a Court of equity extend, be treated as if the representations were true, and shall be compelled to make them good." (*a*). The so-called "doctrine of making representations good" enunciated by Lord *Cottenham* in *Hammersley* v. *De Biel* (*b*), and applied in several subsequent cases (*c*), under which a representation as to future conduct was held enforceable, though not amounting to a contract, has been exploded (*d*).

A voluntary covenant to surrender copyholds cannot be enforced (*e*), but if the settlor goes on to covenant that until surrender he will stand seised of the copyholds in trust for the surrenderee, that is a declaration of trust to which effect will be given (*f*). And such a declaration made by a married woman tenant on the rolls by a deed duly acknowledged under the Fines and Recoveries Act will bind the customary heir (*g*).

An agreement founded upon merely *meritorious consideration*, such for instance as a provision for a wife or children, *after* marriage, will not be enforced as against the settlor himself (*h*). See note "Consideration," infra, pp. 890, 906.

With regard to persons *claiming under the settlor*, it seems now to be clearly settled, that a voluntary agreement or covenant, though under seal, cannot upon the ground of a merely meritorious consideration be enforced as against volunteers claiming under the settlor (*i*).

(*a*) Per *Selborne*, C., in Citizens' Bank of Louisiana *v.* First National Bank of New Orleans, L. R. 6 H. L. 352, at p. 360; see Maunsell *v.* Hedges White 4 H. L. Cas. 1039, where Hammersley *v.* De Biel is explained by *Cranworth*, C., pp. 1056-57, and by Lord *St. Leonards* at p. 1060; Jorden *v.* Money, 5 H. L. Cas. 185, per *Cranworth*, C., at pp. 212 et seq., Warden *v.* Jones, 23 B. 487, at p. 493; Yeomans *v.* Williams, 1 Eq. 184; Taylor *v.* Manners, L. R. 1 Ch. 48; Dillwyn *v.* Llewellyn, 4 De G. F. & J. 517.

(*b*) Sitting on appeal from the M. R., and reported 12 Cl. & F. at p. 61, (n.) (*c*), at p. 62.

(*c*) Prole *v.* Soady, 2 Giff. 1; Loffus *v.* Maw, 3 Giff. 592, disapproved in Maddison *v.* Alderson, 8 A. C., at pp. 473, 483; and see Coverdale *v.* Eastwood, 15 Eq. 121; Dashwood *v.* Jermyn, 12 C. D. 776, in which cases *Bacon*, V.-C., appears to recognise the doctrine.

(*d*) See judgments of House of Lords in Hammersley *v.* De Biel, 12 Cl. & F. 45; Jorden *v.* Money, supra; Maddison *v.* Alderson, supra; *Re* Fickus, (1900) 1 Ch. 331, at p. 335, and see the whole question discussed in Pollock on Contract, 7th edit., note (*k*), pp. 713 et seq., and see note, to Savage *v.* Foster, Vol. I., supra.

(*e*) Jefferys *v.* J., Cr. & Ph. 138.

(*f*) Steele *v.* Waller, 28 B. 466.

(*g*) Carter *v.* C., (1896) 1 Ch. 62.

(*h*) Antrobus *v.* Smith, 12 V. 39; Holloway *v.* Headington, 8 Si. 324; Walrond *v.* W., Johns 25, but as to this case, see Vol. I., pp. 627 et seq: cf. Green *v.* Paterson, 32 C. D. 95.

(*i*) Antrobus *v.* Smith, 12 V. 39; 8 R. R. 278; see Jefferys *v.* J., C. & P.

It has always been held without any doubt that parties claiming as volunteers on a merely meritorious consideration could not enforce an agreement or covenant to settle as against creditors or a purchaser from the settlor (*a*).

Development of Voluntary Agreement into Perfect Trust.—When a purely voluntary agreement, or intention to benefit, is developed into a *perfect trust*, whereby the relation of trustee and *cestui que trust* is established without the aid or interference of the Court, that trust will be enforced against the trustee, the settlor, and all claiming under him (*b*). The point is, have you to come to the Court for aid in *perfecting* (*c*), or for aid in *enforcing?* There must be an intention to create a trust and to part with dominion over the property (*d*). And a mere executory intention to create a trust, or even a voluntary agreement to do so, is insufficient (*e*). There must be an intention to create, completely executed by some act creating a perfect trust, for until such completion there is a *locus pœnitentiæ* (*f*). A voluntary covenant with trustees may, however, create a trust which will be enforceable by the *cestui que trust* (*g*).

A perfect and irrevocable *trust* in favour of volunteers may be created:

(1) By transfer of the property, whether legal or equitable, to a trustee for the purposes of the settlement;

(2) By declaration of trust without transfer, either by the owner declaring himself a trustee for the object of his bounty, of property in his possession; or by his directing the trustee of property of which he is beneficial owner to hold it in trust for such object (*h*).

138; Dillon *v.* Coppin, 4 My. & C. 647; Evelyn *v.* Templar, 2 Bro. Ch. 148; Joyce *v.* Hutton, 11 Ir. Ch. R. 123.

(*a*) Finch *v.* Winchelsea, 1 P. W. 277; Garrard *v.* Lauderdale, 2 Russ. & M. 451, at pp. 453, 454.

(*b*) See the principal case, and Pulvertoft *v.* P., 18 V. 84, at p. 99; 11 R. R. 151; Paul *v.* P., 20 C. D. 743; *Re* Lucan, 45 C. D. 470.

(*c*) Jefferys *v.* J., Cr. & Ph. 138.

(*d*) Gaskel *v.* G., 2 Y. & J. 502; Hughes *v.* Stubbs, 1 Ha. 476; Field *v.* Lonsdale, 13 B. 78; Richards *v.* Delbridge, 18 Eq. 11; Lewin (1911), 74.

(*e*) Jones *v.* Lock, L. R. 1 Ch. 25; Dipple *v.* Corles, 11 Ha. 183; Heartley *v.* Nicholson, 19 Eq. 233; Milroy *v.* Lord, 4 De G. F. & J. 274; *Re* Breton, 17 C. D. 416.

(*f*) Antrobus *v.* Smith, 12 V. 39; Searle *v.* Law, 15 Si. 95; Green *v.* Paterson, 32 C. D., p. 105; *Re* Ridgway, 15 Q. B. D. 447; Cochrane *v.* Moore, 25 Q. B. D. 60.

(*g*) See Clough *v.* Lambert, cited infra, p. 865; Fletcher *v.* F.; *Re* Plumptre's Sett.; Gandy *v.* G.; cited infra, p. 906.

(*h*) See infra, pp. 873 et seq.

A person dead at the execution of a deed cannot take by it, nor can his representatives (*a*). If at the date of execution of a voluntary deed the property which it purports to assign is a mere expectancy, the deed will be inoperative in equity as well as at law, for a possibility is incapable of voluntary assignment (*b*).

Voluntary trusts are within the Statute of Frauds (29 Car. 2, c. 3, s. 7). If the trust is of land, whether freehold, copyhold, or leasehold (*c*), it must be evidenced by writing signed by the settlor (*d*), but if it be a trust of pure personalty a parol declaration is sufficient (*e*). The true intention of the donor or settlor may, however, be proved by parol, for the statute is not to be used as a cover to fraud (*f*).

Bonds and Covenants for Payment of Money to Volunteers.—Where a bond is executed (*g*) in favour of a volunteer, he may prove the debt against the assets of the debtor; but in the old practice of the Court of Chancery he was postponed in equity to creditors for value (*h*). Now, under s. 10 of the Judicature Act, 1875, in the administration of an insolvent estate in the Chancery Division, the bankruptcy rule applies, under which all provable debts, whether contracted for value or not, rank *pari passu* (*i*). But the gift of a voluntary promissory note cannot be treated in equity as giving the holder a claim in the nature of a debt (*k*). In *Re Whitaker* (*l*), a person who afterwards became a lunatic gave a promissory note for 50,000*l.* in discharge of a moral obligation. A claim was made by the holder against his estate after he had been found lunatic. Payment was claimed on the footing of

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(*a*) *Re* Corbishley, 14 C. D. 846.

(*b*) *Re* Ellenborough, (1903) 1 Ch. 697; Meek *v.* Kettlewell, 1 Ha. 464; *Re* Tilt, 74 L. T. 163.

(*c*) Withers *v.* W., Amb. 152; (copyholds); Forster *v.* Hale, 3 V. 696, (leaseholds).

(*d*) Kronheim *v.* Johnson, 7 C. D. 60; Tierney *v.* Wood, 19 B. 330, 23 L. J. Ch. 895.

(*e*) McFadden *v.* Jenkyns, 1 Ha. 461; Middleton *v.* Pollock, 4 C. D. 49; New &c. *v.* Hunting, (1897) 2 Q. B. 19; Lewin (1911), 55; Godefroi (1907), 52.

(*f*) Haigh *v.* Kaye, L. R. 7 Ch. 469; Marlborough *v.* Whitehead, (1894) 2 Ch. 133; Rochefoucald *v.* Boustead, (1897) 1 Ch. 196.

(*g*) Hall *v.* Palmer, 3 Ha. 532.

(*h*) Ramsden *v.* Jackson, 1 Atk. 294; Watson *v.* Parker, 6 B. 283; Dening *v.* Ware, 22 B. 184; Hales *v.* Cox, 32 B. 118; and see *Re* Whitaker, 42 C. D., p. 124 (C. A.), cited infra; *Re* Lucan, 45 C. D. 470, cited infra.

(*i*) *Re* Whitaker, (1901) 1 Ch. 9.

(*k*) *Re* Whitaker, 42 C. D., p. 124, per *Cotton*, L. J., dissenting from Dawson *v.* Kearton, 3 Sm. & G. 186; Lloyd *v.* Chune, 2 Gif. 441; Arthur *v.* Clarkson, 35 B. 458; *Re* Richards, 36 C. D. 541.

(*l*) 42 C. D. 119 (C. A.).

a debt. The Court of Appeal, after going through the cases, held that neither at law, nor in equity, could the payee of a voluntary note have any claim as a creditor. for the holder of such a note is not in the same position as the holder of a voluntary bond, as the former could not maintain an action at law, whilst the latter could. A voluntary bond has been preferred to interest upon debts not by law carrying interest (*a*), and also to legacies, even where they were specific (*b*). And an assignee for value of an equitable interest in money payable under a voluntary bond has been held entitled to rank as a specialty creditor for value against the assets of the obligor (*c*).

Where a person *without consideration covenants to pay a sum* of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared upon the covenant. Thus, in *Clough* v. *Lambert* (*d*), a person, by a voluntary deed, to which his wife and a trustee were parties, covenanted to pay an annuity to the trustee, upon trust for his wife for her life, *Shadwell*, V.-C., held that the covenant might be enforced by the wife against the executors of her husband, though not as against his creditors, and that the mere intervention of a trustee made no difference (*e*).

And in the event of the trustees refusing or declining to sue on the covenant, equity will assist the *cestui que trust*, by enabling him to use the names of his trustees and sue on the deed at law (*f*). But where a covenant for further assurance was given in respect of an assignment which was voluntary and imperfect, it was held that the assignor would not be compelled to allow the assignee to use his name in an action (*g*).

2. Perfect Trust Created.

By Actual Transfer of Legal Interest.—If there be a conveyance or assignment of land passing the legal estate, as is laid down in the

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(*a*) Garrard *v.* Dinorben, 5 Ha. 213.

(*b*) Patch *v.* Shore, 2 Dr. & Sm. 589.

(*c*) Payne *v.* Mortimer, 4 De G. & J. 447, 1 Gif. 118.

(*d*) 10 Si. 174; see Assignment of Equitable Estate or Interest, p. 867, infra.

(*e*) And see Fletcher *v.* F., 4 Ha. 67, at p. 75, distinguished in *Re* Plumptre, (1910) 1 Ch. 609; Bridge *v.* B., 16 B. 315, at p. 321; Alexander *v.* Brame, 19 B. 436; Johnstone *v.* Mappin, 64 L. T. 48; *Re* Lucan, 45 C. D. 470, and see per *Lindley*, L. J., in *Re* Patrick, (1891) 1 Ch. 82, at p. 88.

(*f*) Fletcher *v.* F., 4 Ha. 67; Meldrum *v.* Scorer, 56 L. T. 471; Gandy *v.* G., 30 C. D. 57.

(*g*) See Ward *v.* Audland, 8 B. 211, but see as to this case Kekewich *v.* Manning, 1 De G. M. & G. 176; *Re* Lucan, 45 C. D. 470, infra, p. 870; cf. Cox *v.* Barnard, 8 Ha. 310.

principal case (*a*); or a voluntary covenant to surrender copyholds followed by a legal surrender (*b*); or an assignment of leaseholds (*c*); or of debts or other legal choses in action (*d*); as of money at bankers (*e*); or of securities transferable by delivery (*f*); or in the case of chattels capable of delivery, an assignment by deed, or actual delivery (*g*); or a complete transfer of stock (*h*); or a complete transfer of shares or stock in accordance with the requirements of the company (*i*); or an assignment in writing duly stamped of a policy of insurance (*k*): in all such cases, though the conveyance, assignment, delivery or transfer be voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by the Court (*l*). The giving of a promissory note to a trustee with directions as to its disposition after death has been held to create a perfect trust (*m*).

And the Court will enforce the equitable interest even although, as in the principal case, the trust property by accident *gets back into the hands of the donor* (*n*); to whom, if it were transferred by the trustees, they would commit a breach of trust (*o*).

It is not essential to the creation of a trust in favour of volunteers

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(*a*) Cf. Woodford *v.* Charnley, 28 B. 96; and see this case commented upon by *Lindley*, L. J., in *Re* Patrick, (1891) 1 Ch. 82, at p. 87.

(*b*) Green *v.* Paterson, 32 C. D., p. 103.

(*c*) *Re* Lulham, 33 W. R. 788 (C. A.).

(*d*) See Judicature Act, 1873, s. 25, s.s. 6 and notes; Ryall *v.* Rowles, vol. 1, supra, at p. 150; *Re* Patrick, (1891) 1 Ch. 82.

(*e*) Bridge *v.* B., 16 B. 315; Walker *v.* Bradford Bank, 12 Q. B. D. 511.

(*f*) Langley *v.* Thomas, 26 L. J. Ch. 609; Godefroi (1907), 68.

(*g*) See *Re* Ridgway, 15 Q. B. D. 447, and Cochrane *v.* Moore, 25 Q. B. D. 57, a case of gift, in which all the cases on the subject are considered by the Court of Appeal; and cf. Alderson *v.* Peel, 7 T. L. R. 418.

(*h*) See Mackie *v.* Herbertson, 9 A. C. 303; De Mestre *v.* West, (1891) A. C. p. 271.

(*i*) See Société Générale de Paris *v.* Walker, 11 A. C. at p. 28; Nanney *v.* Morgan, 37 C. D. 346, at p. 352; Godefroi (1907), 69.

(*k*) Fortescue *v.* Barnett, 3 My. & K. 36; *Re* King, 14 C. D. 179; Howes *v.* Prudential, &c., 49 L. T. 133; *Re* Young, 25 L. R. Ir. 372; *Re* Turcan, 40 C. D. 5.

(*l*) See also Colman *v.* Sarrel, 1 V. 50, 1 R. R. 83; Pulvertoft *v.* P. 18 V. 84, 99; Bill *v.* Cureton, 2 My. & K. 503; Jefferys *v.* J., C. & P. 138, 141; Dening *v.* Ware, 22 B. 184; Muggeridge *v.* Stanton, 7 W. R. 638; Dilrow *v.* Bone, 3 Gif. 538.

(*m*) Per North, J., in *Re* Richards, 36 C. D. 541, but quære whether this case was rightly decided; see per Cotton, L. J., in *Re* Whitaker, 42 C. D. 119, at p. 125.

(*n*) Smith *v.* Lyne, 2 Y. & C. Ch. 345; Lanham *v.* Pirie, 3 Jur. (N. S.) 704; Gilbert *v.* Overton, 2 Hem. & M. 117.

(*o*) M'Donnell *v.* Hesilrige, 16 B. 346.

that the trustees should accept the trust (*a*), and if a trustee to whom the legal interest has been transferred disclaim, the Court will hold the settlor in whom the estate reverts on the disclaimer bound by the trust, and will if necessary appoint new trustees (*b*).

Where there is a *clear intention* on the part of the donor of making a gift, a legal transfer of the subject-matter of the gift to the donee will be valid, although it was not knowingly made to him for the purpose of carrying out the gift. "For instance, suppose this occurred, that a person made a memorandum on the title deeds of an estate to this effect: 'I give Blackacre to A. B.' and afterwards conveyed that estate to A. B. by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor? The answer would be, that there is no resulting trust; that is rebutted by showing that the person who conveyed did not intend the person taking the conveyance to be a trustee; and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. On the same principle, where a testator makes his debtor executor, and thereby releases the debt at law, he is no longer liable at law" (*c*). But he would be liable in equity unless he could show some reason for not being made liable, such as a continuing intention to give (*d*).

Where, however, although there has been a transfer to trustees, the trusts have not been finally determined upon by the settlor, he has a *locus pœnitentiæ*, and may call for a re-transfer (*e*).

By assignment of the Equitable Estate or Interest.—Where the assignor has done all in his power at the time (*f*) to make the assignment perfect, such assignment is binding on him, although voluntary. Thus, if the subject of the trust be an equitable interest

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(*a*) Tierney *v.* Wood, 19 B. 330; Donohue *v.* Conrahy, 2 Jo. & Lat. 689.

(*b*) Mallott *v.* Wilson, (1903) 2 Ch. 494; Jones *v.* J., (1874) W. N. 190.

(*c*) Per *Jessel*, M. R., in Strong *v.* Bird, 18 Eq., pp. 318, 19; and cf. Bottle *v.* Knocker, 25 W. R. 209, which *Bacon*, V.-C., distinguishes from Strong *v.* Bird. And see further p. 871, infra, and the cases there cited in notes (*d*), (*e*), (*f*), (*g*).

(*d*) Ibid.

(*e*) *Re* Sykes' Trusts, 2 John. & H. 415; and see Gason *v.* Rich, 19 L. R. Ir. 396.

(*f*) Nanney *v.* Morgan, 37 C. D. 346 at p. 352, cited infra, p. 870; *Re* Griffin, (1899) 1 Ch. 408.

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and the owner executes an absolute assignment of it, then such assignment passes the equitable estate. Thus, in *Sloane* v. *Cadogan* (*a*), W. C. having an equitable reversionary interest in a fund vested in trustees, assigned it to other trustees upon trust for volunteers. It was contended by Sir *Edward Sugden*, in his argument, that, in order to constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and *cestui que trust* should be established; that W. C. did all he could; but that was not enough: that he could not make an actual transfer; that the trustees in whom it was vested would not have been authorised in transferring it of their own authority to the trustees of the settlement made by W. C.; *Grant*, M. R., however, held, that the equitable assignment created a perfect trust. "The Court," he said, "will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees: W. C. had an equitable reversionary interest in that fund, and he assigned it to certain trustees, and then the first trustees are trustees for the assigns, and they may come here; for when the trust is created, no consideration is essential, and the Court will execute it, though voluntary."

In *Fortescue* v. *Barnett* (*b*), J. B. voluntarily assigned by deed a policy of insurance on his own life to trustees for his sister. The grantor kept the policy, and the trustees did not give notice of the assignment. J. B. afterwards surrendered the policy for valuable consideration. *Leach*, M. R., held, that the gift of the policy was complete without delivery, that nothing remained to be done by the grantor, and that the omission of the trustees to give notice could not affect the *cestuis que trust* (*c*). And so in *Blakely* v. *Brady* (*d*), where a debt was equitably assigned by A. to B. to hold as trustee upon certain trusts, by deed containing a power of attorney to get it in, the administrator of A. was held a trustee for B.

The question does not turn upon any distinction between a legal and an equitable title, but simply upon *whether any act remains to be done by the grantor which, to assist a volunteer, the Court will not compel him to do* (*e*).

(*a*) Sugd. V. & P., App. No. xxiv., 11th ed.

(*b*) 3 My. & K. 36.

(*c*) See *Re* King, 14 C. D. 179; Johnstone *v.* Mappin, 64 L. T. 48; Donaldson *v.* D., Kay, 711; *Re* Lucan, 45 C. D. 470; *Re* Patrick, (1891) 1 Ch. 82.

(*d*) 2 Dr. & Wal. 311.

(*e*) See judgment of *Leach*, M. R., in Fortescue *v.* Barnett, supra; see also Godsal *v.* Webb, 2 Keen, 99; Pear-

In *Kekewich* v. *Manning* (*a*), a lady entitled absolutely to the reversion in stock, subject to the life interest of her mother therein, which stock was standing in the joint names of herself and her mother, assigned her interest in this stock on her marriage to trustees in trust for herself for life, remainder to her husband for life, and after their decease, in trust for her niece, and for the issue of the marriage and the issue of the niece according to appointment; and in default of issue of the marriage, in trust for the niece. No transfer of the fund took place, but the mother had notice of the settlement. There was no issue of the marriage. It was held by *Knight-Bruce* and *Cranworth*, L. JJ., that even if the settlement were voluntary as regarded the niece and not supported by the marriage consideration (which point, however, the Court did not decide), the assignment *being complete* would be enforced by the Court. The present case, said *Knight-Bruce*, L. J., raises the question, often discussed, "whether an act or intended act of bounty, whether a gift, or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention, or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention. * * * It is upon legal and equitable principles clear that a person *sui juris*, acting freely, fairly, and with sufficient knowledge ought to have, and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced." * * * "Suppose stock or money to be legally vested in A. as trustee for B. for life, and subject to B.'s life interest, for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of his, C.'s, interest to D. by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. * * * If so, can C. do this better or more effectually than by executing an assignment to D.?" The better opinion is that since this case, *Holloway* v. *Headington* (*b*), *Edwards* v. *Jones* (*c*), *Sewell* v. *Moxsy* (*d*), *Ward* v. *Audland* (*e*), *Beatson* v. *B.* (*f*), are overruled (*g*). But the voluntary assignment

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son *v.* Amicable, &c. Office, 27 B. 229; Pedder *v.* Mosely, 31 B. 159; *Re* King, 14 C. D. 179; and the remarks of *Cottenham*, C., in Edwards *v.* Jones, 1 My. & C. 238; see also *Re* Griffin, (1899) 1 Ch. 408.

(*a*) 1 De G. M. & G. 176.

(*b*) 8 Si. 324.

(*c*) 1 My. & C. 226.

(*d*) 2 Si. (N. S.) 189.

(*e*) 8 B. 201.

(*f*) 12 Si. 281.

(*g*) See Lewin (1911), p. 74. See also Voyle *v.* Hughes, 2 Sm. & Gif. 18;

of a mere *expectancy*, even though under seal, will not be enforced in equity (*a*).

In *Re Lucan* (*b*), L., by indenture between himself and C., granted C. an annuity of 300*l*., issuing out of and chargeable upon certain hereditaments and a reversionary interest of 12,000*l*. standing in name of trustees. The deed contained a covenant for payment, and for further assurance. *Chitty*, J., held that the charge was effectual on the real estate, but that as to the reversionary interest there was no gift or assignment of the thing, but at most a charge, which rested upon *contract*, and C., being a volunteer, could receive no assistance from the Court.

Equitable assignment where the donor has the legal interest.—In two cases, *Bridge* v. *B.* (*c*) and *Beech* v. *Keep* (*d*), *Romilly*, M. R., proceeded upon the principle that a voluntary assignment of the equitable interest where the assignor had power to assign, or compel a transfer of the legal interest was inoperative. But in *Gilbert* v. *Overton* (*e*), G., who had an agreement for a lease subject to rent and covenants, by voluntary deed assigned it to trustees upon trusts therein declared. The following year a lease was granted to G., but he did not assign it to the trustees. *Wood*, V.-C., held the settlement to be complete, and in commenting upon *Bridge* v. *B.*, said that the points there dealt with would require much consideration, that a man who conveys his equitable interest may well be considered to do all that can be required, and that it would be a great extension of the established doctrine on these subjects to hold that if a legal estate is discovered, perhaps many years afterwards, to have been outstanding at the date of a voluntary settlement, the settlement itself is to be deprived of effect. In *Nanney* v. *Morgan* (*f*) the settlor, who had an equitable interest in stock, settled it, but did not compel a transfer of the legal interest, which apparently he might have done, and the Court of Appeal held the settlement effectual,

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Re Way's Trusts, 2 De G. J. & S. 365; Glegg *v.* Rees, L. R. 7 Ch. 74; Warriner *v.* Rogers, 16 Eq. 349; *Re* King, 14 C. D. 187.

(*a*) See *Re* Tilt, 74 L. T. 163; Meek *v.* Kettlewell, 1 Ha. 464; *Re* Ellenborough, (1903) 1 Ch. 697.

(*b*) 45 C. D. 470, but see *Re* Whitaker, (1901) 1 Ch. 9.

(*c*) 16 B. 315, in this case it would seem that the settlor had no power to compel a transfer of the legal interest, see p. 328 of the report, and see per *Hall*, V.-C., in *Re* King, 14 C. D. 179, at p. 184.

(*d*) 18 B. 285.

(*e*) 2 Hem. & M. 110, and see Donaldson *v.* D., Kay, 711 (V.-C. W.).

(*f*) 37 C. D. 346, at p. 352. See *Re* King, 14 C. D. 179.

Cotton, L. J., saying, "The law as regards voluntary settlements is this: if the settlor transfers *all the interest that he is in a position to transfer at the time*, then it is effectual" (*a*).

Though a legal chose in action is now legally assignable under the Judicature Act, 1873, s. 25, sub-s. 6, it appears that a voluntary assignment not complying with that section but valid in equity, will operate as a perfect gift. In *Re Patrick* (*b*), P., by voluntary indenture of settlement, assigned certain debts to trustees on certain trusts, and gave them power to sue for and collect such debts. But he did not assign the securities for the debts, or give them up to the trustees. No *notice* was given to the debtors. P. received payment of all the debts and died. The Court of Appeal held that the assignment was complete, and that the trustees might prove for the debts in the administration of P.'s estate (*c*). In *Re Griffin* (*d*) it was held that the indorsement and delivery of a banker's deposit receipt, by way of gift, operated as a good equitable assignment of the amount on deposit, and that the gift of the amount was perfect. The fact that the assignee was appointed executor by the assignor was, however, relied on as removing all doubt.

If the transaction is imperfect originally by reason of the donor not having transferred the legal estate, but the donor subsequently does something, not with the direct intention of perfecting the gift, but by which in law the gift is perfected, that is sufficient, as where a person intending to make a gift of a debt appoints the debtor executor (*e*).

This doctrine has been applied in *Re Griffin* (supra), and *Re Stewart*(*f*), to perfect an imperfect gift of *specific* property, but in *Re Innes* (*g*) *Parker*, J., refused to extend the principle further and to apply it to a mere promise to pay an indefinite sum at a future time.

Notice.—Since the Judicature Act, 1873, s. 25, sub-s. 6 (*h*), it

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(*a*) And see Société Générale de Paris, 11 A. C. 20, 28; Moore *v.* North-Western Bank, (1891) 2 Ch. 599.

(*b*) (1891) 1 Ch. 82. Cf. *Re* Seaman, (1896) 1 Q. B. 412.

(*c*) Woodford *v.* Charnley, 28 B. 96, and Bizzey *v.* Flight, 24 W. R. 957, were considered in the judgment of *Lindley*, L. J.

(*d*) (1899) 1 Ch. 408. Cf. *Re* Richardson, 30 C. D. 396; *Re* Dillon, 44 C. D. 76.

(*e*) Strong *v.* Bird, 18 Eq. 315; *Re* Flavell, 25 C. D. 100; *Re* Applebee, (1891) 3 Ch. 422, but cf. *Re* Hyslop, (1894) 3 Ch. 522.

(*f*) (1908) 2 Ch. 251.

(*g*) (1910) 1 Ch. 188, and see Vavasseur *v.* V., 25 T. L. R. 250.

(*h*) Notes to Ryall *v.* Rowles, vol. 1, p. 150.

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would seem that until notice is given in pursuance of the section, the *legal* right to a *legal* chose in action which is assigned remains in the assignor (*a*).

It is well established that notice of the voluntary assignment of an equitable interest or of a chose in action, *to the trustees or debtor*, is not essential to its validity as against the settlor, but if the trustees or debtor, before notice, transferred the property or paid the debt, the donee would have no remedy against them. Thus, in *Donaldson* v. *D.* (*b*), the settlor having assigned stock standing in the names of trustees, to other trustees in favour of volunteers, *Wood*, V.-C., held that as between the donees under the assignment and the representatives of the assignor, the title of the former was complete, although no notice of the assignment had been given to the trustees in whose names the stock was standing. "The question," said his Honour, "is, whether, notice not having been given to the trustee, the gift could be enforced. As to that, it has been said in some cases that the gift is complete when no further act is required to be done by the donor or donee: and that seems to imply a doubt, whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original *cestui que trust* for whom they held it; and if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to give notice to the trustee before the stock is transferred; and when he has given such notice his title is complete: and unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of the Court against them" (*c*). Notice does not affect the priorities between volunteers (*d*). Notice to the donee or *cestui que trust is*

(*a*) See Lee *v.* Magrath, 10 L. R. Ir. 313; Harding *v.* H., 17 Q. B. D. 442; Gason *v.* Rich, 19 L. R. Ir. 391. And see Bennett *v.* White, (1910) 2 K. B. 643.

(*b*) Kay, 711, discussed in *Re* Lucan, 45 C. D. 470, supra, p. 870; *Re* Griffin, ubi supra.

(*c*) See *Re* Way's Trusts, 2 De G. J. & S. 365; Gorringe *v.* Irwell, &c., 34 C. D., p. 132 (C. A.); *Re* Lucan, 45 C. D., p. 474; *Re* Patrick, (1891) 1 Ch., p. 87; *Re* Seaman, (1896) 1 Q. B. 412; Lewin (1911), pp. 75, 79; Godefroi (1907), pp. 109, 792.

(*d*) Justice *v.* Wynne, 12 Ir. Ch. R. 289; Newman *v.* N., 28 C. D. 674; cf. *Re* Ford, 63 L. T. 557; and see Vol. I. ante, p. 121.

not necessary for the completion of the assignment (*a*). Notice of assignment to the debtors is not necessary to render a gift of the debt complete (*b*).

By Declaration of Trust.—A declaration of trust has, in equity, the same effect as a transfer of the legal estate, or as the vesting of a legal interest has in a Court of law, and if the transaction by which the trust is created is *complete*, it will not be disturbed for want of consideration (*c*).

There must be a clear intention to create a trust, carried into effect and perfected by an act intended to give effect to such intention. For as long as the matter rests in intention only, there is a *locus pœnitentiæ* (*d*).

This intention to declare a trust may be effected in two ways: (1) Where a person having the legal estate or possession declares himself to be a trustee of it for another;

(2) Where the legal estate or possession being outstanding in another, the person entitled to the equitable interest therein constitutes such other person a trustee for volunteers (*e*).

If the declaration relates to hereditaments, it must under the 7th section of the Statute of Frauds be *manifested and proved* by writing signed, &c., &c. (*f*); and as to agreements in consideration of marriage, see (*g*). An estate tail cannot be barred by a mere declaration of trust, because the Fines and Recoveries Act requires such an assurance as would pass the legal estate in fee simple (*h*). And if a married woman desires to declare a trust of copyholds the declaration must be by deed duly acknowledged under that Act, in which case it will be effectual as a "disposition" under s. 77 thereof (*i*). But a declaration by parol is sufficient to create a trust of personal property (*k*).

(*a*) Tate *v.* Leithead, Kay 658; Paterson *v.* Murphy, 11 Ha. 88-91; Standing *v.* Bowring, 31 C. D. 282; London County Banking Co. *v.* London River Plate, 21 Q. B. D. p. 542; Mallott *v.* Wilson, (1903) 2 Ch. 494.

(*b*) See, e.g., *Re* Patrick, p. 871, supra, and Vol. I., ante, pp. 106, 112, 115.

(*c*) Collinson *v.* Pattrick, 2 Keen, 123.

(*d*) *Re* Sykes' Trusts, 2 John & H. 415; Dipple *v.* Corles, 11 Ha. 183; *Re* Mills, 7 W. R. 372; Penfold *v.* Mould, 4 Eq. 562; Forbes *v.* F., 6 W. R. 92; Gason *v.* Rich, 19 L. R. Ir. 396; Johnstone *v.* Mappin, 69 L. J. Ch. 241; Antrobus *v.* Smith, 12 V. p. 47.

(*e*) Infra, p. 876, and cf. Richards *v.* Delbridge, p. 880, infra.

(*f*) Forster *v.* Hale, 5 V. 308, 4 R. R. 129; Tierney *v.* Wood, 19 B. 330; Kronheim *v.* Johnson, 7 C. D. 60; Caton *v.* C., L. R. 2 H. L. 127.

(*g*) See 29 Car. 2, c. 3, s. 4; Johnstone *v.* Mappin, 64 L. T. 48; *Ex p.* Whitehead, 14 Q. B. D. 419.

(*h*) Green *v.* Paterson, 32 C. D. 95.

(*i*) Carter *v.* C., (1896) 1 Ch. 62.

(*k*) M'Fadden *v.* Jenkyns, 1 Ha. 458.

In *Ex p. Pye* (*a*), M. had by letter directed an agent in Paris to purchase an annuity for a lady, which was accordingly purchased, but in the name of M., the lady being at that time married, and also deranged. M. afterwards sent to his agent a power of attorney authorising him to transfer the annuity into the lady's name, but died before the transfer was made. *Eldon*, C., held, that although the legal interest remained in M., he had *constituted himself a trustee* for the lady. The question involved the point, "whether the power of attorney amounts here to a declaration of trust? It is clear that this Court will not assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, *that, upon an agreement to transfer stock, this Court will not interpose;* but, *if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more,* and the Court will act upon it." "Upon the *documents* before me, it does appear, that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what *seems to me a sufficient declaration that he held this part of the estate in trust for the* annuitant" (*b*). But this case is one "of great peculiarity," per *Romilly*, M. R., in *Price* v. *P.* (*c*), and see the judgment of *Bacon*, V.-C., in *Warriner* v. *Rogers* (*d*).

In *Wheatley* v. *Purr* (*e*), H. O. directed her bankers to place 2,000*l.* in the joint names of her children, J. R. W., M. W., and H. W., and her own as trustee for her children. That sum was accordingly entered in the books of the bankers to the account of H. O. as trustee for J. R. W., M. W., and H. W. The bankers gave H. O., as trustee for J. R. W., M. W., and H. W., a promissory note for the amount, with interest at 2½ per cent., and she gave the bankers a receipt for the promissory note. *Langdale*, M. R., held that she had *constituted herself a trustee* for the plaintiffs, her children, and that a trust was completely declared, so as to give them a title to relief. But the control retained by the settlor over the fund must be a beneficial control for the purposes of the trust, and not a control inconsistent with the intention to create a trust (*f*).

It is not necessary to use the words, "I declare myself a trustee,"

(*a*) 18 V. 140; 11 R. R. 173.

(*b*) Ibid., at pp. 149 and 150; p. 149 is not printed in the report, supra, p. 372, of this case on Satisfaction.

(*c*) 14 B. 602.

(*d*) 16 Eq. p. 350.

(*e*) 1 Keen, 551.

(*f*) Vandenberg *v.* Palmer, 4 K. & J. 204; Gaskell *v.* G., 2 Y. & J. 502; Stapleton *v.* S., 14 Si. 186; Evans *v.* Jennings, 6 W. R. 610; Bill *v.* Cureton, 2 My. & K. 511; Crabb *v.* C., 1 My. & K. 511; Kelpen *v.* K., 1 My. & K. 520; and see p. 911, infra.

but there must exist in the transaction that which is the equivalent of those words (*a*); for instance, the giving of a power of attorney (*b*); a simple memorandum that money in hands of the holder was trust money (*c*); admission, by answers to questions in letters, that the holder of money was a trustee (*d*). Where a husband invested moneys subject to the trusts of his settlement, in the purchase of an estate, adding thereto 500*l.* of his own, it was held he had devoted this money to the trusts of the settlement (*e*); where an equitable mortgagee, by deposit, signed a memorandum accompanying the deposit, by which she declared that the mortgagor should pay the debt by instalments, some of which were to be invested by him in consols for the benefit of the children of A., this was held an irrevocable declaration of trust (*f*), so where D. lent 100*l.* to C. and took a receipt in the following terms, "Received of D. for the use of A. 100*l.*, to be paid to A. at D.'s death, but interest at 4 per cent. to be paid to D," which receipt was signed as approved by D.; it was held that C. was a trustee for A. on the death of D. (*g*). A testator gave a promissory note to G., saying he wished to provide for L., he then made his will and appointed G. his executor: held G. was a trustee for L. (*h*). A covenant to surrender copyholds, and meantime to stand possessed of them as trustees for volunteers, is a valid trust for them (*i*). In *Brewster* v. *Prior* (*k*), a residuary account contained an item, "Retained to pay outstanding legacy to W. G., 500*l.*," this, coupled with payment of interest, was held to be equivalent to a declaration of trust *by admission or acknowledgment* (*l*).

Papers of a testamentary character.—"If the character of the paper

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(*a*) Kekewich *v.* Manning, 1 De G. M. & G. 176; Richards *v.* Delbridge, 18 Eq. 11, cited p. 880, infra; and Dipple *v.* Corles, 11 Ha., p. 184.

(*b*) *Ex p.* Pye, 18 V. 140, supra, but see Milroy *v.* Lord, infra, p. 879; Pearson *v.* Amicable, &c., 27 B. 229.

(*c*) James *v.* Bydder, 4 B. 605; and see Middleton *v.* Pollock, 2 C. D. 104, 4 C. D. 49. See New, &c. Trustee *v.* Hunting, &c. (1897) 2 Q. B. 19, S. C.; Sharp *v.* Jackson (1899), A. C. 419; cf. Wigan *v.* English and Scottish, &c. Assurance Assoc., (1909) 1 Ch. 291.

(*d*) Thorpe *v.* Owen, 5 B. 225.

(*e*) Ouseley *v.* Anstruther, 10 B. 461.

(*f*) Paterson *v.* Murphy, 11 Ha. 88.

(*g*) Moore *v.* Darton, 4 De G. & Sm. 517.

(*h*) Lloyd *v.* Chune, 2 Gif. 441; which with Arthur *v.* Clarkson, 35 B. 458, and *Re* Richards, 36 C. D. 541, are criticised in *Re* Whitaker, 42 C. D. 119.

(*i*) Steele *v.* Waller, 28 B. 466; Donaldson *v.* D., Kay, 711.

(*k*) 25 W. R. 251.

(*l*) Scott *v.* Bentley, 1 K. & J. 221; *Re* Bennett, 17 L. T. 438; Morton *v.* Tewart, 2 Y. & C. Ch. 67; see further Stapleton *v.* S., 14 Si. 186; Donaldson *v.* D., Kay, 716; Gray *v.* G., 2 Si. (N. S.) 273.

is testamentary, then of course it is impossible to enlarge or convert it into a declaration of trust. The danger is great if such an attempt were to succeed: because, then, the result of such a transaction as this would be that the solemn disposition of property which the law requires to be made in the shape of a will would be entirely lost sight of" (*a*). But an imperfect settlement may be confirmed by a will (*b*).

Husband and Wife.—Before the Married Women's Property Act, 1882, it was doubtful whether a husband could make a good gift to his wife except by constituting himself a trustee for her. If he attempted to give and the gift was held imperfect, then it was in danger of failing as a declaration of trust. In *Baddeley* v. *B.* (*c*), *Malins*, V.-C., held that an assignment of a leasehold to a wife by her husband although void as a gift by a husband of chattels to his wife, operated as a declaration of trust, following *Grant* v. *G.* (*d*), rather than *Richards* v. *Delbridge*, and so in *Fox* v. *Hawks* (*e*), but both these cases were observed upon by *Hall*, V.-C., in *Re Breton* (*f*), in which he followed *Milroy* v. *Lord* (*g*), and on this point they cannot now be considered law (*h*). In *Penfold* v. *Mould* (*i*), a married woman gave her consent before commissioners to a transfer of stock to her husband, but before the gift was completed by transfer she changed her mind and was held entitled to revoke it.

Declaration of trust of equitable interest vested in trustees.—If the equitable owner of property vested in trustees directs them to apply in trust in favour of volunteers (*k*), such trust will be enforced in equity. A direction to trustees, even verbal (*l*) is equivalent to an equitable assignment (*m*). In *Rycroft* v.

(*a*) Per *Bacon*, V.-C., in Warriner *v.* Rogers, 16 Eq. p. 353; Milroy *v.* Lord, 4 De G. F. & J. 274; *Re* Fleetwood, 15 C. D. 594; *Re* Boyes, 26 C. D. 531; Towers *v.* Hogan, 23 L. R. Ir. 53; *Re* Smith, 64 L. T. 13; *Re* Shield, 53 L. T. 5; Gason *v.* Rich, 19 L. R. Ir. 391; cf. further Johnson *v.* Ball, 5 De G. & Sm. 85; *Re* Hetley, (1902) 2 Ch. 866.

(*b*) Bizzey *v.* Flight, 3 C. D. 269.

(*c*) 9 C. D. 113.

(*d*) 34 B. 623.

(*e*) 13 C. D. 822.

(*f*) 17 C. D. 416. See *Re* Whittaker, 21 C. D. 657, 666; Hayes *v.* Alliance Assurance Co., 8 L. R. Ir. 149.

(*g*) Infra, p. 879, and see Hayes *v.* Alliance, &c. Co., 8 L. R. Ir. 149.

(*h*) See M. W. Prop. Act, 1882, s. 1; Lewin (1911), p. 73; Godefroi (1907), 91, 113.

(*i*) 4 Eq. 562.

(*k*) *Semble*, acceptance by the trustees is not necessary; Tierney *v.* Wood, 19 B. 330; Harding *v.* H., 17 Q. B. D. 444; Mallott *v.* Wilson (1903), 2 Ch. 494; and see Part 6, p. 907, infra. As to notice, see p. 872, supra.

(*l*) M'Fadden *v.* Jenkyns, 1 Ha. 458; on appeal, 1 Ph. 153; Meek *v.* Kettlewell, 1 Ha. 471.

(*m*) See Lambe *v.* Orton, 1 Dr. & Sm.

Christy (*a*), Mrs. Rycroft, being entitled to the dividends of money in the hands of a trustee, by deed without consideration directed the trustee to pay part of the said dividends weekly to E. The trustee accepted this trust and acted upon it; *Langdale*, M. R., held that as Mrs. Rycroft had, *so far as she had the power*, transferred the trust from herself to E., and as there was no further instrument or formality to be executed, and the trustee had accepted and acted on the trust, such trust was binding on Mrs. Rycroft. He also held that a trust once executed, as this was, could not be rendered executory by anything which subsequently happened to the fund, as by a transfer into Court. In *Bentley* v. *Mackay* (*b*), a father entitled during the life of his son to dividends on funds in the names of himself and three other trustees, directed two of the trustees to pay the dividends to his son, and they acted upon such direction; the Court held that there was a valid declaration of trust: and see *Bridge* v. *B.* (*c*). In *Tierney* v. *Wood* (*d*), the legal fee in lands was vested in A. in trust for B. B. signed a document addressed to A. directing him to hold the lands after his death on trust for certain persons, and this was held a good declaration of trust within sect. 7 of the Statute of Frauds (*e*).

3. An Imperfect Gift or Transfer will not be Construed as a Declaration of Trust.

The clearest intention to create an irrevocable trust in favour of a volunteer, will not be sufficient unless the settlor does some act in confirmation of his intention. The following cases show that an intention to give or assign will not be aided in equity, unless the act of gift or assignment in pursuance of such intention is complete, or *unless the donor has done all in his power to make it complete.*

In *Antrobus* v. *Smith* (*f*), Gibbs Crawford made the following indorsement upon a receipt for one of the subscriptions in the Forth and Clyde Navigation: "I do *hereby assign* to my daughter, Anna Crawford, all my right, title, and interest of and in the enclosed call, and all other calls, of my subscription in the Clyde and Forth

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125; Harding *v.* H., 17 Q. B. D. 443; cf. *Re* Lucan, 45 C. D. 470.

(*a*) 3 B. 238.

(*b*) 15 B. 12.

(*c*) Cf. Collinson *v.* Pattrick, 2 Keen, 123.

(*d*) 19 B. 330.

(*e*) See Kronheim *v.* Johnson, 7 C. D. 60.

(*f*) 12 V. 39, 8 R. R. 278.

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Navigation." This not being a legal assignment, it was argued, "that the father meant to make himself a trustee for his daughter of these shares." But *Grant*, M. R., observed, "Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a *gift*. He says, he *assigns* the property. But it was *a gift not complete*. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is *locus pœnitentiæ* as long as it is incomplete." So, in *Edwards* v. *Jones* (*a*), where the obligee of a bond signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be *an assignment* of the bond, without consideration, to the person to whom the bond was at the same time delivered, *Cottenham*, C., upon the authority of the doctrine laid down in *Antrobus* v. *Smith*, which he said it was impossible to question, held that the *gift was incomplete*, and that, as it was without consideration, the Court could not give effect to it (*b*).

In *Searle* v. *Law* (*c*), A. made a voluntary assignment of turnpike road bonds and shares in an insurance and in a banking company to B., in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B., but did not observe the formalities required by the Turnpike Act, and the deeds by which the companies were formed, to make the assignment effectual. *Shadwell*, V.-C., held, that on A.'s death no interest in either the bonds or the shares passed by the assignment, and that B. ought to deliver them to the executor of A. "If that gentleman," said his Honour, "*had not attempted to make any assignment of either the bonds or the shares, but had simply declared, in writing, that he would hold them upon the same trusts as are expressed in the deed*, that *declaration would have been binding upon him*; and whatever bound him, would have bound his personal representative. But it is evident that he had *no intention whatever of being himself a trustee for any one*, and that he meant all the persons named in the deed as *cestuis que trustent* to take the provisions intended for them

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(*a*) 1 My. & C. 226; but cf. *Re* Patrick, supra, p. 871.

(*b*) *Semble*, this case is overruled by Kekewich *v.* Manning, supra, p. 869; and see supra, p. 871; but cf. *Re* Richardson, 30 C. D. p. 404.

(*c*) 15 Si. 95; see note (*a*), supra.

through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment; and, therefore, both the legal and the beneficial interest in the bonds and shares remained vested in him at his death." And see the following cases of imperfect gift or transfer: *Jones* v. *Lock* (*a*), where a father put a cheque into his son's hand, saying, "I give this to baby for himself," and then took back the cheque; *Moore* v. *M.* (*b*), imperfect gift of debenture stock; *Heartley* v. *Nicholson* (*c*), where a gift of a share in a colliery company, notwithstanding expression in letters, signature of minutes, and receipt of dividend, was held insufficient as a declaration of trust; *Re Shield* (*d*), an imperfect gift of debenture stock; *Ex p. Todd* (*e*), where by deed, in 1877, the settlor recited his intention to settle certain shares and to transfer them to trustees, but the transfer was not made until 1886: see judgment of *Cave*, J., in *West* v. *W.* (*f*); *Hayes* v. *Alliance, &c., Assoc. Co.* (*g*), an incomplete gift of a policy of assurance by husband to wife; *Re Breton* (*h*), where a husband by three letters purported to give furniture to his wife. In *Woodford* v. *Charnley* (*i*), a mortgagee in fee for 5,000*l.* without any covenant for payment in the deed, assigned the sum of 5,000*l.* to trustees and gave them a power of attorney to recover it, but did not convey to them *the legal* estate and the settlement was held incomplete (*k*).

In *Milroy* v. *Lord* (*l*), T. M. executed a deed poll by which he purported to assign, for a nominal consideration, fifty shares in a bank to the defendant, Lord, in trust for the plaintiff, his niece. Both T. M. and Lord executed this deed. At this time Lord held a power of attorney from T .M. to transfer stock. After the execution of the deed T. M. gave him a further power to receive dividends, and handed him the scrip for the shares. Lord from time to time paid the dividends to the plaintiff. The fifty bank shares were transferable only by entry in the books of the company. No such transfer was ever made by T. M. or Lord. On the death of T. M., Lord handed over the certificates of the shares to his executor. *Stuart*, V.-C., held the shares were bound by the trusts of the deed

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(*a*) L. R. 1 Ch. 25.

(*b*) 18 Eq. 474.

(*c*) 19 Eq. 233.

(*d*) 53 L. T. 8.

(*e*) 19 Q. B. D. 186.

(*f*) 9 L. R. Ir. 121.

(*g*) 8 L. R. Ir. 149.

(*h*) 17 C. D. 416.

(*i*) 28 B. 96.

(*k*) But see remarks of *Lindley*, L. J., on this case, *Re* Patrick, (1891) 1 Ch. p. 87, cited supra, p. 871; cf. *Re* Richardson, 30 C. D. 396; a parol voluntary gift of mortgage money by an equitable mortgagee with delivery of the deed.

(*l*) 4 De G. F. & J. 264; *Re* Griffin, (1899) 1 Ch. 408.

poll, but *Turner*, L. J., on allowing the appeal, said, "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have *done everything, which, according to the nature of the property comprised in the settlement, was necessary to be done* in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared *either in writing or by parol;* but in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement *is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.* These are the principles by which, as I conceive, this case must be tried."

In the case of *Richards* v. *Delbridge* (*a*), J. Delbridge, who was possessed of leasehold business premises and stock in trade, shortly before his death purported to make a voluntary gift in favour of his grandson E. B. Richards, who was an infant, and assisted him in his business, by the following memorandum signed and endorsed on the lease: "This deed, and all thereto belonging, I give to E. B. Richards from this time forth, with all the stock in trade," signed, "J. Delbridge." J. Delbridge delivered the lease to the mother of his grandson. *Jessel*, M. R., following *Milroy* v. *Lord*, supra, p. 879, and declining to follow *Richardson* v. *R.* (*b*) and *Morgan* v. *Malleson* (*c*), which are inconsistent with that case, held that there was no valid declaration of trust of the property in favour of E. B. Richards. "A man," said his Lordship, "may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership,

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(*a*) 18 Eq. 11.

(*b*) 3 Eq. 686.

(*c*) 10 Eq. 475.

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in which case the person who by those acts acquires the property, takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. *It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning:* for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning * * * * * For a man to make himself trustee there must be an expression *of intention* to become a trustee, whereas words of present gift show an *intention* to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise." Then, after referring to the judgment of *Turner*, L. J., in *Milroy* v. *Lord*, and citing the passage commencing, "The cases, I think, go further," &c., supra, p. 880, he continued, "It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord *Romilly* and Vice-Chancellor *Wood, i.e.*, in *Morgan* v. *Malleson* and *Richardson* v. *R.*, supra, were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases, in which words of present transfer *for valuable consideration* are held to be evidence of a contract which the Court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature, which this Court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion" (*a*).

(*a*) See also Warriner *v.* Rogers, 16 Eq. 340, gift of a box containing title deeds, and a memorandum that contents of box were a deed of gift, the memorandum was not to take effect until after donor's death, and the donor had no present intention of parting with anything; Lee *v.* Magrath, 10 L. R. Ir. 313, a promissory note; *Re* Caplen, 45 L. J. Ch. 280, a promissory note; *Re* Whittaker, 21 C. D. 657, declaration of trust by husband; *Ex p.* Todd, 19 Q. B. D. 186, incomplete transfer of shares; Green *v.* Paterson, 32 C. D. 95, settlement of copyholds without surrender; *Re* Richards, 36 C. D. 541, promissory note; cf. *Re* Patrick, (1891) 1 Ch. 82.

Donatio mortis causâ.—There is this difference between an incomplete voluntary gift *inter vivos*, and a *donatio mortis causâ*. In the former case the Courts will not interfere to compel the donor or his executor to perfect it, but in the latter case the executors may be compelled to do so (*a*).

4. Rectification, Revocation and Avoidance of Voluntary Deeds, &c.

A Court of equity will not set aside a voluntary deed or agreement not obtained by fraud, by mistake, or against public policy, even if it be such as, according to the principles before laid down, it will not carry into effect. Equity stands neutral, and invariably follows the rule thus quaintly laid down in an old case, "that if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly" (*b*). When a settlement is impeached on the ground of undue influence, the absence of a power of revocation is not *in itself* a ground for setting the settlement aside (*c*). The settlor can in no wise invalidate his deed, though prior to the Voluntary Conveyances Act, 1893, he could defeat it by a subsequent disposition by himself for value and to the extent of that disposition (*d*). And the rule is the same whether the interference of equity is invoked by the settlor himself, or by a person claiming through him (*e*). Where an instrument creating a valid and complete voluntary trust is duly sealed and delivered, the obligation is complete, the detention thereof by the settlor does not render it inoperative (*f*). Nor will the destruction of the instrument affect the trust (*g*).

Rectification.—As we have before seen, a deed for valuable con-

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(*a*) See judgment of *Cotton*, L. J., in *Re* Dillon, 44 C. D., p. 82; cf. Antrobus *v.* Smith, 12 V. 39, 8 R. R. 278; *Re* Weston, (1902) 1 Ch. 680; *Re* Beaumont, (1902) 1 Ch. 889: *Re* Andrews, (1902) 2 Ch. 394.

(*b*) Villers *v.* Beaumont, 1 Vern. 101.

(*c*) Phillips *v.* Mullings, L. R. 7 Ch. 244; Hall *v.* H., L. R. 8 Ch. 430.

(*d*) See Dolphin *v.* Aylward, L. R. 4 H. L. 486; *Re* Walhampton Estate, 26 C. D. 391; Godfrey *v.* Poole, 13 A. C. p. 505; and see Bill *v.* Cureton, 2 My. & K. 503; Petre *v.* Espinasse, 2 My. & K. 496; Page *v.* Horne, 11 B. 227.

(*e*) Dolphin *v.* Aylward, supra.

(*f*) *Re* Patrick, supra; Hall *v.* Palmer, 3 Ha. 532; Fletcher *v.* F., 4 Ha. 67; *Re* Way's Trusts, 2 De G. J. & S. 365; cf. Xenos *v.* Wickham, L. R. 2 H. L. 323.

(*g*) Smith *v.* Lyne, 2 Y. & C. Ch. 345.

sideration not carrying out the intention of the parties may be so modified and rectified as to carry them out (*a*), and this even at the suit of a volunteer *cestui que trust* (*b*). In the case of a *voluntary* deed it was formerly said that rectification was impossible, and that the deed could not be modified to suit former intentions (*c*). This is no longer the law; see the modern authorities discussed supra at p. 818. In certain cases, on proof that the effect of the absence of a power of revocation was not present to the mind of a voluntary settlor when he executed the settlement, the Court has rectified it, by inserting powers of disposition in default or failure of issue (*d*), and in one case adding a power of revocation (*e*). In this case, however, the Court with the consent of the plaintiff directed that a new settlement with all proper powers should be made under the directions of the Court.

Revocation (see p. 907 as to creditors' deeds, infra).—A complete executed trust, either by actual transfer on assignment or declaration of trust, cannot in the absence of a power reserved for that purpose to the settlor, or in the absence of fraud, mistake, &c., be revoked by him (*f*). And it is immaterial that the legal estate by accident or breach of trust gets back into the hands of the settlor, as he would simply take it as a trustee (*g*).

In *M'Donnell* v. *Hesilrige* (*h*), a *feme sole*, in contemplation of her marriage with T., transferred property to trustees, upon trust for herself until marriage (if any), and then on trusts for her issue. She did not marry T., but M., and the trustees then handed over to her part of the fund. Held, that the settlement was irrevocable, and that the trustees were guilty of breach of trust. But if a settlement is executed with reference to a particular marriage, and the contract is definitely put an end to, the Court has jurisdiction to put an end to the settlement (*i*). If the trusts are for the settlor until marriage,

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(*a*) See note to Glenorchy *v.* Bosville, ante, p. 815.

(*b*) Thompson *v.* Whitmore, 1 J. & H. 268.

(*c*) Phillipson *v.* Kerry, 32 B. 628, 638; Turner *v.* Collins, L. R. 7 Ch. 329.

(*d*) See James *v.* Couchman, 29 C. D. 212.

(*e*) Welman *v.* W., 15 C. D. 570.

(*f*) Villers *v.* Beaumont, 1 Vern. 101; Ogilvie *v.* Littleboy, 13 T. L. R. 399; same case in House of Lords, Ogilvie *v.* Allen, 15 T. L. R. 294; Bill *v.* Cureton, 2 My. & K. 496; Rycroft *v.* Christy, 3 B. 238; Newton *v.* Askew, 11 B. 145; Paul *v.* P., 20 C. D. 742 (C. A.); Mackie *v.* Herbertson, 9 A. C. 303.

(*g*) Mallott *v.* Wilson, (1903) 2 Ch. 494.

(*h*) 16 B. 346.

(*i*) Essery *v.* Cowlard, 26 C. D. 191; Bond *v.* Walford, 32 C. D. 238.

and then upon other trusts, and the proposed marriage is such that by the law of this country it never can take place, the trust for the settlor remains in force (*a*).

Voluntary Conveyances and the Statute of Fraudulent Conveyances, 27 Eliz. c. 4.—By this statute conveyances, charges, and leases of lands, made with intent to defraud and deceive purchasers, were made void against such purchasers. The statute said nothing as to voluntary conveyances, but by a process of judicial construction a voluntary conveyance of real estate, or a voluntary settlement of land by way of trust, was, until the passing of the Voluntary Conveyances Act, 1893, liable to be avoided by a subsequent sale by the voluntary grantor under the statute to a purchaser for valuable consideration (*b*). The principle formerly acted upon was thus stated in *Newman* v. *Rusham* (*c*): "by selling the property for a valuable consideration the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively against him, and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser."

But a voluntary conveyance could not be defeated by a subsequent judgment creditor, who is not a purchaser and who can only have resort against such interest, if any, as remained in the settlor by virtue of, or unaffected by, the voluntary settlement (*d*).

The statute applies only to *real* property and interests in *land*. Chattels real, advowsons, rent charges or annuities issuing out of land, are therefore within the statute, and, perhaps, timber and minerals (*e*). Chattels personal do not come within the statute 27 Eliz. c. 4; a voluntary settlement, therefore, of chattels personal was never liable to be defeated by a subsequent sale (*f*).

(*a*) Chapman *v.* Bradley, 4 De G. J. & S. 71; Pawson *v.* Brown, 13 C. D. 202.

(*b*) 27 Eliz. c. 4, s. 1; Doe *v.* Manning, 9 East, 59; Clarke *v.* Wright, 6 H. & N. 849; Doe *v.* Rusham, 17 Q. B. 724; Trowell *v.* Shenton, 8 C. D. p. 325; Godefroi (1907), 140; Lewin (1911), 81. See form of judgment, Seton (1893), p. 1959.

(*c*) 17 Q. B. 724; cited in Godfrey *v.* Poole, 13 A. C. p. 504.

(*d*) Dolphin *v.* Aylward, L. R. 4 H. L. 486; Beavan *v.* Oxford, 6 De G. M. & G. 507.

(*e*) May, Fraudulent Conveyances (1908), p. 203.

(*f*) Sloane *v.* Cadogan, 2 Sug. V. & P., App. xxiv. ed. 11; Bill *v.* Cureton, 2 My. & K. 502; Barton *v.* Vanheythuysen, 11 Ha. 126; *Re* Walhampton Estate, 26 C. D. 391.

A voluntary gift for charitable purposes is not within the statute of Elizabeth (*a*).

A voluntary conveyance would be defeated by a conveyance or settlement for value to the extent only which was necessary to give effect to the conveyance or settlement for value (*b*).

A purchaser is not entitled to repudiate his contract simply because one link in the vendor's title consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value (*c*).

By the Voluntary Conveyances Act, 1893 (*d*), it is enacted as follows:

"2. Subject as hereinafter mentioned no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.

"3. This Act does not apply in any case in which the author of a voluntary conveyance of any lands, tenements, or hereditaments has subsequently, but before the passing of this Act, disposed of or dealt with the same lands, tenements, or hereditaments to or in favour of a purchaser for value.

"4. The expression 'conveyance' includes every mode of disposition mentioned or referred to in the said Act of Elizabeth.

"5. This Act shall extend to Ireland, and, as applied to Ireland, shall be read and construed as if the Act of 10 Car. 1. sess. 2, c. 3 (Ireland), were substituted for the said Act of Elizabeth."

Voluntary conveyances, after June 29, 1893, are no longer affected by the decisions resulting from the above-mentioned judicial construction of the statute 27 Eliz. c. 4. In view, however, of the light thrown on the nature of a voluntary conveyance by those decisions,

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(*a*) Ramsay *v.* Gilchrist, (1892) A. C. 412. See further as to charities, A. G. *v.* Corporation of Newcastle, 5 B. 307; Trye *v.* Corporation of Gloucester, 14 B. 173; Godefroi (1907), 125.

(*b*) Croker *v.* Martin, 1 Bli. (N. S.) 573; see also Dolphin *v.* Aylward, L. R. 4 H. L. 486; *Re* Walhampton Estate, 26 C. D. 391; Godfrey *v.* Poole, 13 A. C. p. 505; and as to the right of lien for improvements, Stepney *v.* Biddulph, 13 W. R. 576; Trevelyan *v.* White, 1 B. 588.

(*c*) Noyes *v.* Paterson, (1894) 3 Ch. 267.

(*d*) 56 & 57 Vict. c. 21; 29 June, 1893.

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and of the proviso contained in sect. 3 of the Act of 1893, the more important of those decisions have been retained in this note.

Where there was *no fraud* in fact, *two acts by the same person* were necessary to render a voluntary conveyance void under the old construction of the statute of Elizabeth, namely, a voluntary conveyance by the grantor, and a subsequent sale *by him* to a purchaser (*a*). For a voluntary conveyance would not be defeated by a conveyance for value by the *heir or devisee* of the settlor (*b*).

And where the sale was effected by a mortgagee under a power contained in a mortgage deed prior in date to the voluntary settlement, it would not have the same effect as a sale by the voluntary settlor himself, and the volunteer was held entitled to the proceeds of the sale after the deduction of what was due to the mortgagee (*c*).

A deed, apparently voluntary, may be supported by collateral evidence, showing it to be a contract for value (*d*).

The *onus* of proving *some* valuable consideration fell upon the person sustaining the deed (*e*).

A conveyance, moreover, which in its creation, being voluntary, might, under the old construction of the statute, be deemed fraudulent and void as against a purchaser, could yet become valid by matter *ex post facto*, as when the volunteer before the subsequent sale conveyed the settled property in consideration of marriage, or for other valuable consideration (*f*).

Purchaser for Value.—A purchaser is one who gives money or other valuable consideration for the land (*g*). It includes legal and equitable purchasers (*h*): mortgagees, both legal (*i*) and equitable,

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(*a*) Godfrey *v.* Poole, 13 A. C. 505.

(*b*) Doe *v.* Rusham, 17 Q. B. 734; Lewin *v.* Rees, 3 K. & J. 132.

(*c*) *Re* Walhampton Estate, supra.

(*d*) Pott *v.* Todhunter, 2 Coll. Ch. R. 76; Ford *v.* Stuart, 15 B. 493; Harman *v.* Richards, 10 Ha. 81; Townend *v.* Toker, L. R. 1 Ch. 446; Gale *v.* Williamson, 8 M. & W. 405; Mullins *v.* Guilfoyle, 2 L. R. Ir. 95; *Re* Holland, (1902) 2 Ch. 360.

(*e*) Kelson *v.* K., 10 Ha. 385.

(*f*) Prodgers *v.* Langham, Sid. 133; cited in Brown *v.* Carter, 5 V. 862, 5 R. R. p. 198; George *v.* Milbanke, 9 V. 190, 193, 7 R. R. 157; Guardian Ass. Co. *v.* Avonmore, 6 L. R. Ir. 391; Clarke *v.* Willott, L. R. 7 Ex. 313; May, ch. 3, p. 315; cf. *Re* Carter and Kenderdine's Contract, (1897) 1 Ch. 776.

(*g*) Beavan *v.* Oxford, 6 De G. M. & G. p. 517.

(*h*) Barton *v.* Vanheythuysen, 11 Ha. 126; Smith *v.* Garland, 2 Mer. 123.

(*i*) Dolphin *v.* Aylward, L. R. 4 H. L. 486; Cracknall *v.* Janson, 11 C. D. 1; *Re* Walhampton Estate, 26 C. D. 391; Shurmur *v.* Sedgwick, 24 C. D. 597.

and by deposit of title deeds (*a*) : lessees (*b*), except lessees without fine or rent (*c*) : also the assignee of a lease (*d*) : grantees in consideration of the release of a right (*e*) : and parties taking under settlements for valuable consideration (*f*), whether they were made in consideration of an intended marriage (*g*), or being post-nuptial, in consideration of ante-nuptial articles (*h*), or of some consideration such as an additional portion (*i*).

The husband of a volunteer could not be treated on his marriage as a purchaser under the statute: *Collins* v. *Burton* (*k*), reversed on other points (*l*). Nor could a person claiming under a post-nuptial settlement, unless it were made in pursuance of articles entered into before marriage (*m*), and those articles were of a binding character (*n*).

Notice.—Under the old construction of the statute, a purchase would be valid under 27 Eliz. c. 4, even *with notice* of a voluntary settlement, though *founded on a meritorious consideration* as being a fair provision for a wife and children; and the settlor would not be restrained from selling the settled estates; but, if the trust were complete, the volunteers were held entitled to the execution of it until the sale (*o*). And as their title was complete against all except purchasers for value, they could set aside prior voidable conveyances (*p*). The *cestui que trust*, however, under a voluntary settlement could not follow the estate in the hands of the purchaser (*q*), nor charge him with misapplying the purchase-money by paying it to the vendor, the grantor or settlor, with notice of the settlement (*r*). But if the settlor were in such a position that a subsequent sale for

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(*a*) Lloyd *v.* Attwood, 3 De G. & J. 614; Ede *v.* Knowles, 2 Y. & C. Ch. 172; Lister *v.* Turner, 5 Ha. 281.

(*b*) Lewis *v.* Hopkins, cited 9 East, 70; Goodright *v.* Moses, 2 Wm. Black, 1022; Owen *v.* O., 3 H. & C. 88.

(*c*) Upton *v.* Basset, Cro. Eliz. 444.

(*d*) Colville *v.* Parker, Cro. Jac. 158.

(*e*) Hill *v.* Bishop of Exeter, 2 Taunt. 69.

(*f*) Watkins *v.* Steevens, Nels. 160; Doe *v.* Lewis, 11 C. B. 1035.

(*g*) Douglasse *v.* Ward, 1 Ch. Ca. 79.

(*h*) Kirk *v.* Clark, Pr. Ch. 275.

(*i*) Brown *v.* Jones, 1 Atk. 190.

(*k*) 5 Jur. (N. S.) 952.

(*l*) Ib. 1113, 4 De G. & J. 612; Doe *v.* Lewis, 11 C. B. 1039.

(*m*) Martin *v.* Seamore, 1 Ch. Ca. 170.

(*n*) Doe *v.* Rowe, 4 Bing. N. C. 737; Trowell *v.* Shenton, 8 C. D. 318; and see *Re* Holland, (1902) 2 Ch. 360.

(*o*) Pulvertoft *v.* P., 18 V. 84, 91, 93, 11 R. R. 151; Clarke *v.* Wright, 6 H. & N. 870; Dolphin *v.* Aylward, L. R. 4 H. L. 486; Trowell *v.* Shenton, 8 C. D. 318; Doe *v.* Manning, 9 East, 59; Godfrey *v.* Poole, 13 A. C. pp. 504, 505.

(*p*) Dickinson *v.* Burrell, 1 Eq. 337.

(*q*) Williamson *v.* Codrington, 1 Ves. Sen. 516.

(*r*) Evelyn *v.* Templar, 2 Bro. Ch. 148; Pulvertoft *v.* P., supra; Townend *v.* Toker, L. R. 1 Ch. 446.

value by him would be a breach of trust, he would be liable to make compensation for it (*a*).

Specific Performance.—The settlor could not generally enforce the specific performance of a contract for the sale of the estate entered into by him after the settlement (*b*), except as against a purchaser willing to complete upon a good title being shown (*c*), for the vendor has no equity to defeat an act which he has done himself, and it can never be certain that matter *ex post facto* may not have made the settlement good (*d*).

But a purchaser, even with notice of a previous voluntary settlement, could always enforce the contract (*e*), or refuse the title, and sue for the deposit (*f*). He could recover the land against volunteers by action as he formerly could by ejectment (*g*), and he could also set aside the voluntary deed (*h*), and to such action the volunteers would be proper parties (*i*); and he might do this, even after a suit commenced by volunteers to have the trust carried into execution (*k*). A volunteer in his defence to proceedings taken against him by an alleged purchaser for value might show inadequacy ot consideration as amounting to evidence that it was not a *bonâ fide* conveyance, but colourable to get rid of the settlement (*l*). Where a voluntary settlement of land was avoided by a subsequent sale by the settlor for valuable consideration, the volunteers had no equity against the purchase-money payable to the settlor (*m*).

What Conveyances were deemed Voluntary within the Statute.—Conveyances in trust to sell and pay creditors *not* parties or privy to the deed (*n*). Conveyances on good or meritorious consideration (*o*).

(*a*) Harding *v.* Howell, 14 A. C. p. 317.

(*b*) Smith *v.* Garland, 2 Mer. 123; Johnson *v.* Legard, T. & R. 294; Clarke *v.* Willott, L. R. 7 Ex. 313.

(*c*) Peter *v.* Nicolls, 11 Eq. 391; *Re* Briggs, (1891) 2 Ch. 127; Noyes *v.* Paterson, (1894) 3 Ch. 267.

(*d*) Fry, S. P. (1903), p. 387; *Re* Briggs, supra. Cf. *Re* Handman and Wilcox's Contract, (1902) 1 Ch. 599.

(*e*) Buckle *v.* Mitchell, 18 V. 100, 11 R. R. 155; Rosher *v.* Williams, 20 Eq. 210.

(*f*) Clarke *v.* Willott, supra; Gen. Meat, &c. *v.* Bouffler, 41 L. T. 719.

(*g*) Doe *v.* James, 16 East, 212.

(*h*) See Form, Seton (1893), p. 1959; Currie *v.* Nind, 5 L. J. Ch. 172.

(*i*) Townend *v.* Toker, L. R. 1 Ch. 446.

(*k*) Pulvertoft *v.* P., 18 V. 92, 11 R. R. 151.

(*l*) Doe *v.* James, 16 East, 213.

(*m*) Pulvertoft *v.* P., 18 V. 92, 11 R. R. 151; Daking *v.* Whimper, 26 B. 568; Townend *v.* Toker, L. R. 1 Ch. 446, 460; Evelyn *v.* Templar, 2 Bro. Ch. 148.

(*n*) Wallwyn *v.* Coutts, 3 Mer. 707.

(*o*) Doe *v.* Manning, 9 East, 59. See for the rule applicable when the presumption against double portions applies, *Ex p.* Pye, ante, p. 369.

A purchase by a parent in the name of a child (*a*). A voluntary deed of settlement of the husband's property on separation of husband and wife (*b*). A post-nuptial settlement upon wife, husband, or family (*c*), unless made in pursuance of a binding ante-nuptial agreement (*d*).

A *post-nuptial* settlement, however, between a husband and wife, is for *value* if there is a bargain that either one or the other should give up something. So it was settled that if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, came to an agreement which was afterwards embodied in a settlement, that was a bargain between husband and wife which was not a transaction without valuable consideration, and consequently not void against a subsequent purchaser or mortgagee (*e*). When the concurrence both of the husband and wife is necessary to a post-nuptial settlement, the consent of each to the alteration made thereby constitutes a valuable consideration (*f*). But this is not the case where the husband joins in a settlement of property of which the wife is the sole and absolute owner, as being settled to her separate use (*g*).

The concurrence also of a tenant-in-tail in remainder, in disentailing an estate, would be ample consideration for a settlement thereof, even as against a purchaser (*h*). And a covenant by the trustees to indemnify the husband against the wife's debts (*i*), or a relinquishment of her claim to alimony (*k*), and perhaps a compromise of a suit (*l*), would constitute a valuable consideration as against creditors,

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(*a*) Barton *v.* Vanheythuysen, 11 Ha. 126; Vaizey, p. 1540.

(*b*) Fitzer *v.* F., 2 Atk. 511; Clough *v.* Lambert, 10 Si. 174; Cow *v.* Foster, 1 John. & H. 30.

(*c*) Evelyn *v.* Templar, 2 Bro. Ch. 148; Doe *v.* Rae, 6 Sco. 525; Currie *v.* Nind, 1 My. & C. 17; Doe *v.* Bottriell, 5 B. & Ad. 131; *Re* Holden, 20 Q. B. D. 43.

(*d*) Griffin *v.* Stanhope, Cro. Jac. 454; Randall *v.* Morgan, 12 V. 74, 8 R. R. 289; Battersbee *v.* Farrington, 1 Swans. 106; Spurgeon *v.* Collier, 1 Eden, 55; Trowell *v.* Shenton, 8 C. D. 318; *Re* Holland, (1902) 2 Ch. 360.

(*e*) See Bayspoole *v.* Collins, L. R. 6 Ch. 228; Schreiber *v.* Dinkel, 54 L. T. 911; Carter *v.* Hind, 22 L. T. 116; Teasdale *v.* Braithwaite, 5 C. D. 630; *Re* Foster and Lister, 6 C. D. 87; Shurmur *v.* Sedgwick, 24 C. D. 597; *Re* Lulham, 33 W. R. 788; *Re* Bell's Estate, 11 L. R. Ir. 512; *Re* Cameron and Wells, 37 C. D. 32; *Re* Conlan, 29 L. R. Ir. 199.

(*f*) Parker *v.* Carter, 4 Ha. 400, 409; *Re* Foster and Lister, 6 C. D. 89.

(*g*) Shurmur *v.* Sedgwick, 24 C. D. 597; and see Vaizey, Sett. p. 113.

(*h*) Doe *v.* Rolfe, 8 Ad. & Ell. 650; Tarleton *v.* Liddell, 17 Q. B. 390; see Green *v.* Paterson, 32 C. D. 95.

(*i*) Stephens *v.* Olive, 2 Bro. Ch. 90; Worrall *v.* Jacob, 3 Mer. 256.

(*k*) Hobbs *v.* Hull, 1 Cox, 445.

(*l*) Jodrell *v.* J., 9 B. 45; Wilson *v.* W., 1 H. L. Cas. 538.

purchasers, or mortgagees. A settlement, moreover, founded upon a compromise of doubtful rights would be considered as executed for value (*a*).

Consideration.—The Courts, considering the law under the statute 27 Eliz. c. 4, by which a person could indirectly get rid of a settlement, to be unsatisfactory, "will not weigh in golden scales the extent of its quantum and value" (*b*), and have held that a small and inadequate consideration is sufficient to support such a settlement, unless the inadequacy be such as to suggest want of good faith (*c*). The question what is a good consideration under 13 Eliz. c. 5, and what is a good consideration under this statute (27 Eliz. c. 4), is not always the same (*d*).

The result, in effect, of the authorities appears to be that if upon the occasion of executing that which is called a voluntary settlement it turns out that, instead of being purely voluntary, any legal obligation is discharged, *or any benefit rendered to the grantor*, that will be sufficient consideration (*e*) to support the settlement. For example, a *legal obligation* to support a wife and family (*f*), but not where the consideration is merely meritorious, and there is no obligation (*g*); a covenant by the grantee of an estate to indemnify the grantor against action by persons having charges, &c., on the estate (*h*); expenses incurred by the grantee on the faith of the settlement (*i*); an advance of 150*l.* to settlor as a loan secured by a promissory note supported a settlement of property worth 1,300*l.* (*k*); where the consideration is partly meritorious and partly valuable (*l*);

(*a*) See Stapilton *v.* S., 1 Atk. 2, ante, vol. 1, p. 234; Heap *v.* Tonge, 9 Ha. 90; Harman *v.* Richards, 10 Ha. 81; Stone *v.* Godfrey, 5 De G. M. & G. 76.

(*b*) Fitzer *v.* F., 2 Atk. 511; Bayspoole *v.* Collins, L. R. 6 Ch. 232.

(*c*) Tennent *v.* Tennents, L. R. 2 H. L. Sc. p. 9; cf. Fry *v.* Lane, 40 C. D. p. 321; see, further, Cheale *v.* Kenward, 3 De G. & J. 27; Townend *v.* Toker, L. R. 1 Ch. 446; Rosher *v.* Williams, 20 Eq. 218; Crossman *v.* The Queen, 18 Q. B. D. 256; Green *v.* Paterson, 32 C. D. 95; May (1908), p. 194; Addison, Contracts (1903), pp. 2-11.

(*d*) *Re* Ridler, 22 C. D. 82; May, Fraudulent Conveyances (1908), Part iv. ch. i.

(*e*) See the definition given in Bolton *v.* Maddan, L. R. 9 Q. B. p. 55; Currie *v.* Misa, L. R. 10 Ex. p. 162; Fleming *v.* Bank of New Zealand, (1900) A. C. 577.

(*f*) Moor *v.* Rycault, Pr. Ch. 22; Middlecome *v.* Marlow, 2 Atk. 520; Montefiore *v.* Behrens, 1 Eq. 171.

(*g*) Goldsmith *v.* Russell, 5 De G. M. & G. p. 555; and see Rosher *v.* Williams, 20 Eq. 218; May, Fraudulent Conveyances (1908), p. 196.

(*h*) Townend *v.* Toker, L. R. 1 Ch. p. 459.

(*i*) Ib.

(*k*) Bayspoole *v.* Collins, L. R. 6 Ch. p. 233; see Pott *v.* Todhunter, 2 Coll. Ch. R. 76.

(*l*) *Re* Johnson, 20 C. D. 389.

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undertaking a liability for the settlor (*a*); releasing rights (*b*); annuity to settlor (*c*).

In *Price* v. *Jenkins* (*d*), leaseholds were assigned to trustees on certain trusts. There was no covenant by the trustees to pay the rent or perform the covenants. Held, that as there was an implied obligation on the part of the trustees to pay the rent and performance of the covenants, the assignment was for valuable consideration (*e*), and whether this decision is right or wrong, the Court of Appeal is bound by it (*f*).

In *Re Marsh and Earl Granville* (*g*), which came before the Court of Appeal on a vendor and purchaser's summons, *Cotton*, L. J., expressly pointed out that the point the Court had to decide had nothing to do with the question whether the conveyance in question was voluntary or otherwise; but *Bowen*, L. J., after stating it was not necessary to decide the point, expressed a doubt as to whether a conveyance including freeholds could be considered a conveyance for value, merely because some leaseholds were included therein. The Irish Courts (*h*) have declined to follow *Price* v. *Jenkins*, which remains, nevertheless, a binding authority in English Courts (*i*).

A mere *demise* to trustees of leaseholds, subject to a nominal rent, does not seem to come within the principle of *Price* v. *Jenkins* (*k*).

A covenant by the grantee, in a deed conveying the whole real estate of the grantor and otherwise voluntary, that the grantee would under certain circumstances build a house on part of the estate conveyed within a limited time, but without any shifting clause or provision for defeasance in case of non-performance of the covenant, will raise no consideration affecting the voluntary character of the settlement (*l*).

Marriage.—Marriage is in itself a sufficient consideration for

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(*a*) Ford *v.* Stuart, 15 B. 493; Scott *v.* S., 4 H. L. Cas. 1065; Holmes *v.* Penney, 3 K. & J. 90.

(*b*) Stiles *v.* A.-G., 2 Atk. 152; *Ex p.* Berry, 19 V. 218; Roe *v.* Mitton, 2 Wils. 356; Shurmur *v.* Sedgwick, 24 C. D. 597.

(*c*) *Ex p.* Doble, 26 W. R. 407.

(*d*) 5 C. D. 619 (C. A.).

(*e*) *Ex p.* Doble, 38 L. T. 183; Horrocks *v.* Rigby, 9 C. D. 184. So far as regards any claim of a purchaser under 27 Eliz. c. 4; as to the 13 Eliz. c. 5, s. 5, see *Ex p.* Hillman, 10 C. D. 623; but see also Harris *v.* Tubb, 42 C. D. 79.

(*f*) See judgment of *Cotton*, L. J., *Re* Ridler, 22 C. D. p. 82.

(*g*) 24 C. D. 11.

(*h*) See Lee *v.* Matthews, 6 L. R. Ir. 530.

(*i*) *Re* Lulham, 32 W. R. 1013; Harris *v.* Tubb, 42 C. D. 79.

(*k*) Shurmur *v.* Sedgwick, 24 C. D. 597.

(*l*) Rosher *v.* Williams, 20 Eq. 210.

an *ante-nuptial* settlement upon the husband, wife, and issue of the marriage (*a*). If there is no valid marriage, *secus*, *Coulson* v. *Allison* (*b*), *Chapman* v. *Bradley* (*c*).

The question as to how far the consideration of marriage extends, and to what extent the contract is binding as against a *bonâ fide* purchaser for value, has given rise to much discussion (*d*). The consideration in a settlement made before marriage extends only to the husband, the wife, and the children of the marriage; for the children of the marriage are not only objects of it, but *quasi* parties to it (*e*). All other persons are *volunteers*, in some sense (*f*). An exception to this rule, so far as this statute is concerned, exists in the case of a widow providing by such settlement for her children by a former marriage (*g*). But a settlement made by a *widower* on his second marriage in favour of children by his first wife has been held not within this rule: per *Kay*, J., *Re Cameron* (*h*), following reluctantly and without conviction *Price* v. *Jenkins* (*i*) and *Gale* v. *G.*, supra.

As to collaterals, the considerations of the contract, though founded on marriage, must extend to all those terms of the contract on which depend the interests of the persons who are within the consideration of marriage: and when they take only on terms which admit to a participation with those others (*e.g.*, collaterals) who would not otherwise be within the consideration, then not the matrimonial consideration properly so called, but the considerations of the mutual contract extend to and comprehend them (*k*), and if the limitations to collaterals are such that they cannot be defeated without defeating the interests of persons unquestionably within the consideration of marriage, then this statute will not apply (*l*). See p. 906, infra.

(*a*) Nairn *v.* Prowse, 6 V. 752, 6 R. R. 37; Townshend *v.* Windham, 2 Ves. Sen. 1; Kevan *v.* Crawford, 6 C. D. 29; Dart (1905), 919; May, Fraudulent Conveyances (1908), 265; Godefroi (1907), p. 144.

(*b*) 2 De G. F. & J. 521.

(*c*) 33 B. 61.

(*d*) Pulvertoft *v.* P., 18 V. 92, 11 R. R. 151; Davenport *v.* Bishopp, 2 Y. & C. Ch. 451.

(*e*) Hill *v.* Gomme, 5 My. & C. p. 254; Newstead *v.* Searles, 1 Atk. 264; explained in De Mestre *v.* West, (1891) A. C. 264; Clarke *v.* Wright, 6 H. & N. 849; Gale *v.* G., 6 C. D. p. 149; Mackie *v.* Herbertson, 9 A. C. 336; Tucker *v.* Bennett, 38 C. D. 10, see (n.) "Marriage," p. 906, infra.

(*f*) Per *Lindley*, L. J., A.-G. *v.* Jacobs-Smith, (1895) 2 Q. B. p. 348; *Re* Cameron, 37 C. D. p. 36.

(*g*) Newstead *v.* Searles, 1 Atk. 264, explained in De Mestre *v.* West, (1891) A. C. 264.

(*h*) 37 C. D. 32.

(*i*) 4 C. D. 483.

(*k*) Mackie *v.* Herbertson, 9 A. C. p. 337.

(*l*) De Mestre *v.* West, (1891) A. C.

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[For forms of judgments setting aside conveyances under this statute, see Seton (1893), p. 1959.]

When Void against Creditors under 13 Eliz. c. 5.—By this statute (made perpetual by 29 Eliz. c. 5), "every . . . alienation . . . of lands . . . and chattels . . . or of any lease, rent common, or other profit . . . or charge out of the same . . . and every bond . . . made . . . for any intent before declared," that is to say, "an intent to delay, hinder, or defraud creditors and others of their just . . . actions . . . debts, accounts, damages, penalties, forfeitures . . . shall be . . . only as against that person or persons and his or their heirs, successors, executors, administrators, and assigns . . . void . . . any pretence, colour, feigned consideration, expressing of use or other matter . . . to the contrary notwithstanding" (*a*). By s. 5 an exception is made in favour of conveyances made upon good consideration *and bonâ fide* to persons without notice of the intended fraud, and this section applies to protect a purchaser for value without notice of an interest derived under a settlement, though the statute may make the settlement void against creditors as to other persons claiming under it (*b*).

As to the general construction of this statute, which was enacted for the protection of creditors, as that of 27 Eliz. c. 4, was for the protection of purchasers, see *Twyne's Case* (*c*).

What Property it includes.—The statute includes all kinds of property, real and personal, legal and equitable (*d*), vested, reversionary (*e*), or contingent (*f*), if such property is of such a character that it could, under due process of law, have been taken in execution at the time the fraudulent conveyance was made (*g*), for if the creditors could not have touched the property, the conveyance of it could not have been a fraud upon them.

The statute, accordingly, before the changes in the law mentioned below, did not apply to stock (*h*), bonds (*i*), or any other chose

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p. 270; and see Tucker *v.* Bennett, 38 C. D. p. 11; Dart (1905), p. 925; May, Fraudulent Conveyances (1908), pp. 264—286, where all the cases are fully considered.

(*a*) Chitty's Statutes (Lely), vol. 2, p. 11; Vaizey's Sett., vol. 2, 1526; Copis *v.* Middleton, 2 Madd. 427.

(*b*) Halifax, &c. Co. *v.* Gledhill, (1891) 1 Ch. 31.

(*c*) 3 Rep. 80; Smith's Leading Cases, (1903) vol. 1, p. 1.

(*d*) Ashfield *v.* A., 2 Vern. 287.

(*e*) Ede *v.* Knowles, 2 Y. & C. Ch. 172.

(*f*) French *v.* F., 6 De G. M. & G. 95.

(*g*) Sims *v.* Thomas, 12 A. & E. 536.

(*h*) Dundas *v.* Dutens, 1 V. 196, 1 R. R. 112.

(*i*) Sims *v.* Thomas, 12 A. & E. 536.

in action (*a*), or copyholds (*b*), unless from their particular tenure or special custom they were liable to debts (*c*): a voluntary assignment, therefore, of such things was valid against creditors. But by various changes in the law, property which was not formerly subject to be taken in execution by creditors has become liable to be so taken, and becomes, therefore, liable under this statute. For instance, copyholds, cash, banknotes, stock, and choses in action, may now be taken in execution, and so come within the statute (*d*). Leaseholds are within the statute, and the liability of the grantee for rent does not, as it does under 27 Eliz. c. 4, bring the case within the exemption (*e*). If the settlor dies or becomes bankrupt, the property, whether capable of being taken in execution or not, is then within the statute (*f*).

Since *Biscoe* v. *Kennedy* (*g*), the property of a married woman vested in a trustee for her separate use was considered as her property, and subject therefore in equity to make good to creditors of hers before her marriage such portion of their debt as they had failed to recover at law against the husband (*h*). As to an ante-nuptial settlement by a married woman being held voluntary as regards collaterals, see supra, p. 892.

Intent to Defeat, &c.—The intent to delay, hinder, or defraud creditors may be actual (*i*), or may be inferred, as, for instance, by the creditor showing that the settlor was *indebted to the extent of insolvency;* or that he was *largely indebted* at the time of making the settlement, *and soon afterwards became insolvent* (*k*). And even if the settlor

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(*a*) Norcutt *v.* Dodd, Cr. & Ph. 100.

(*b*) Matthews *v.* Feaver, 1 Cox, 278.

(*c*) Ib. 280.

(*d*) Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 11, 12, 14; Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 60 et seq.; and see Barrack *v.* M'Culloch, 3 K. & J. 110; Norcutt *v.* Dodd, Cr. & Ph. 100; Stokoe *v.* Cowan, 29 B. 637; Edmunds *v.* E., (1904) P. 362; Ideal Bedding Co. *v.* Holland, (1907) 2 Ch. 157 (equitable reversionary interest in personalty).

(*e*) *Re* Ridler, 22 C. D. 82.

(*f*) Twyne's Case and notes, 1 Sm. L. C. (1903), vol. 1, p. 1.

(*g*) 1 Bro. Ch. 17 (n.).

(*h*) Chubb *v.* Stretch, 9 Eq. 555; Sanger *v.* S., 11 Eq. 470; London, &c. Bank *v.* Bogle, 7 C. D. 773; Dilkes *v.* Broadmead, 2 De G. F. & J. 566; cf. *Re* Hedgely, 34 C. D. 379; Vaizey, Sett., p. 1534; May, Fraudulent Conveyances (1908), p. 22; M. W. Prop. Act, 1882, s. 1, ss. 5, s. 19; *Ex p.* Gilchrist, 17 Q. B. D. 521; *Re* Armstrong, 21 Q. B. D. 264.

(*i*) Spirett *v.* Willows, 3 De G. J. & S. 293.

(*k*) Fletcher *v.* Sedley, 2 Vern. 490, (n.); Taylor *v.* Jones, 2 Atk. 600; Townsend *v.* Westacott, 2 B. 340; Skarf *v.* Soulby, 1 Mac. & G. 364; Jenkyn *v.* Vaughan, 3 Drew. 419; *Re* Magawley's Trust, 5 De G. & Sm. 1; Holmes *v.* Penney, 3 K. & J. 90; Barton *v.* Vanheythuysen, 11 Ha. 126; French *v.* F., 6 De G. M. & G. 95;

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was not indebted at the time, but only subject to a liability—*e.g.* a guarantee—which might never become a debt, yet if the circumstances are such that there is a reasonable probability of its being enforced, a settlement will be taken as made with intent, &c. (*a*). The whole of the circumstances surrounding the transaction must be looked at to ascertain whether the guilty intent existed or not (*b*).

A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with *an intent* to defeat and delay them (*c*).

The principle, however, now established is this:—The language of the Act being that any conveyance of property (*d*) is void against creditors if it is made *with intent* to defeat, hinder, or delay creditors, the Court is to decide *in each particular case* whether, on all the circumstances, it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors: per *Kindersley*, V.-C., in *Thompson* v. *Webster* (*e*), cited with approval in *Re Johnson* (*f*), and in the judgment of the Privy Council in *Godfrey* v. *Poole* (*g*). And although the various badges of fraud referred to in *Twyne's Case* (*h*) will be duly weighed, yet none of them, it would seem, will now be considered as necessarily determining the matter.

The statute itself says nothing about voluntary deeds, and a deed for valuable consideration may, if made with intention to defraud creditors, be void under the statute (*i*). But where a transaction is *voluntary*, the Court may infer an intent to defeat creditors from a variety of circumstances, whereas if it is founded on valuable consideration, then actual and express intent is necessary to be proved: per *Giffard*, L. J., in *Freeman* v. *Pope* (*k*), cited with approval by *Fry*, J., in *Re Johnson* (*l*), *Ex p. Mercer* (*m*). Generally speaking,

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Clements *v.* Eccles, 11 Ir. Eq. R. 229; Neale *v.* Day, 7 W. R. 45; Christy *v.* Courtenay, 26 B. 140; Penhall *v.* Elwin, 1 Sm. & Gif. 258; Elsey *v.* Cox, 26 B. 95; Thompson *v.* Webster, 4 De G. & J. 600; Crossley *v.* Elworthy, 12 Eq. 158; Cornish *v.* Clark, 14 Eq. 184; Taylor *v.* Coenen, 1 C. D. 636.

(*a*) *Re* Ridler, 22 C. D. 74.

(*b*) *Re* Holland, (1902) 2 Ch. 360.

(*c*) *Re* Ridler, supra; Green *v.* Paterson, 32 C. D. p. 105; Freeman *v.* Pope, L. R. 5 Ch. 538, 541; Smith *v.* Cherrill, 4 Eq. 390, 396.

(*d*) Cf. *Re* Stephenson, 45 W. R. 416, and p. 903, infra.

(*e*) 4 Drew. 632.

(*f*) 20 C. D. p. 392.

(*g*) 13 A. C. 503; and see *Ex p.* Mercer, 17 Q. B. D. 290, infra, p. 898; *Re* Holland, supra.

(*h*) 3 Rep. 80 b.; Smith, L. C. (1903), vol. 1, p. 1.

(*i*) Holmes *v.* Penney, 3 K. & J. 90.

(*k*) L. R. 5 Ch. p. 544.

(*l*) 20 C. D. 393.

(*m*) 17 Q. B. D. 290.

all voluntary transfers of property made by a person who at the date of such transfer is indebted beyond his means, are void under the statute (*a*). Actual insolvency need not be shewn (*b*), but if it can be shewn that the settlor at the time he made the settlement was indebted to the extent of insolvency, or became insolvent by reason of the transfer of the property comprised in the settlement, the settlement will be void (*c*). But if a settlor, although in embarrassed circumstances, has property not included in the settlement ample for the payment of debts owing by him at the time of making it, the settlement may be supported against creditors, although debts due at the date of it may to a considerable amount remain unpaid (*d*).

To sustain a voluntary settlement the settlor, at the date of it, must have property outside the settlement available to discharge or provide for all his debts or liabilities (*e*).

In order to set aside a voluntary settlement it is not necessary to show that the settlor contemplated becoming actually indebted. If he contemplated a state of things which might result in bankruptcy or insolvency, that is sufficient (*f*). In estimating the debts of the settlor, future contingent *liabilities* must be also taken into account (*g*); but as to damages claimed in an action, see *Crossley* v. *Elworthy* (*h*), *Ex p. Mercer* (*i*); and as to taking the life estate of settlor reserved in the settlement into account, see case in note (*k*).

The burden of proving the existence of debts, &c., generally rests upon the person who seeks to avoid the settlement (*l*), unless the settlor becomes insolvent shortly after the date of settlement, in which case the burden of proving that he was in a position to make such a settlement rests on him (*m*).

(*a*) George *v.* Milbanke, 9 V. 190, 7 R. R. p. 161; Freeman *v.* Pope, L. R. 5 Ch. 540; *Ex p.* Mercer, 17 Q. B. D. 290; *Re* Holland, (1902) 2 Ch. 360.

(*b*) Townsend *v.* Westacott, 2 B. 340; Thompson *v.* Webster, 4 Drew. 628.

(*c*) Smith *v.* Cherrill, 4 Eq. 390; Freeman *v.* Pope, L. R. 5 Ch. p. 545; May, Fraudulent Conveyances (1908), p. 28.

(*d*) Kent *v.* Riley, 14 Eq. 190.

(*e*) *Ex p.* Russell, 19 C. D. 588; *Re* Ridler, 22 C. D. 74; Halifax J. S. Banking Co. *v.* Gledhill, (1891) 1 Ch. 31; cf. *Re* Lowndes, infra.

(*f*) Stileman *v.* Ashdown, 2 Atk. 477; Mackay *v.* Douglas, 14 Eq. 106.

(*g*) Goodriche *v.* Taylor, 2 De G. J. & S. 141; *Re* Ridler, 22 C. D. 74.

(*h*) 12 Eq. 158.

(*i*) 17 Q. B. D. 290.

(*k*) *Re* Lowndes, 18 Q. B. D. 677.

(*l*) Richardson *v.* Smallwood, Jac. 552; *Ex p.* Mercer, 17 Q. B. D. 290; *Re* Holland, (1902) 2 Ch. 360.

(*m*) Crossley *v.* Elworthy, 12 Eq. 165; Mackay *v.* Douglas, 14 Eq. 106; *Ex p.* Russell, 19 C. D. 588.

Where there is an actual intent to delay and hinder creditors, it is immaterial whether, when the settlement was executed, the settlor was indebted or not indebted; as, for instance, where a person settles all his present and future property (*a*); and in the case of a trader engaged in trade it is immaterial that the settlement is of a trifling amount compared with the extent of his business (*b*).

The *dictum* of *Westbury*, C., to the effect that, "if the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement" (*c*), has been disapproved of, as being expressed in probably too large terms (*d*).

But it is not necessary that a man should be indebted at the time he enters into a voluntary settlement, for if a man does it with a view of being indebted at a future time it is equally fraudulent: per *Hardwicke*, C. (*e*).

If there be a creditor whose debt was incurred subsequently to the voluntary deed, and there is also at the time of instituting the proceedings an unpaid creditor whose debt was incurred prior to the deed, the subsequent creditor has exactly the same right to commence an action as the prior creditor has (*f*). If the settlement contains a provision for the payment of debts, it is good against all *future* creditors (*g*).

A voluntary settlement may be executed under such circumstances as to make it void as against *subsequent* creditors, although all antecedent creditors may have been paid (*h*), where, for instance, it has been executed in order to defeat the plaintiff in an action (*i*). In *Freeman* v. *Pope* (*k*), the settlor, *being solvent at the time*, but having contracted a considerable debt, which would fall due in the course of

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(*a*) Ware *v.* Gardner, 7 Eq. 317; 321; Spirett *v.* Willows, 3 De G. J. & S. 293; Taylor *v.* Coenen, 1 C. D. 641; cf. *Re* Reis, (1904) 2 K. B. 769.

(*b*) Taylor *v.* Coenen, 1 C. D. 641.

(*c*) Spirett *v.* Willows, 3 De G. J. & S. 302.

(*d*) See Freeman *v.* Pope, L. R. 5 Ch. 543.

(*e*) Stileman *v.* Ashdown, 2 Atk. 481; Ware *v.* Gardner, 7 Eq. 317; Vaizey, Sett., p. 1533; May, Fraudulent Conveyances (1908), p. 43.

(*f*) Jenkyn *v.* Vaughan, 3 Drew. 419; Freeman *v.* Pope, L. R. 5 Ch. 538; but see *Re* Kelleher, (1911) 2 Ir. R. 1.

(*g*) George *v.* Milbanke, 9 V. 190.

(*h*) Richardson *v.* Smallwood, Jac. 559; Holmes *v.* Penney, 3 K. & J. 90, 99.

(*i*) Kidney *v.* Coussmaker, 12 V. 138; see May, Fraudulent Conveyances (1908), p. 43; Barling *v.* Bishopp, 29 B. 417.

(*k*) L. R. 5 Ch. 538.

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a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of his debts, after which he collected his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid.

In *Mackay* v. *Douglas* (*a*), a man, not insolvent at the time, made a voluntary settlement of the bulk of his property in contemplation of his going into trade of a hazardous character, and became insolvent a few months after, and it was held the onus lay upon him of showing that he was in a position to make a settlement (*b*).

The fact that a voluntary settlement contains a clause protecting the settlor's life interest is not conclusive to avoid the settlement under the statute of Elizabeth (*c*). A covenant by a husband in his marriage settlement to settle all his after-acquired property except business assets is not fraudulent within the statute (*d*).

In *Ex p. Russell* (*e*), a baker, who was solvent, purchased a grocery business, which he intended to carry on in addition to the bakery, He then made a voluntary settlement upon his wife and children of the bulk of his property. It was held that his object was to put his property out of the reach of his future creditors, and that the deed was void (*f*).

It is, however, always difficult to impeach successfully a deed as being fraudulent against future creditors if it is admitted there is no intention to defraud present creditors (*g*).

A voluntary deed executed, *pendente lite*, for the purpose of defeating any process in the nature of execution, will be set aside (*h*), or where a man knows that a decision is about to be pronounced against him (*i*).

In *Ex p. Mercer* (*k*), W., a mariner, was engaged to be married to V., but he married another. In 1881 V. commenced an action against him for breach of promise of marriage, and he was served

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(*a*) 14 Eq. 106.

(*b*) And see *Re* Cross, 19 W. R. 153.

(*c*) *Re* Holland, (1902) 2 Ch. 360 (C. A.); overruling *Re* Pearson, 3 C. D. 807.

(*d*) *Re* Reis, (1904) 2 K. B. 769; per *Vaughan-Williams*, L.J., *Ex p.* Bolland, 17 Eq. 115, is no longer of authority on this point.

(*e*) 19 C. D. 588.

(*f*) And cf. *Ex p.* Chaplin, 26 C. D. 319

(*g*) Jenkyn *v.* Vaughan, 3 Drew. 425; Smith *v.* Tatton, 6 L. R. Ir. 32, 44; *Re* Kelleher, (1911) 2 Ir. R. 1.

(*h*) Blenkinsopp *v.* B., 1 De G. M. & G. 495; and see Gonville's Trustee *v.* Patent Caramel Co., (1912) 1 K. B. 599.

(*i*) Barling *v.* Bishopp, 29 B. 417; Reese River Silver Mining Co. *v.* Atwell, 7 Eq. 347.

(*k*) 17 Q. B. D. 290; cf. *Re* Holland, (1902) 2 Ch. 360.

with the writ at Hong Kong. A few days after W. executed a voluntary assignment of a legacy of 500*l.* in trust for his wife for life, and then for survivor and the children of the marriage. In July, 1882, V. obtained judgment in the action for 500*l.* damages. In November, 1882, W. became bankrupt. The Court, holding that on the evidence there was no *intent* in the bankrupt's mind to defeat or delay his creditors, upheld the settlement. And if a man makes a conveyance *bonâ fide* for the payment of some creditors, and not as a contrivance for his own personal benefit, the conveyance will be good even although the deed should contain a stipulation that the debtor should remain in possession of the property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession should cease (*a*). As to alienations to avoid forfeitures for felony, see May on Fraudulent Conveyances (1908), p. 49.

This note deals only with voluntary assurances, but it may be here remarked that *mala fides* supersedes all inquiry into consideration, for the question of consideration as regards *creditors* is only of importance where it is *bonâ fide*. Therefore, even the consideration of marriage, which is the highest known to the law, will not support a transaction unless there is *bona fides*. If the Court, therefore, in such cases finds that a marriage was merely resorted to as a cloak to defeat the rights of creditors, an ante-nuptial settlement will be set aside (*b*). To avoid an ante-nuptial settlement as a fraud upon creditors, it must be shown that both husband and wife are parties to the fraud (*c*).

An ante-nuptial settlement, so far as relates to limitations to *collaterals*, may be void as against creditors (*d*).

A *post-nuptial* settlement by a settlor, if *insolvent* at the time, though in pursuance of a verbal contract before marriage, is void against his creditors (*e*), but where there is some valuable consideration, such as the payment of the debts of the settlor, though he

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(*a*) Alton *v.* Harrison, L. R. 4 Ch. 622; and see Spencer *v.* Slater, 4 Q. B. D. 13; *Ex p.* Games, 12 C. D. 314; *Ex p.* Chaplin, 26 C. D. 336; Maskelyne, &c. *v.* Smith, (1902) 2 K. B. 158; (1903) 1 K. B. 671.

(*b*) Colombine *v.* Penhall, 1 Sm. & G. 228; Bulmer *v.* Hunter, 8 Eq. 46; *Re* Pennington, 59 L. T. 774; *Re* Home, 54 L. T. 301; May, Fraudulent Conveyances (1908), pp. 64, 65.

(*c*) Parnell *v.* Stedman, 1 C. & E. 153.

(*d*) Smith *v.* Cherrill, 4 Eq. 390; De Mestre *v.* West, (1891) A. C. 264.

(*e*) Warden *v.* Jones, 2 De G. & J. 76; Barkworth *v.* Young, 4 Drew. 1; and see Trowell *v.* Shenton, 8 C. D. 324; *Re* Holland, (1902) 2 Ch. 360.

concealed one (*a*), or a loan to pay off other debts (*b*), the settlement will not be void. Conveyances on mere *meritorious* considerations, stand on the same footing, as regards this statute, as those which are voluntary (*c*), and a debt for advances by a parent, barred by the Statute of Limitations, is not sufficient to support a post-nuptial settlement against creditors (*d*).

Since the coming into operation of the 1 & 2 Vict. c. 110 (*e*), money can be taken in execution, and therefore a purchase after that date in the name of a child, or wife, or third person, would be within the statute (*f*). Gifts in money or banknotes by a father to his children, the effect of which would be to defeat or delay his creditors, will now also be invalid (*g*). In *Cornish* v. *Clark* (*h*), where a debtor, in a weak state of mind and body, distributed the whole of his property, consisting of chattels, money in the bank, and secured upon mortgage among his children partly in consideration of annuities for his life, partly by voluntary settlement, and partly by voluntary gifts, the transaction was held void as against creditors under the statute, the Court being satisfied upon the evidence that the children were aware at the time that the creditors' claims would be defeated, though it did not appear that the debtor had any such intention. So an annuity or bond given to secure an annuity for the wife of the settlor has been held void as against creditors under the statute (*i*).

Persons who rank as Creditors under the Statute.—The words of the statute, "creditors and others," are wide enough to include any person who has a legal demand against the settlor, so that he may rank as a creditor, although at the date of the settlement he may have no legal right to enforce it. It is not necessary that the creditor should have any lien or charging order on the property (*k*). The creditors' rights are under a positive enactment that the deed is void against them, their claim therefore is *legal*, not equitable (*l*), and

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(*a*) Holmes *v.* Penney, 3 K. & J. 90, 99.

(*b*) Thompson *v.* Webster, 4 De G. & J. 600.

(*c*) Strong *v.* S., 18 B. 408; *Re* Johnson, 20 C. D. p. 393.

(*d*) Penhall *v.* Elwin, 1 Sm. & G. 258.

(*e*) Jan. 1, 1838.

(*f*) Barrack *v.* M'Culloch, 3 K. & J. 110; Neale *v.* Day, 28 L. J. Ch. 45; Barton *v.* Vanheythuysen, 11 Ha. 126; Drew *v.* Martin, 2 Hem. & M. 130; May, Fraudulent Conveyances (1908), p. 17; Vaizey, Settlements, 1535.

(*g*) French *v.* F., 6 De G. M. & G. 95; Sims *v.* Thomas, 12 Ad. & E. 536; Christy *v.* Courtenay, 13 B. 96.

(*h*) 14 Eq. 184.

(*i*) French *v.* F. 6 De G. M. & G. 95; Hue *v.* French, 26 L. J. Ch. 317.

(*k*) Reese River, &c. Co. *v.* Atwell, 7 Eq. 347; May, Fraudulent Conveyances (1908), p. 310.

(*l*) Halifax J. S. Banking Co. *v.* Gledhill, (1891) 1 Ch. p. 37.

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it follows that unless the delay in bringing an action to set aside the deed is such as to cause a statutory bar, the right to do so cannot be lost by mere delay (*a*). A mortgage debt adequately secured is not a debt for the purposes of the statute (*b*). A creditor of an ancestor is a creditor of an heir to whom lands have descended, and a voluntary conveyance by such heir will be void against the creditors of the ancestor; a like conveyance by a devisee (*c*), or by a legal personal representative is void against creditors of the testator (*d*). A purchaser for value from a volunteer under a deed void by the statute will be preferred to the general creditors of the settlor having no specific charge (*e*).

A creditor under a *voluntary* post-obit bond, is as much entitled to the benefit of the statute as any other creditor. Where, therefore, a testator, having executed a voluntary post-obit bond for securing an annuity of 100*l.* to his daughter-in-law for her life, afterwards made a voluntary settlement, from and after his decease, in favour of his widow and child, comprising all his property (except about 300*l.*), and before his death acquired only about 1000*l.* more, it was held that the settlement was void under the statute as against the bond creditor (*f*), and probably the assignee (voluntary) of a debt under Judicature Act, 1873, s. 25 (6), would now be deemed a creditor (*g*).

A voluntary settlement is void as against creditors to the extent only to which it may be necessary to deal with the estate for their satisfaction. To every other purpose it is good (*h*). A creditor, however, may by concurring or acquiescing in a deed voidable under 13 Eliz. c. 5, preclude himself and his representatives from impeaching such deed (*i*), especially if he has been a party with the donees to instruments and transactions proceeding on the assumption of its validity (*k*). And an inquiry may be directed

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(*a*) *Re* Maddever, 27 C. D. 523.

(*b*) Stephens *v.* Olive, 2 Bro. Ch. 90; Vaizey, p. 1534.

(*c*) Gooch's Case, 5 Rep. 60; Apharry *v.* Bodingham, Cro. El. 350; Richardson *v.* Horton, 7 B. 112.

(*d*) Doe *v.* Fallows, 2 Tyr. 460; but see the (n.) to this case, Williams' Exors. (1905), p. 704.

(*e*) George *v.* Milbanke, 9 V. 190, 7 R. R. 157; Halifax J. S. Banking Co. *v.* Gledhill, (1891) 1 Ch. 31.

(*f*) Adames *v.* Hallett, 6 Eq. 468.

(*g*) See May, Fraudulent Conveyances (1908), 103.

(*h*) Per *Grant*, M. R., in Curtis *v.* Price, 12 V. 103, 106; French *v.* F., 6 De G. M. & G. p. 103; Smith *v.* Cherrill, 4 Eq. 390; May (1908), p. 319; Vaizey, Sett., 1535.

(*i*) Olliver *v.* King, 8 De G. M. & G. 110.

(*k*) Ib.

whether any and which of the creditors of the settlor had acquiesced in a voluntary deed (*a*).

The right of a creditor under the statute is a legal right (*b*), therefore it can only be barred by the Statutes of Limitation (*c*).

Any creditor, whose debt is over 50*l.* (*d*), may commence an action to set aside a settlement under 13 Eliz. c. 5, and it will not be affected by the subsequent insolvency of the settlor (*e*). If the settlor is alive and not a bankrupt, the action ought to be on behalf of all the creditors of the debtor (*f*).

On the bankruptcy of the settlor the trustees in his bankruptcy are the proper parties to commence an action (*g*).

A subsequent creditor can maintain an action to set aside the deed on the ground that it is *voluntary*, if, at the time of the commencement of the action, a debt due at the date of the settlement remains unpaid (*h*), and also an intent to delay, hinder, or defraud creditors can be shown (*i*). When a voluntary deed is set aside under the statute, creditors subsequent and antecedent to the deed are let in together (*k*); a creditor who is privy to a fraudulent transfer cannot impeach it (*l*).

Where in an administration action a voluntary deed was held void as against creditors, and the trustees paid the whole fund (which was the total amount of the assets) into Court, it was held that the costs of the action were payable out of such part of the fund as was equal to the amount of the debts, and that the balance due to the trustees was payable to them (*m*).

The judgment usually declares the instrument impeached to be fraudulent and void as against creditors, with or without directions for cancellation (*n*).

(*a*) Freeman *v.* Pope, 9 Eq. 212; Seton (1901), p. 2345.

(*b*) Halifax J. S. Banking Co. *v.* Gledhill, (1891) 1 Ch. p. 37.

(*c*) *Re* Maddever, 27 C. D. 523.

(*d*) Green *v.* Brand, 1 Cab. & E. 410.

(*e*) Goldsmith *v.* Russell, 5 De G. M. & G. 547.

(*f*) Reese River S. M. Co. *v.* Atwell, 7 Eq. 347.

(*g*) Collins *v.* Burton, 4 De G. & J. 612; Goldsmith *v.* Russell, 5 De G. M. & G. 547.

(*h*) Jenkyn *v.* Vaughan, 3 Drew. 419; Freeman *v.* Pope, L. R. 5 Ch. 538; May (1908), 41.

(*i*) Spirett *v.* Willows, 3 De G. J. & S. 293; Crossley *v.* Elworthy, 12 Eq. 158; *Ex p.* Russell, 19 C. D. 588; *Re* Kelleher, (1911) 2 Ir. R. 1.

(*k*) Barton *v.* Vanheythuysen, 11 Ha. 126; Strong *v.* S., 18 B. 408.

(*l*) Olliver *v.* King, 25 L. J. Ch. 427.

(*m*) *Re* Turner's Estate, (1884) W. N. 191; May, Fraudulent Conveyances, (1908), pp. 335 to 340.

(*n*) Seton (1901), Form 1, Cazenove *v.* Pilkington, p. 2345; Form 2, Freeman *v.* Pope, ib.

If there is proof of one prior debt (*a*), or evidence that the settlor was in embarrassed circumstances (*b*), an inquiry will be ordered as to the amount of the settlor's debts, &c., and the value of his property at the date of the settlement (*c*).

The statute 13 Eliz. c. 5, s. 3, imposes penalties and forfeitures on parties to fraudulent conveyances. In *Bunn* v. *B.* (*d*) the defendants objected to make the usual affidavit as to documents, on the ground that the discovery would expose them to pains and penalties under the statute, but the Court of Appeal held that the discovery must be made (*e*).

As to the general construction of the 13 Eliz. c. 5, see *Twyne's Case* (*f*). For forms of judgments setting aside conveyances in fraud of creditors, see Seton (1901), vol. iii., pp. 2345—2347; and *Bott* v. *Smith* (*g*), *Smith* v. *Cherrill* (*h*), *Reese River, &c., Co.* v. *Atwell* (*i*).

Voluntary Deeds Void under Bankruptcy Act, 1883.—By the Bankruptcy Act, 1883, s. 47, "(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration (*k*), or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void as against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void as against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." (2) "Any covenant or contract made in consideration of marriage, for

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(*a*) Skarf *v.* Soulby, 1 Mac. & G. 364; Jenkyn *v.* Vaughan, 3 Drew. 419.

(*b*) Norcutt *v.* Dodd, 1 Cr. & Ph. 100.

(*c*) May, Fraudulent Conveyances (1908), 33, 312, 313.

(*d*) 4 De G. J. & S. 316.

(*e*) See Bray on Discovery (1885), p. 341.

(*f*) 3 Rep. 80; Smith's Leading Cases (1903), vol. 1, p. 1; Godefroi's Trusts (1907), p. 158.

(*g*) 21 B. 511.

(*h*) 4 Eq. 390.

(*i*) 7 Eq. 347.

(*k*) See Hance *v.* Harding, 20 Q. B. D. 732; Mackintosh *v.* Pogose, (1895) 1 Ch. 505; *Re* Parry, (1904) 1 K. B. 129; *Re* Pope, (1908) 2 K. B. 169.

the future settlement on or for the settlor's wife or children, of any money or property, wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy."

(3) "'Settlement' shall for the purposes of this section include any conveyance or *transfer of property* (*a*).

This section is somewhat similar to section 91 of the Bankruptcy Act, 1869, except that the latter section was restricted to cases in which the settlor was a trader, and the words "And that the interest of the settlor in such property had passed to the trustee of the settlement on the execution thereof" are now introduced for the first time (*b*). Deeds and assurances void under this section are usually, but not necessarily, void also as acts of bankruptcy, or as acts of fraudulent preference (*c*). As to intent to defeat creditors, see p. 894, supra.

This section (47) seems to make a settlement coming within its terms voidable against the trustee in bankruptcy only, leaving it subsisting for all other purposes. Suppose, for instance, a man by a voluntary deed, void as against his creditors, conveys real estate for the benefit of his wife and children, and afterwards becomes bankrupt, any surplus of the estate so settled will be bound by the trusts of the settlement (*d*). As to what is a voluntary conveyance within this section, see cases cited below (*e*).

The meaning of the word "void" in this section is "voidable" (*f*), and a *bonâ fide* purchaser for value, whether he acquires before the act of bankruptcy (*g*), or after it but without notice of it (*h*), has

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(*a*) *Re* Player, 15 Q. B. D. 682; *Re* Plummer, (1900) 2 Q. B. 790.

(*b*) See Wace on Bankruptcy (1904), pp. 240—244, where the cases on these sections are collected.

(*c*) See Seton (1901), vol. 3, pp. 2352—2354.

(*d*) *Ex p.* Bell, 1 G. & J. 282; French *v.* F., 6 De G. M. & G. 95; *Re* Parry, (1904) 1 K. B. 129; Wace (1904), p. 243.

(*e*) *Re* Carter & Kenderdine, (1897) 1 Ch. 776; *Re* Vansittart, (1893) 2 Q. B. 377; *Re* Dale, (1892) W. N. 56; *Re* Player, 15 Q. B. D. 682; *Re* Tankard, (1899) 2 Q. B. 57; *Re* Plummer, (1900) 2 Q. B. 790.

(*f*) *Re* Carter & Kenderdine, (1897) 1 Ch. 776.

(*g*) *Re* Carter & Kenderdine, (1897) 1 Ch. 776, approving *Re* Brall, (1893) 2 Q. B. 381, and *Re* Holden, 20 Q. B. D. 43; overruling *Re* Briggs and Spicer, (1891) 2 Ch. 127.

(*h*) *Re* Hart, (1912) W. N. 174; reversing decision of *Phillimore*, J., (1912) 2 K. B. 257.

a good title against the trustee in bankruptcy. In applying the section, the Court acts upon the equitable principle that relief must be refused against a *bonâ fide* purchaser for value without notice having the legal estate (*a*).

If a settlement is declared void against the trustee hereunder, that does not place him in the position of the beneficiaries and so enable him to claim priority over subsequent incumbrancers, but apparently merely accelerates their rights (*b*). Further the avoidance of the settlement is only operative to the extent necessary to satisfy the debts of the bankrupt and the costs of the bankruptcy. The surplus, if any, reverts to the trustees of the settlement, subject to the trusts thereof (*c*).

Fraudulent Preference.—This lies outside the limits of this note, but see sect. 48 of the Act, and cases below (*d*).

5. When a Voluntary Settlement may be enforced by Persons not Parties thereto.

The rule as established by the most recent decisions appears to be that third persons who are not named as parties to a contract cannot sue either of the contracting parties unless they possess *an actual beneficial right*, which puts them *in the position of cestuis que trust* under the contract (*e*).

In *Colyear* v. *Mulgrave* (*f*), a father having four natural daughters and a legitimate son, entered into an agreement with his son, whereby he covenanted to transfer the sum of 20,000*l.* to a trustee, for the benefit of his four daughters, and the son covenanted to pay the debts of the father. The son paid some of the father's debts, and before the covenant on the part of the father was performed, died, having by his will given the whole of his property to his father, who

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(*a*) *Re* Hart, supra; Wilkes *v.* Bodington, 2 Vern. 599; and see *Re* Brall, ubi supra, at p. 385.

(*b*) Sanguinetti *v.* Stuckey's B. Co., (1895) 1 Ch. 177.

(*c*) *Re* Sims, 45 W. R. 189; *Re* Parry, (1904) 1 K. B. 129; cf. Jones *v.* Barker, (1909) 1 Ch. 321.

(*d*) New's Trustee *v.* Hunting, (1897) 1 Q. B. 607; (1897) 2 Q. B. 19 (C. A.); S. C. in House of Lords nom. Sharp *v.* Jackson, (1899) A. C. 419; *Re* Eaton, (1897) 2 Q. B. 16; *Re* Laurie, 67 L. J. Q. B. 431; *Re* Vautin, (1900) 2 Q. B. 325; *Re* Lake, (1901) 1 Q. B. 710; *Re* Blackpool Motor Co., Ltd., (1901) 1 Ch. 77; *Re* The Stenotyper, Ltd., (1901) 1 Ch. 250.

(*e*) See Addison, Contracts (1903), pp. 205 et seq.; Tweddle *v.* Atkinson, 1 B. & S. 393; *Re* Empress Engineering Co., 16 C. D. 125 (C. A.); Gandy *v.* G., 30 C. D. 57; Green *v.* Paterson, 32 C. D. 95; Drimmie *v.* Davies, (1899) 1 Ir. R. 176. See note (*d*), p. 912, infra.

(*f*) 2 Keen, 81, 98.

became the son's personal representative. Upon a bill being filed by one of the natural daughters, praying to have the agreement executed against the estates of the father and the son, a demurrer thereto was allowed by *Langdale*, M. R., saying, "that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other." There was nothing in this case to show that the trustee was to hold in trust for the daughters.

In *Fletcher* v. *F.* (*a*), E. F. by voluntary deed covenanted with trustees that in certain events, which happened, his executors should pay a sum to the trustees on trusts declared in favour of A. and B. E. F. retained possession of the deed until his death, and did not communicate it to the trustees or to A. or B. E. F. died, leaving all his property in trust for A., B., and others. The trustees declined to accept the trust or to sue on the covenant, but submitted to the Court. A. filed a bill to establish the deed. Held that a trust for A. was created, and that the covenant created a debt recoverable out of the assets of E. F. (*b*). *In Re Plumptre's Marriage Settlement* (*c*) it was held that the next of kin of a wife were not entitled to enforce a covenant contained in her marriage settlement by her and her husband for the settlement of her after-acquired property. *Fletcher* v. *F.*, supra, was distinguished on the ground that in that case there was a complete voluntary trust, while the covenant in question amounted merely to an executory contract to create a trust.

In *Gandy* v. *G.* (*d*), a separation deed, to which the husband, wife, and trustees were alone parties, provided that the husband should maintain the children. This he failed to do, and one of the children brought an action against the trustees and the husband, the trustees having declined to sue. The Court, whilst approving the rule as above stated, held that the covenant did not in fact give the plaintiff any beneficial right (*e*).

Marriage.—The rule as above stated would appear to be applicable to marriage settlements, for there seems to be "no reason in

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(*a*) 4 Ha. 67; Clough *v.* Lambert, 10 Si. 174.

(*b*) See also Page *v.* Cox, 10 Ha. 163, a trust founded on a contract in articles of partnership; *Re* Flavell, 25 C. D. 89 (C. A.); Byrne *v.* Reid, (1902) 2 Ch. 735; Drimmie *v.* Davies, (1899) 1 Ir. R. 176.

(*c*) (1910) 1 Ch. 609, following *Re* D'Angibau, 15 C. D. 228.

(*d*) 30 C. D. 57 (C. A.).

(*e*) See also *Re* Baker, 44 L. T. 414; Drimmie *v.* Davies, supra.

principle why, because the instrument is a marriage settlement, it should not take effect according to the intention to be collected from its terms" (*a*), and if, therefore, upon the construction of such an instrument, it appears that there is a complete and perfect trust declared in favour of children of a former marriage, such children, although not parties, would have a right to sue upon it (*b*).

6. Distinction between Mandate and Trust, Creditor's Deeds, &c.

Where there is no *intention* of constituting a perfect trust, and so parting with all control over the property, the deed will be revocable. In creditors' deeds the *intention* of the party executing the deed is generally to promote his own convenience and not to benefit his creditors. In that case the deed is revocable, although by subsequent events it may become an irrevocable trust (*c*), and the Court will examine the whole deed and the surrounding circumstances in order to discover the *intention* (*d*). See p. 883, supra.

Where, therefore, a legal transfer of property has been made to trustees, for payment *of the debts* of the owner, *the creditors being neither parties nor privies thereto*, the creditors do not thereby become *cestuis que trust*, and the trustees are mere *mandatories*, and the *owner* of the property, who alone stands towards them in the relation of *cestui que trust*, can recall the money and authority at pleasure, until they have been acted upon. It is an arrangement by the debtor for his own convenience only, and there is no privity between the agent and the creditors: see *Acton* v. *Woodgate* (*e*), where the trustee was a creditor; *Walwyn* v. *Coutts* (*f*), where the creditors were scheduled to the deed; *Garrard* v. *Lauderdale* (*g*),

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(*a*) Per *Selborne*, C., in Mackie *v.* Herbertson, infra, approved in De Mestre *v.* West, (1891) A. C. 264. See also (n.) "Marriage," p. 891, supra.

(*b*) Mackie *v.* Herbertson, 9 A. C. 303; and cf. Davenport *v.* Bishopp, 2 Y. & C. Ch. 451; Gale *v.* G., 6 C. D. 144; *Re* D'Angibau, 15 C. D. 242; *Re* Baker, 20 C. D. 230; Paul *v.* P., 20 C. D. 742; Green *v.* Paterson, 32 C. D. 95; Johnstone *v.* Mappin, 64 L. T. 48; Tucker *v.* Bennett, 38 C. D. 1; De Mestre *v.* West, (1891) A. C. 264; A.-G. *v.* Jacobs-Smith, (1895) 2 Q. B. 342. Judgment of *Lindley*, L. J., p. 349.

(*c*) See Smith *v.* Hurst, 10 Ha. 30; Simmonds *v.* Palles, 2 Jo. & Lat. 489; Johns *v.* James, 8 C. D. 749.

(*d*) See New's Trustee *v.* Hunting, (1897) 1 Q. B. 607, (1897) 2 Q. B. 19 (C. A.); S. C. in H. L. nom. Sharp *v.* Jackson, (1899) A. C. 419; Smith *v.* Hurst, supra; and cf. Smith *v.* Cooke, (1891) A. C. 297.

(*e*) 2 My. & K. 492; *Re* Ashby, (1892) 1 Q. B. 872.

(*f*) 3 Si. 14. See Godfrey *v.* Poole, 13 A. C., p. 502.

(*g*) 3 Si. 1. See judgment of *James*, L. J., in Johns *v.* James, 8 C. D. 744 at p. 748, explaining Garrard *v.* Lauder-

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where notice of the execution of the deed was sent to the creditors, although the receipt by them of such notice does not seem to have been proved.

Where, however, a trust in favour of creditors has been *communicated* to the creditors—a fact, it seems, which must be clearly proved (*a*)—it can be no longer revoked by the settlor, because the creditors, being aware of such a trust, might have been thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised (*b*); and *à fortiori* will this be the case when the deed has been acted upon (*c*). The communication may be proved by the creditors having executed the deed (*d*), by their having acted upon it (*e*), or being party or privy to it (*f*).

And it is clear that where an assignment is made to a *creditor in trust for himself* and other creditors, it cannot be revoked by the assignor after it has been communicated to the assignee, unless he has done something to show his dissent (*g*). And where property had been conveyed by a mere deed of agency to a person who was *surety* for some of the debts, it was held that the person to whom the property had been so conveyed was entitled to retain it, until he should be discharged from his liability as surety (*h*).

Where a creditor is *party* to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is, as to that creditor, irrevocable. A valid trust is created in his favour, and the relation between the debtor and trustee is no longer that of mere principal and agent (*i*). And that

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dale, supra. See also Synnot *v.* Simpson, 5 H. L. C. 121; Glegg *v.* Rees, L. R. 7 Ch. 71; *Re* Fitzgerald, 37 C. D. 18; and infra, p. 911; Priestley *v.* Ellis, (1897) 1 Ch. 489; Rex *v.* Humphris, (1904) 2 K. B. 89; and cf. Taylor *v.* London and County, &c., (1901) 2 Ch. 231 (C. A.).

(*a*) Cornthwaite *v.* Frith, 4 De G. & Sm. 552.

(*b*) Acton *v.* Woodgate, 2 My. & K. 495; Browne *v.* Cavendish, 1 Jo. & Lat. 635; Simmonds *v.* Palles, 2 Jo. & Lat. 504; Kirwan *v.* Daniel, 5 Ha. 499; Harland *v.* Binks, 15 Q. B. 713.

(*c*) Cosser *v.* Radford, 1 De G. J. & S. 585; but cf. Cornthwaite *v.* Frith, 4 De G. & Sm. 552; Malcolm *v.* Scott, 3 Ha. 39.

(*d*) Glegg *v.* Rees, L. R. 7 Ch. 71; Johns *v.* James, 8 C. D. 750.

(*e*) *Re* Baber, 10 Eq. 554.

(*f*) Walwyn *v.* Coutts 3 Si. 14; Garrard *v.* Lauderdale, 3 Si. 1.

(*g*) Siggers *v.* Evans, 5 Ell. & B. 367, 380, 381; Montefiore *v.* Browne, 7 H. L. Cas. 241; Lawrence *v.* Campbell, 7 W. R. 170; Hobson *v.* Thelluson, L. R. 2 Q. B. 612; Johns *v.* James, 8 C. D. 751, 753; cf. Mallott *v.* Wilson, (1903) 2 Ch. 494.

(*h*) Wilding *v.* Richards, 1 Coll. Ch. R. 655.

(*i*) Mackinnon *v.* Stewart, 1 Si. (N. S.) 88; Glegg *v.* Rees, L. R. 7 Ch. 71.

which is true where a single creditor is the *cestui que trust*, is at least equally so where there are many creditors (*a*).

It seems to be doubtful whether, after the trust has been communicated to one or some of the creditors, it can after satisfying them be revoked by the settlor as to the other creditors (*b*).

Nor does the creditor executing the deed become less a *cestui que trust*, because he gives nothing to the debtor, as a consideration for the trust created in his favour, or because it was the voluntary unsolicited act of the debtor to create the trust (*c*), or because he was party to the deed in another right (*d*).

In *Henderson* v. *Rothschild* (*e*), the plaintiff was the holder of a bond issued by a Government in respect of a loan, of which the defendants were the agents in England, and he sued the defendants as "trustees for the bondholders." The defendants, on the instructions of their principal, had issued notice that interest would be paid in a certain manner, and this alleged appropriation of the money was relied upon as taking the case out of the rule. Held, the defendants were merely agents.

Where a Trust for Creditors is perfectly created.—Where it is the *intention* of the assignor to create an irrevocable trust in favour of his creditors, the creditors are *cestuis que trust*, and can enforce the deed against the trustee and the settlor (*f*). The deed must be registered under the Deeds of Arrangement Acts, 1887 and 1890 (*g*); or it will be void; and, if it comprises land, it must also be registered under the Land Charges, &c. Act, 1888. As to whether a creditor who has become such after the execution of the deed can call for its execution, see *La Touche* v. *Lucan* (*h*).

The trust is to distribute amongst the creditors who have executed the deed. If they do not execute it within the time limited, they will not be necessarily excluded, unless, perhaps, time is, or is made,

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(*a*) Mackinnon *v.* Stewart, 1 Si. (N. S.) 88; Glegg *v.* Rees, L. R. 7 Ch. 71.

(*b*) Griffith *v.* Ricketts, 7 Ha. 307; Glegg *v.* Rees, L. R. 7 Ch. 71; see also Gurney *v.* Oranmore, 5 Ir. Ch. R. 436.

(*c*) Mackinnon *v.* Stewart, supra; Field *v.* Donoughmore, 2 Dr. & Wal. 630; Gurney *v.* Oranmore, 5 Ir. Ch. R. 436.

(*d*) Montefiore *v.* Browne, 7 H. L. Cas. 241, 266.

(*e*) 33 C. D. 459.

(*f*) See the forms of deeds given in Prideaux, 19th ed. (1904), vol. 2, pp. 834—849. Cf. New's Trustee *v.* Hunting, (1897) 2 Q. B. 19; S. C. sub nom. Sharp *v.* Jackson, (1899) A. C. 419.

(*g*) See the B. Act, 1890, s. 25. Cf. *Re* Hobbins, 6 Manson, 212; Hedges *v.* Preston, 80 L. T. 847.

(*h*) 7 Cl. & Fin. 772.

of the essence (*a*). But execution is not necessary if the creditor has acted under the deed (*b*). The deed, if it comprise the whole of the debtor's property, is an act of bankruptcy (*c*). But it cannot be made use of as such by the creditors who are privy to it or have acquiesced in it (*d*). If the deed is avoided as an act of bankruptcy, the release contained in it is also avoided and the executing creditors must prove (*e*). It may also be fraudulent under 13 Eliz. c. 5, and see Bankruptcy Act, 1883, s. 4 (b) (*f*).

Where the assignor divests himself of all interest in the property, for the benefit of his creditors, and does not merely put the property in trust for a special and limited purpose, there is no resulting trust (*g*).

Where a debtor assigns property for the benefit of his creditors, although no creditor may be aware of the assignment, the assignee may, nevertheless, take proceedings in equity to recover the property (*h*). The trustees are the proper persons to bring actions in respect of the trust estate (*i*). But the debtor cannot bring an action for an account against the trustees unless the deed contains an ultimate trust in favour of the debtor (*k*). Accounts under the Deeds of Arrangement Act, 1887, are also to be furnished to the Board of Trade by the trustee (*l*), but this is not retrospective (*m*). As to a conveyance or transfer of property in trust for creditors being fraudulent, see the Bankruptcy Act, 1883, s. 4 (c) (*n*).

(*a*) Dunch *v.* Kent, 1 Vern. 260; Spottiswoode *v.* Stockdale, G. Coop. 102; Whitmore *v.* Turquand, 3 De G. F. & J. 107; *Re* Baber, 10 Eq. 554; Jud. Act, 1873, s. 25, sub-s. 7; Annual Practice (1912), vol. 2 p. 630.

(*b*) Field *v.* Donoughmore, 2 Dr. & Wal. 630; and see Drever *v.* Maudesley, 16 Si. 511; Forbes *v.* Simond, 2 W. R. 70; *Re* Meredith, 29 C. D. 745.

(*c*) See Bankruptcy Act, 1883, s. 4 (a). *Re* Hughes, (1893) 1 Q. B. 595.

(*d*) Wace, Bankruptcy (1904), pp. 10, 22.

(*e*) *Re* Stephenson, 20 Q. B. D. 540.

(*f*) See Spencer *v.* Slater, 4 Q. B. D. 13; Maskelyne, &c., *v.* Smith, (1902) 2 K. B. 158, (1903) 1 K. B. 671; Wace, Bankruptcy (1904), pp. 16, 17; New's Trustee *v.* Hunting, (1897) 2 Q. B. 19; S. C. in H. L. nom. Sharp *v.* Jackson, (1899) A. C. 419.

(*g*) Smith *v.* Cooke, (1891) A. C. p. 303.

(*h*) Glegg *v.* Rees, L. R. 7 Ch. 71.

(*i*) Doran *v.* Simpson, 4 V. 651; Troughton *v.* Binkes, 6 V. 573, 5 R. R. 401; and see R. S. C. (1883), O. 16, r. 8; Annual Practice (1912), vol. i. p. 220.

(*k*) See Smith *v.* Cooke, (1891) A. C. 303.

(*l*) Bankruptcy Act, 1890, s. 25, sub-s. 2 (b).

(*m*) *Re* Norman, 9 T. L. R. 425.

(*n*) See New's Trustee *v.* Hunting, supra; S. C. in H. L. Sharp *v.* Jackson; *Re* Lake, (1901) 1 K. B. 710; and cases cited note (*d*), p. 905, supra.

Provisions in a settlement for the payment of creditors, which are to come into operation after the death of the settlor cannot be determined by a person who becomes absolutely entitled under the settlement (*a*).

It is clear that, in cases in which creditors are not concerned, a person *not intending to give or part with the dominion over his property*, may retain such dominion, notwithstanding he may have vested the property in trustees, and declared a trust upon it in favour of third persons. Thus in *Hughes* v. *Stubbs* (*b*), a testatrix drew a cheque on her bankers for 150*l.* in favour of A., and she verbally directed A. to apply that sum, or so much of it as might be necessary, to make up to a legatee the difference in value between a legacy of 100*l.* which the testatrix, by her will, had given to the legatee, and the price of a 100*l.* share in a certain railway: the testatrix informing A. that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A. for the 150*l.* The testatrix afterwards died. In a suit for the administration of her estate, *Wigram*, V.-C., held, that no trust was created for the benefit of the legatee in respect of the 150*l.* "The cases," observed his Honour, "on this subject are necessarily of difficulty; but the conclusion to which I feel bound to come is, that the testatrix did not part with her property in the sum in question, or create any trust for the legatee (*c*). So in *Gason* v. *Rich* (*d*), it was held that although the acts of the donor might have amounted to an equitable assignment, the evidence showed that the assignor *did not intend* to make a present gift, but one which was to be ambulatory and revocable until his death (*e*).

The principle according to which a deed vesting property in trustees for the purpose of distribution among creditors, is revocable as being a mere arrangement for the convenience of the settlor and which he can therefore at any time revoke, will not, it seems, be

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(*a*) *Re* Fitzgerald, 37 C. D. 18; and see Frewen *v.* Law Life, &c. Society, (1896) 2 Ch. 511; Priestley *v.* Ellis, (1897) 1 Ch. 489.

(*b*) 1 Ha. 476, and see per *Page Wood*, V.-C., in Tate *v.* Leithead, Kay, 658, at p. 659.

(*c*) See also Gaskell *v.* G., 2 Y. & J. 502; Paterson *v.* Murphy, 11 Ha. 88; Smith *v.* Warde, 15 Si. 56; and the remarks of *Wood*, V.-C., in Vandenberg *v.* Palmer, 4 K. & J. 214, 218; Field *v.* Lonsdale, 13 B. 78; Pedder *v.* Mosely, 31 B. 159; Davies *v.* Otty, 33 B. 540. Cf. *Re* Abbott Fund, (1900) 2 Ch. 326; *Re* Andrews, (1905) 2 Ch. 48.

(*d*) 19 L. R. Ir. 396.

(*e*) And see Warriner *v.* Rogers, 16 Eq. 340; *Re* Whittaker, 21 C. D. 657. Cf. O'Flaherty *v.* Browne, (1907) 2 Ir. R. 446.

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applied as between the settlor and persons who are *purely the objects of his bounty*, the former having appointed an agent to administer the bounty, and declared for whom it was intended (*a*). Nor where there is an ultimate trust for the benefit of the wife and children of the debtor (*b*). It is doubtful whether a mere agency deed, not communicated to or acted upon by the creditors, is revoked by the death of the principal, the assignor (*c*).

Where the Crown, by warrant, "grants," as for instance, booty of war to an officer of state, even though it be "in trust" to distribute among certain persons found to be entitled thereto, such warrant will not operate as a transfer of property, or as creating a trust cognizable in a Court of law, but will make such officer merely the agent of the Crown to distribute the fund, and from his decision there can be no appeal except to the Crown (*d*).

Where parties interested in a fund, by an arrangement between themselves, without any communication with a third party, transfer it by deed to trustees upon trust to pay the costs of the third party and divide the residue among themselves, *the third party*, as the deed was revocable by the parties executing it, cannot in his own favour compel an execution of the trusts thereof (*e*).

(*a*) Paterson *v.* Murphy, 11 Ha. 88.

(*b*) Godfrey *v.* Poole, 13 A. C. 497.

(*c*) Wilding *v.* Richards, 1 Coll. Ch. R. 660. See also Synnot *v.* Simpson, 5 H. L. Cas. 121, 139, 141; Montefiore *v.* Browne, 7 H. L. Cas. 241, 266; Burrowes *v.* Gore, 6 H. L. Cas. 907.

(*d*) Kinloch *v.* Secretary of State, &c., 7 A. C. 619; Hughes *v.* Coles, 27 C. D. 231; cf. Te Teira Te Paea *v.* Te Roera Tareha (1902) A. C. 56.

(*e*) Gibbs *v.* Glamis, 11 Si. 584; Simmonds *v.* Palles, 2 Jo. & Lat. 489; Synnot *v.* Simpson, 5 H. L. Cas. 121.

VENDOR AND PURCHASER.

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ELLIOT v. MERRYMAN.

1740. Barnardiston's Chy. Rep. 78.

Liability of Purchaser to see to the Application of his Purchase Money.

A purchaser of personalty from an executor will not be held liable to see to the application of the purchase-money, except in cases of fraud.

It is a general rule, that, where real estate is devised to trustees, upon trust to sell for payment of debts generally, the purchaser is not bound to see that the money is rightly applied. The same rule applies where real estate is not devised to be sold for the payment of debts, but is only charged with such payment.

If real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.

THE facts of this case are sufficiently stated in the judgment.

VERNEY, M. R.—His Honour, after some preliminary remarks, proceeded as follows:—

The case is this:—Thomas Smith, being possessed of a real and personal estate, was indebted to several persons by bond, in three of which bonds Goodwin was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted, he makes his will to the following effect. The will begins with this introduction:—"My will is, that all my debts be paid; and I do charge all my lands with the payment thereof. *Item*—I give all my real and personal estate to——Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable, nevertheless, with the payment of my debts and legacies." 'Tis indeed true that these words do not amount to a devise of the lands to be sold for the payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the Statute of Fraudulent Devises (*a*), and does interrupt the descent to the heir-at-law. By this will the devisee was made executor.

The testator died in 1724. Goodwin paid interest for the debts at 5*l.* per cent. regularly till 1730. After the testator's death, three sales of this estate were made by Goodwin: one, of an estate which was entirely freehold; the other, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both.

The bill in general is brought by the creditors of Smith against the purchasers, in order to have a payment of their debts out of the lands of Smith, which were sold to them by Goodwin.

With regard to the leasehold estate, the case is so extremely plain, that the sale of that must stand, and that the creditors cannot have a satisfaction out of it, that his Honour said it would be monstrous to call it in question. The executors are the proper persons that, by law, have a power to dispose of a testator's personal estate. 'Tis indeed true that personal estate may be clothed with such a *particular trust* (*b*), that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such *particular trust* or a *fraud* in the case, it is impossible to say but the sale of a personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.

His Honour said, he would now consider the other sales that have been made, and would examine those, first upon the general rules of the Court, and in the next place upon the particular circumstances which this case is attended with.

With regard to the first of these matters, the general rule is, that *if a trust directs that land should be sold for the payment of debts generally the purchaser is not bound to see that the money be rightly applied.* On the other hand, *if the trust directs that lands*

(*a*) 3 W. & M. c. 14, repealed by 11 Geo. 4 & 1 Will. 4, c. 47.

(*b*) See Bonney *v.* Ridgard, 1 Cox. 145.

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should be sold for the payment of certain debts, mentioning, in particular, to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts.

The present case, indeed, does not fall within either of these rules, because here lands are *not given to be sold for* the payment of debts, but *are only charged with such payment. However, the question is, whether that circumstance makes any difference. And his Honour was of opinion that it did not.* And if such a distinction was to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this Court, which would be extremely inconvenient. *No instances have been produced to show that in any other respect the charging lands with the payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect.* The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trusts may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far, indeed, it is true, that where lands are charged with the payment of annuities those lands will be charged in the hands of the purchaser (*a*), because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction.

Having thus considered the case under the general rule, his Honour said he would now consider it under the particular circumstances that attend it; and the particular circumstances are such as are far from strengthening the plaintiff's case, but rather the contrary.

One of those circumstances is the length of time the plaintiffs have lain by, without at all insisting on any charge upon these estates. Goodwin was a solvent man till his bankruptcy, in 1732.

(*a*) Not, it seems, if there is also a charge of debts. See Page *v.* Adam, 4 B. 269.

Here have been three purchases of these estates, made at different times—the one in 1727, the other two in 1725 and 1724. The first of them was made by Hunt, the second by Wright, and the third by Merryman. During all these transactions the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of Goodwin till the year 1730. It is indeed true, that there is no express proof that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood by outcry; some of the creditors lived in the same town that Goodwin did; and all of them lived within three or four miles of him; and Elliot, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice, too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears that the creditors greatly relied upon Goodwin for their pay-master; and there is not much reason therefore that they should now be allowed to resort to the testator's estate.

Upon the whole, his Honour's opinion was that the plaintiffs' bills must be dismissed; and even with costs, as against Wright, there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold and sold to Wright by the executor, who by law is the proper person entrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants his Honour said he would only dismiss the bill generally without costs and so he was pleased to decree accordingly.

NOTES.

1. Legislation as to trustee's receipts.
2. The law independently of statutory enactment, p. 919.
3. As to the continuance of a power or trust for sale, p. 922.
4. As to the persons who can sell and convey under charges of debts, &c., p. 929.
5. Effect of Settled Land Act on implied powers of executors, p. 936.
6. How far real estate in the hands of an alienee of the devisee or heir at law is liable for debts, p. 937.
7. Liability of purchasers of personal estate from executors or administrators to see to application of the purchase-money. The Land Transfer Act, 1897, Part I., p. 939.

1. Legislation as to Trustees' Receipts.

Elliot v. *Merryman* is a leading case (1) as to the liability of a purchaser to see to the application of his purchase-money (*a*); (2) on the question whether a charge of debts gives a power of sale.

The following enactments have, however, materially altered the former law upon the first point.

By Lord St. Leonards' Act (*b*), which came into operation on the 13th August, 1859, it is enacted:

Sect. 23. "The *bonâ fide* payment to and the receipt of any person to whom any *purchase or mortgage money shall be* payable upon any express or implied *trust,* shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security."

It is generally considered that this section was not retrospective (*c*).

Lord Cranworth's Act (*d*), passed the 28th August, 1860, enacted:

Sect. 29. "The receipts in writing of any trustees or trustee, for *any money* payable to them or him, by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

(*a*) See Bonney *v.* Ridgard, 1 Cox. 147; M'Leod *v.* Drummond, 17 V. 162, 9 R. R. 296, Shaw *v.* Borrer, 1 Keen, 547; Colyer *v.* Finch, 5 H. L. Cas. 923; where the rules laid down in this case were approved of and adopted.

(*b*) 22 & 23 Vict. c. 35, s. 23.

(*c*) Lewin on Trusts, 1911, pp. 326, 534.

(*d*) 23 & 24 Vict. c. 145, s. 29.

The Act was not retrospective (sect. 34), and might be excluded by "express" declaration or probably by implication (sect. 32).

This section was repealed by the 71st section of the Conveyancing and Law of Property Act, 1881 (*a*), which came into operation from and after the 31st of December, 1881. So that this section only applies to receipts from trustees between the 28th of August, 1860, and the 31st of December, 1881.

By the Conveyancing and Law of Property Act, 1881 (*b*), s. 36, it was enacted that "the receipt in writing of any trustees or trustee for any money, securities, *or other personal property* or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same," &c., &c. And the section applied to all *trusts* created before or after the commencement of the Act (sub-s. 2). But it only applied to *receipts* given under such trusts after 1881 (*c*). "In every case payment or transfer to duly appointed trustees operates as a good discharge whatever might be the position of the beneficial ownership" (*d*). There was no provision that its application might be excluded by express direction, and while the other Acts only in terms applied to money, this extended to all personal estate. The section was repealed by the Trustee Act, 1893, infra.

By the Settled Land Act, 1882 (*e*), coming into operation, except as therein otherwise expressed, from and after the 31st of December, 1882, it is enacted:

Sect. 40. "The receipt in writing of the trustees of a settlement (*f*), or where one trustee is empowered to act, of one trustee or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised" (*g*).

(*a*) 44 & 45 Vict. c. 41.

(*b*) Ib.

(*c*) Wolstenholme, Con. Acts (1905), p. 247.

(*d*) Ib.

(*e*) 45 & 46 Vict. c. 38.

(*f*) See definition, s. 2 (1).

(*g*) Wolstenholme Con. Acts. (1905), p. 398. *Semble*, the power to give receipts extends to trustees appointed under s. 38 of the Settled Land Act, 1882; Cookes *v.* C., 34 C. D. 498. And

Sect. 39 prohibits payment of capital money to one trustee unless there is express authority.

The Trustee Act, 1893 (*a*), repealed sect. 36 of the Conveyancing, &c., Act, 1881, but virtually re-enacted it, thus:

Sect. 20 (1). "The receipt in writing of any trustee for any money, securities, or other personal property or effects, payable, transferable, or deliverable to him under any trust or power, shall be sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same, from seeing to the application or being answerable for any loss or misapplication thereof."

Sect. 20 (2). "This section applies to trusts created either before or after the commencement of this Act."

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage (*b*); but with this exception, the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person (*c*).

2. The Law independently of Statutory Enactment.

The rules in the principal case relating to receipts by trustees and hereafter referred to, are only important wherever none of the statutory provisions apply, for instance:

Assuming Lord St. Leonards' Act not to apply to instruments dated or taking effect before the 13th August, 1859, such rules are material in examining titles where money has been paid prior to the 1st January, 1882, and the right to receive it has arisen under a trust created by an instrument dated before the 13th August, 1859.

It seems that if the money was paid to a trustee *in pursuance of his trust* since the 1st January, 1882, when the Conveyancing Act of 1881 came into force, his receipt would be a good discharge although

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trustees under the Acts can give a good receipt for purchase-money of land sold in a partition action; Pyne *v.* Phillips, (1895) W. N. 8.

(*a*) 56 & 57 Vict. c. 53.

(*b*) See as to declaration of trust by a mortgagor London and County Bank *v.* Goddard (1897) 1 Ch. 642.

(*c*) S. 50. The Trustee Acts do not authorize the appointment of a trustee to perform the duties which belong to the office of an executor, see Trustee Act, s. 25 (3), but when the estate is cleared by payment of debts, &c., the Court will appoint trustees, Eaton *v.* Daines, (1894) W. N. 32.

his trust or power might have been created under an instrument dated not only before 1881, but before 1859.

The power of the vendor to give a good discharge is a question of *title*, not of conveyance (*a*).

Where a power of giving receipts was in *express* terms conferred upon trustees, the purchaser, provided the terms of the power were followed, was not, in cases free from fraud and collusion, bound to see to the application of the purchase-money (*b*).

Where, however, no such power was in *express* terms given, it was held, under the old law, that it could not be *implied* in the following cases:—

If a trust directed lands to be sold for payment of *certain* debts, mentioning in particular to whom those debts were owing (*c*). Where there was a trust for payment of *legacies or annuities* (*d*). If property were vested in trustees upon trust to sell and *divide* the proceeds amongst certain adult *cestuis que trust* (*e*). So if an estate were charged with a sum of money payable to an infant on his attaining his majority, the purchaser would be bound to see the money duly paid (*f*). Where a testator gave a person the like powers of sale and exchange to those contained in the will of another person, in which there were also powers to give receipts, the Court held that such person had not by implication a power to give receipts (*g*).

Where, however, trustees were directed to sell at a time when the persons amongst whom they were to distribute the proceeds of the sale were either not ascertainable or not of age, it was implied that the settlor or testator *intended* to confer upon the trustees a power of giving receipts, inasmuch as the money could not be paid at the time of the sale to any persons but the trustees: see *Balfour* v. *Welland* (*h*).

So, where money to arise from a sale was not merely to be paid to

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(*a*) Forbes *v.* Peacock, 12 Si. 528.

(*b*) Pell *v.* De Winton, 2 De G. & J. 13.

(*c*) See the principal case, and Doran *v.* Wiltshire, 3 Swans. 701; Smith *v.* Guyon, 1 Bro. Ch. 186; Rogers *v.* Skillicorne, Amb. 189; Binks *v.* Rokeby, 2 Madd. 238; Lewin (1910), p. 539.

(*d*) Johnson *v.* Kennett, 3 My. & K. 630; Horn *v.* H., 2 S. & S. 448; and see *Re* Rebbeck, 63 L. J. Ch. 596, and cf. *Re* Henson, (1908) 2 Ch. 356.

(*e*) Weatherby *v.* St. Giorgio, 2 Ha. 624.

(*f*) Dickinson *v.* D., 3 Bro. Ch. 19; see Dart (1905), p. 632.

(*g*) Cox. *v.* C., 1 K. & J. 251.

(*h*) 16 V. 151, 156. See also Dart (1905), 618; Groom *v.* Booth, 1 Drew. 548. See also Sowarsby *v.* Lacy, 4 Madd. 142; Lavender *v.* Stanton, 6 Madd. 46; Breedon *v.* B., 1 Russ. & My. 413; Keon *v.* Magawly, 1 Dr. & W. 401.

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certain persons, but was to be applied by the trustees upon trusts requiring care and discretion, the presumption arose that the settlor intended to confide the execution of the trust to the trustees solely, and the purchaser was not bound to see to the application of the purchase-money, *Doran* v. *Wiltshire* (*a*); and the same principle applied to a trust to raise a sum of money, with authority to invest and vary investments (*b*).

If there were no collusion, or fraud, or no action for administration pending (*c*), a purchaser was not bound to see that the purchase-money was rightly applied, "*if a trust directed the land to be sold for the payment of debts generally*," as laid down in the principal case; and it was, for the first time, there decided, *that it made no difference whether lands were given to be sold for the payment of debts or were only charged with such payment* (*d*). So, also, if the trust were for the payment of a *particular* debt, *and of the testator's other debts* (*e*); or where there was a trust or charge for the general payment of debts, as well as for the payment of *legacies*, for the purchaser could not be expected to see to the discharge of legacies, which could not be paid till after the debts (*f*); or where there was a devise or charge for the general payment of debts and *annuities* (*g*). But where an annuity was charged on land, and there *was no devise for the payment of debts, and no general charge of debts, secus*, for it was deemed that the land was intended to be a constant and subsisting security for the payment of the annuity (*h*); and where there was

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(*a*) 3 Swans. 699; and see Mr. Booth's opinion, cited Lewin (1910), p. 537; Balfour *v.* Welland, 16 V. 151; Tait *v.* Lathbury, 35 B. 112; Ford *v.* Ryan, 4 Ir. Ch. R. 342; Wood *v.* Harman, 5 Madd 368.

(*b*) Locke *v.* Lomas, 5 De G. & Sm. 326, 329. See Pell *v.* De Winton, 2 De G. & J. 13.

(*c*) See Lewin (1911), p. 539.

(*d*) Williamson *v.* Curtis, 3 Bro. Ch. 96; Smith *v.* Guyon, 1 Bro. Ch. 186; Balfour *v.* Welland, supra; Shaw *v.* Borrer, 1 Keen, 559; Barker *v.* Devon, 3 Mer. 310; Robinson *v.* Lowater, 5 De G. M. &. G. 272; Dowling *v.* Hudson, 17 B. 248; Storry *v.* Walsh, 18 B. 559; Glynn *v.* Locke, 3 Dr. & W. 11, 22; Ford *v.* Ryan, 4 Ir. Ch. R. 342; Lewin (1891), p. 505; Shelford (1893), p. 391; Dart (1888), vol. 1, p. 673.

(*e*) Robinson *v.* Lowater, 5 De G. M. & G. 272.

(*f*) See *Re* Henson, (1908) 2 Ch. 356, distinguishing *Re* Rebbeck 63 L. J. Ch. 596; 42 W. R. 473; Jebb *v.* Abbott and Benyon *v.* Collins, cited by Mr. Butler in his note on Co. Litt., 290 b; Rogers *v.* Skillicorne, Amb. 188; Walker *v.* Flamstead, 2 Ld. Ken. 2nd part, 57; Dowling *v.* Hudson, 17 B. 248.

(*g*) Page *v.* Adam, 4 B. 269.

(*h*) Ib., and see Johnson *v.* Kennett, 3 My. & K. 624; Eland *v.* E., 1 B. 235; S. C., 4 My. and C. 420.

a trust or charge for payments of *debts generally* and *legacies*, a purchaser, *even after the debts had been paid*, and he was aware of their having been paid, was held not liable to see to the application of the purchase-money in payment of the legacies, for the rule applied to the state of things at the death of the testator, and was not affected by subsequent circumstances (*a*).

3. As to the continuance of a Power or Trust for Sale.

The receipt of a trustee for sale moneys is only a good discharge to a purchaser if it be given in respect of a power or trust for sale which is existing.

If a trust or power of sale has determined, trustees attempting to exercise it would be committing a breach of trust, and moneys payable to them in respect of it by a person who had notice would not be a payment in accordance with their trust or covered by the statutes.

An express power or even a trust for sale may be determined by the trusts being satisfied not only in cases where it was expressed that it was to be exercised only during the continuance of such trusts (*b*), but also if there is no such restriction. For cases where powers of sale without limit as to time of exercise had been determined by the beneficial interests having become absolute, see note (*c*).

In some cases, notwithstanding that the interests have become absolute, the power has been held to continue for the purpose of division or the manifest intention of the testator (*d*), or where there are several beneficiaries, and the trusts are subsisting as to some, though others have attained vested absolute interests (*e*);

(*a*) Johnson *v.* Kennett, supra, Eland *v.* E., 4 My. & C. 429; Page *v.* Adam, 4 B. 269; *Re* Henson, (1908) 2 Ch. 356.

(*b*) Wood *v.* White, 2 Keen, 664; 4 My. & C. 460.

(*c*) Lantsbery *v.* Collier, 2 K. & J. 709; see per *Fry*, J., in *Re* Cotton's Trustees, 19 C. D. 624; Doncaster *v.* D., 3 K. & J. 26; Wolley *v.* Jenkins, 23 B. 53, 63; but see as to this case, Walrond *v.* Rosslyn, 11 C. D. 640, and Vine *v.* Raleigh, 24 C. D. 238; *Re* Kaye & Hoyles Contract, 53 Sol. Jo. 520; and as to a power in a settlement where the fee is vested, see Waring *v.* Coventry, 1 My. & K. 249, 252; Jefferson *v.* Tyrer, 9 Jur. 1083; *Re* Brown, 10 Eq. 349.

(*d*) *Re* Cooke's Contract, 4 C. D. 454; Peters *v.* Lewes, &c. Ry. Co., 16 C. D. 703; S. C., 18 C. D. 429; *Re* Sudeley, (1894) 1 Ch. 334; *Re* Cotton's Trustees, 19 C. D. 624; *Re* Dyson & Fowke, (1896) 2 Ch. 720; *Re* Jump, (1903) 1 Ch. 129.

(*e*) Trower *v.* Knightley, 6 Madd. 134; Taite *v.* Swinstead, 26 B. 528; *Re* Horsnaill, (1909) 1 Ch. 631.

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and where there is not a mere *power*, but a *trust* for sale, it continues, for the protection of a purchaser thereunder, until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale (*a*); and see as to the distinction between a trust for sale to be exercised at discretion and a mere power, cases in note (*a*).

So there are cases where the original trustee was dead and the power or trust for sale did not pass to the assign, or the survivor, or the heir: see cases cited note (*b*), and infra.

For cases in which a trust for sale was held void for perpetuity, see cases cited note (*c*).

In *Forbes* v. *Peacock* (*d*) the testator charged his real estate with the payment of his debts, and directed it to be sold (but without saying by whom) upon the death of his wife, who was tenant for life, if not sooner disposed of, and the proceeds, with the residue of his personal estate, to be divided among certain of his relations. Soon after the death of the widow (twenty-five years having elapsed since the testator's death), the executor contracted to sell to the defendant, and refused to answer an inquiry whether there were any debts unsatisfied. Lord *Lyndhurst*, reversing *Shadwell*, V.-C., held that the executor could make a title. He said: "Assuming that the facts *relied upon in this case amount to notice that the debts had been paid*, yet, as the executor had authority to sell, not only for the payment of debts, *but also for the purpose of distribution* among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required." The observations of Lord *Lyndhurst* in *Forbes* v. *Peacock* and *Johnson* v. *Kennett* implied that if at the death of the testator there had been

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(*a*) See Conveyancing Act, 1911, s. 10, sub.-s. (3) and (4), and see Biggs *v.* Peacock, 20 C. D. 201; on appeal 22 C. D. 287; *Re* Tweedie & Miles Contract, 27 C. D. 317; *Re* Douglas & Powell, (1902) 2 Ch. 296; Minors *v.* Battison, 1 A. C. 428; and cf. *Re* Patten and Edmonton Union, 31 W. R. 785; *Re* Jenkins & Randall's Contract, (1903) 2 Ch. 362.

(*b*) Cooke *v.* Crawford, 13 Si. 98; Osborne to Rowlett, 13 C. D. 774; Mortimer *v.* Ireland, 11 Jur. 721; 6 Ha. 196; *Re* Morton & Hallett, 15 C. D. 143; *Re* Cunningham & Frayling, (1891) 2 Ch. 567; *Re* Crunden & Meux's Contract, (1909) 1 Ch. 690; but see now Conveyancing Act, 1911, sect. 8 (1).

(*c*) *Re* Daveron, (1893) 3 Ch. 421; Goodier *v.* Edmunds, (1893) 3 Ch. 455; *Re* Wood, (1894) 2 Ch. 310; (1894) 3 Ch. 381. *Re* Appleby, (1903) 1 Ch. 565; *Re* Bewick, (1911) 1 Ch. 117.

(*d*) 1 Ph. 717.

no debts, the power would not have arisen. In *Stronghill* v. *Anstey* (*a*), Lord *St. Leonards* disapproved of this, and laid down the general rule as to a charge of debts and legacies thus:—

"When a testator by his will charges his estate with debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.* * * * In that way all the cases are reconcilable, and all stand upon one footing, viz., that if a trust be created for the payment of debts and legacies the purchaser or mortgagee shall in no case be bound to see to the application of the money raised" (*b*).

Lord *St. Leonards*, however, added this important qualification: "I will only add, in regard to the general question of distance of time, that people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about."

The liability to debts imposed by statute upon real estates of deceased persons has not the same operation as a charge of debts by such persons, and a purchaser was bound to see to the application of the purchase-money in payment of *legacies charged* on such estates unaccompanied by a general charge of debts (*c*); and this rule applies to cases within 3 & 4 Will. 4, c. 104 (*d*), which makes the real estates of all persons dying after 1833 liable to simple contract debts (*e*).

Where no statute applies (*f*), if a testator charges his land with the payment of his debts and devises it to trustees, not being executors, upon trust for others, it is a question whether the executor *alone* can sell, and convey the legal estate; it is, however, clear that (subject to the question as to the application of the

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(*a*) 1 De G. M. & G. 648; Anson *v.* Potter, 13 C. D. 141, and see *Re* Henson, (1908) 2 Ch. 356.

(*b*) And see Carlyon *v.* Truscott, 20 Eq. 348.

(*c*) Horn *v.* H., 2 S. & S. 448.

(*d*) Carson R. P., (1910) p. 421.

(*e*) Shaw *v.* Borrer, 1 Keen, 566, 577; Ball *v.* Harris, 4 My. & C. 268; Jones *v.* Noyes, 4 Jur. (N. S.) 1033.

(*f*) As to cases falling within Lord St. Leonards' Act, 1859, see infra, pp. 934 et seq., and as to the Land Transfer Act, infra, p. 943.

Settled Land Act, 1882, s. 56)(*a*) the devisee in trust and the executor between them, or a person in whom those two characters are combined, may sell and make a good title to the estate. In *Shaw* v. *Borrer* (*b*), a testator, after commencing his will with words amounting to a charge of his real estate with payment of his debts, devised an advowson to trustees, upon trust to present his youngest son to the living when vacant, and subject thereto, in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his residuary real estate, upon certain trusts, to other trustees and appointed three executors (who proved his will), one of whom was his youngest son, and another, one of the trustees of the advowson. The personal estate being insufficient for the payment of debts, the trustees of the advowson, *one of whom was an executor*, at the instance of the other executors, contracted to sell the advowson, before any vacancy had occurred in the living. In a suit for specific performance by the plaintiffs, the trustees of the advowson, and the executors, against the purchaser, *Langdale*, M. R., held, that, the charge being *in effect a devise of the real estate in trust for the payment of debts*, a good title could be made by the plaintiffs, and that the purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money.

Such charge of debts will also authorise a mortgage by an executor who is also trustee of the estates upon which they are charged (*c*).

And where a direction to executors to pay debts is followed by a devise of real estate to the executors, either as such or in their own names, and they take the legal estate, then whether they take the beneficial interest for themselves or in trust for others, the estate is charged with the debts, and they have a power to sell for payment thereof, and to convey the legal estate, and ordinarily a purchaser is not bound to inquire as to whether the debts or legacies have been paid (*d*). And where a testatrix, a married woman, entitled to the income of certain estate for life, for her separate use without power

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(*a*) Infra, p. 936.

(*b*) 1 Keen, 556.

(*c*) Ball *v.* Harris, 4 My. & C. 264; Gosling *v.* Carter, 1 Coll. Ch. R. 644; Corser *v.* Cartwright, L. R. 7 H. L., 731; West of England Bank *v.* Murch, 23 C. D. 138; see also Dolton *v.* Hewen, 6 Madd. 9; Johnson *v.* Kennett; Eland *v.* E.; Page *v.* Adam; Forbes *v.* Peacock, supra; Sabin *v.* Heape, 27 B. 553.

(*d*) *Re* Tanqueray-Willaume, &c., 20 C. D. 465, 479, infra, p. 927; Marshall *v.* Gingell, 21 C. D. 790.

of anticipation, but with a general power of appointment, made her will in 1879, and thereby directed her executrices to pay her debts and appointed the estate to them for life with remainder over, and died in 1880, the debts were held charged (*a*). But the question is always one of intention, to be collected from the whole will (*b*). And a purchaser is not bound to ascertain how much land it is necessary to sell for payment of debts (*c*).

Where a testator devises an estate to trustees, and directs a sale *in case the personal assets are insufficient*, or where in such an event the debts are charged on the estate, the question which arises is, whether the sale is a proper sale, rather than, whether, the sale being admittedly proper, there is a power to give a good discharge for the purchase-money (*d*).

The rule, that a purchaser is not bound, where the debts are charged generally, to see to the application of the purchase-money, is subject to this obvious exception, that, if a purchaser or mortgagee is a party to a breach of trust, it can afford him no protection. Where, for instance, a devisee has a right to sell, but he sells to pay his own debt, and the party who concurs in the sale is aware or has notice of the fact that such is its object (*e*): or where the power to sell the real estate is only in case of a deficiency of the personal estate, and the purchaser has notice that the personal estate is ample and that the debts have been paid; for as he has then notice that what is intended to be done is a breach of trust, he would therefore by becoming a purchaser concur in such breach of trust, and thereby become responsible: *Carlyon* v. *Truscott* (*f*). This case is distinguishable from that of *Forbes* v. *Peacock*, supra, p. 923, as what Lord *Lyndhurst* there held was, that assuming the debts were paid, there was still no breach of trust in selling, as it was necessary to sell for distribution in accordance with the will. So, in *Johnson* v. *Kennett* (*g*), the legacies were unpaid, and the power of sale continued on that

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(*a*) *Re* De Burgh Lawson, 41 C. D. 568.

(*b*) *Re* Bailey, 12 C. D. 268.

(*c*) Spalding *v.* Shalmer, 1 Vern. 303; Thomas *v.* Townsend, 16 Jur. 736.

(*d*) See Culpepper *v.* Aston, 2 Ch. Ca. 115; Keane *v.* Robarts, 4 Madd. 356; Greetham *v.* Colton, 34 B. 615; Carlyon *v.* Truscott, 20 Eq. 348.

(*e*) Eland *v.* E., 4 My. & C. 427. See also Rogers *v.* Skillicorne, Amb. 189; Watkins *v.* Cheek, 2 S. & S. 199; Burt *v.* Trueman, 8 W. R. 635; Howard *v.* Chaffer, 2 Dr. & Sm. 236; Stroughill *v.* Anstey, 1 De G. M. & G. 648; Colyer *v.* Finch, 5 H. L. Cas. 923; Dart, 7th edit., pp. 619 et seq.

(*f*) 20 Eq. 351; cf. *Re* Verrell's Contract, (1903) 1 Ch. 65.

(*g*) 3 My. & K. 624; see *Re* Henson, (1908) 2 Ch. 356.

account; both these cases imply that if the purpose was satisfied for which a power was given, and the purchaser had notice, the sale would be invalid, and see the passage quoted from *Stroughill* v. *Anstey*, supra, p. 924.

The burthen of proving that a mortgagee or purchaser had notice of a breach of trust lies upon a creditor of the testator who impeaches the validity of the transaction (*a*).

Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used, will not make the purchaser or mortgagee liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts (*b*).

And the fact that an executor, who is also devisee, has mortgaged his private property together with the property devised to him charged with payment of debts, will not raise a presumption against him that he was not acting in the ordinary discharge of his duty as executor (*c*)

Where, however, trustees, instead of selling under a trust to convert, in a will, raise money by mortgage many (sixteen) years after the death of the testator, the mortgagee will be a party to a breach of trust, and his security will be invalid: *Stroughill* v. *Anstey* (*d*), in which case *St. Leonards*, C., dismissed a claim filed by the mortgagees to enforce their securities, holding that as the trusts of the will showed a conversion, out and out, of the testator's property, to be absolutely necessary, the trustees were not authorised in raising money by mortgage (*e*).

The question as to what period of time is sufficient to raise a presumption that debts have been paid, so as to make it the duty of a purchaser to make inquiries, has, after some conflict of judicial opinion (*f*), been settled at the period of *twenty years from the death of the testator* "I think," said *Jessel*, M. R., in *Re Tanqueray-Willaume* (*g*), "it is desirable that a rule should be laid down upon which parties may act without coming to a Court of Equity, and in my opinion the reasonable period is twenty years. The reason why I say twenty years

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(*a*) Corser *v.* Cartwright, L. R. 7 H. L. 731; West of England District Bank *v.* March, 23 C. D. 138.

(*b*) Ibid.

(*c*) Barrow *v.* Griffith, 13 W. R. 41.

(*d*) 1 De G. M. & G. 635.

(*e*) See Devaynes *v.* Robinson, 24 B. 86; Ball *v.* Harris, 4 My. & C. 264; *Re* Jones, 38 W. R. 90; *Re* Dimmock, 52 L. T. 594; McNeillie *v.* Acton, 4 De G. M. & G. 744; Charlton *v.* Durham, L. R. 4 Ch. 433. Cf. Binnie *v.* Broom, 14 A. C. p. 588.

(*f*) Sabin *v.* Heape, 27 B. 553; Forbes *v.* Peacock, 12 Si. 528.

(*g*) 20 C. D. 480.

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is this; that is the period of limitation for a specialty debt, and we know as a fact that most landowners owe mortgage debts. It therefore seems reasonable to say that after the lapse of twenty years, which is sufficient to bar mortgage debts and all other specialty debts (*a*), there is a presumption that the debts are paid, especially when you find a beneficiary in the enjoyment of the estate * * * and in such a case I think a purchaser is bound to inquire." In this case, as ten years and a half only had elapsed, it was held that presumption of payment of the debts did not arise, and that therefore the purchaser not being bound and not being entitled (*b*) to make any inquiries as to their payment, a good title might be made by the executors, who were also owners of the real property charged with payment of debts (*c*).

This rule does not, however, in general apply to an executor selling leaseholds, for the exercise by a trustee of a power of sale, and the exercise by an executor, known to be an executor (*d*), of the power which the law gives him to deal with assets vested in him in that character, are two very different things (*e*). If, however, the executor has assented to a bequest of the leaseholds it might be otherwise, for the leaseholds would then be vested absolutely in the legatee (*f*). See Part 7, infra.

It has been said that the mere institution of a suit for administration of real and personal estate or execution of trusts would prevent the purchaser getting a good title to real estate from the trustee if he had notice, see *Lloyd* v. *Baldwin* (*g*), in which case, however, a decree had been made, and see *Walker* v. *Smalwood* (*h*), where the trustee had by answer submitted to a sale by the Court. In *Turner* v. *T.* (*i*) a sale had been agreed upon before the institution of the administration suit, and it was held that even before decree the trustees with a power of sale might properly apply for the sanction of the Court before carrying it out.

(*a*) See R. P. Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 8; Sutton *v.* S., 22 C. D. 511; Fearnside *v.* Flint, Ib. 579, Kirkland *v.* Peatfield, (1903) 1 K. B. 756.

(*b*) *Re* Ford and Hill, 10 C. D. 365.

(*c*) *Re* Molyneux, 13 L. R. Ir. 382; *Re* Ryan, 17 L. R. Ir. 42.

(*d*) Solomon *v.* Attenborough, (1912) 1 Ch. 151.

(*e*) *Re* Whistler, 35 C. D. 561; *Re* Venn, &c., (1894) 2 Ch. 101; followed in *Re* Henson, (1908) 2 Ch. 356; and see *Re* Scott, &c., (1895) 1 Ch. p. 625; and further, infra, p. 940.

(*f*) *Re* Culverhouse, (1896) 2 Ch., p. 253.

(*g*) 1 Ves. Sen. 173; Annesley *v.* Ashurst, 3 P. W. 282.

(*h*) Amb. 676. And see Dart, V. & P. (1905), p. 66.

(*i*) 30 B. 414.

This, however, was a case of a specific trust power, and not sale for the payment of debts. In *Neeves* v. *Burrage* (*a*), explained by *Kay*, L. J., in *Price* v. *P.* (*b*), it was held that the power of an executor or administrator to sell leaseholds was not controlled or suspended by the commencement of an action by a creditor for administration until judgment, and that a sale was good to a purchaser who had notice of the action. The sale was apparently in the course of the executor's duty to sell for payment of debts. If the purchaser had notice of an action involving some specific application with respect to the particular property, it is presumed that the rule that the purchaser would take a title, subject to any order that might be made in the action, would apply (*c*).

As regards the doctrine of *lis pendens*, in *Price* v. *P.* (*d*), *Kay*, J., said that "where debts are charged upon a testator's real estate by his will or as judgment debts under the old law, a suit by a creditor to administer the real and personal estate is a *lis pendens*, which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will. But there is an exception where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts" (*e*).

With regard to personal estate other than leaseholds, the doctrine of *lis pendens* will not affect a person taking *pendente lite* without notice, who, but for the existence of the action, would have a good title (*f*).

4. As to the Persons who can Sell and Convey under Charges of Debts, &c. (*g*).

A charge is created not only by a direct expression of intention to that effect, but even by a mere direction that the debts shall be paid.

(*a*) 14 Q. B. 504; Maltby *v.* Russell, 2 S. & S. 227; Bolton *v.* Stannard, 6 W. R. 570.

(*b*) Price *v.* P., 35 C. D. 297, 304. See also Williams on Executors (1905), 711, 783; Farwell on Powers (1893), pp. 33, 44; Walker *v.* Flamstead, 2 Kenyon, Part ii., p. 57; Berry *v.* Gibbons, L. R. 8 Ch. 747; *Re* Barrett, 43 C. D. 70; *Re* Hall, 54 L. J. Ch. 527; *Re* Mansell, 33 W. R. 727; Cardigan *v.* Curzon-Howe, 30 C. D. 531; Hampden *v.* Earl of Buckingham, (1893) 2 Ch. 542.

(*c*) Bellamy *v.* Sabine, 1 De G. & J. 580.

(*d*) Supra.

(*e*) See also Walker *v.* Flamstead, 2 Kenyon, Part ii. p. 57; Neeves *v.* Burrage 14 Q. B. 504; Berry *v.* Gibbons, L. R. 8 Ch. 547.

(*f*) Wigram *v.* Buckley, (1894) 3 Ch. 483 (C. A.).

(*g*) The law stated in this part must be read subject to the Land Transfer Act, 1897, Part 1. See Note 7, infra.

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Such a direction gave the executors an equitable power of sale over the real estate (*a*), but a mere direction that the testator's *debts were to be paid by his executors* was insufficient to give the executors a power of sale, for it was held to amount merely to a direction to the executors to pay out of the personal estate (*b*). Where, however, such a direction was followed by a devise to the executors of the testator's real estate, it was construed as a direction to pay out of that real estate, which became charged (*c*). Whether a general charge of debts upon real estate empowered the executors to sell and convey *at law* was doubtful. *Shadwell*, V.-C., in *Forbes* v. *Peacock* (*d*), overruled upon another point (*e*), said that, "if a testator charges his real estate with payment of his debts, that, *primâ facie*, gives his executor *power to sell* the estate, and to give a good discharge for the purchase-money." If the Vice-Chancellor meant that such a charge gave a *legal* power to the executors to sell and convey the legal estate, the subsequent authorities render it necessary that his proposition should be modified.

Where there is a charge of debts generally on all the testator's real estate, followed by a devise of that estate to trustees upon trusts which do not include, or even negative, the payment of debts by them, the trustees and executors can together sell (*f*); and this case was approved by *Cottenham*, C., in *Ball* v. *Harris* (*g*), where he held that *an executor* who was *also trustee of the real estate for other persons*, there being a general charge of debts, had power to sell or mortgage the estate.

Now, in the first of these cases, the trustees joined with the executors in the sale; and, in the second, the executor was also trustee, so that, as no difficulty arose with respect to the conveyance of the *legal estate*, a good title could be made; in the first case, by the trustees and executors; and in the second case, by the executor, acting in a double capacity, alone.

In a subsequent case, on a bill for specific performance, it was held that where there was a general direction or charge of debts the

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(*a*) Legh *v.* Earl of Warrington, 1 Bro. P. C. 511, Dart (1905), p. 633 et seq.; and see *Re* Head's Trustees & Macdonald, 45 C. D. 310; *Re* Butler, (1894) 3 Ch. 250.

(*b*) Brydges *v.* Landon, cited 3 V. 550; Keeling *v.* Brown, 5 V. 359; Gosling *v.* Carter, 1 Coll. Ch. R. 644; Cook *v.* Dawson, 29 B. 123; and see Land Transfer Act, 1897, infra, Note 7.

(*c*) Alcock *v.* Sparhawk, 2 Vern. 228; *Re* Tanqueray-Willaume, &c., 20 C. D. 465, 479.

(*d*) 12 Si. 541.

(*e*) 1 Ph. 717.

(*f*) Shaw *v.* Borrer, 1 Keen, 559.

(*g*) 4 My. & C. 264.

executor had an implied power to sell (*a*), *Knight-Bruce*, V.-C., being of opinion that upon the will there was an *intention* exhibited, that a sale, if made, should be made by the executors; but as to whether this intention was expressed so as to create a *legal* power (in which case the concurrence of the heir-at-law would not be necessary), he thought the question one of too great nicety to decide against a purchaser (*b*).

The question was next considered at law in the case of *Doe* d. *Jones* v. *Hughes* (*c*); there a testator, after *charging all his real* and personal estate with *his debts*, funeral and testamentary expenses, and a legacy therein mentioned, subject thereto, gave and devised the rents and profits of all his messuages, farms, and lands, *except his Bala Houses*, to his wife for life, with remainder over to another person in fee, and he bequeathed to his wife the whole of his personal estates, and appointed her sole executrix. It was held that the executrix had no implied power to sell or mortgage the *Bala Houses* (which descended to the heir) for the payment either of the debts or of the funeral or testamentary expenses or legacy; that a charge, in short, had no operation at law, but must be enforced in equity (*d*).

But in *Robinson* v. *Lowater* (*e*), a testator devised some messuages in Rutland Place to his daughter Elizabeth for life, with remainder to all her children living at her decease, and two closes in Sandfield to his son Richard for life, with remainder to the use of his children who should be living at his decease, as tenants in common, with a limitation over in the event of that remainder not taking effect. And he devised his estate at Arnold to his son Richard in fee charged with the payment of the sum of 200*l.* due on mortgage of his messuages devised to his daughter Elizabeth, and of the legacies therein mentioned, and with and to the payment *of his debts*, and funeral and testamentary expenses. But if his premises at Arnold should not be sufficient for that purpose, then he charged his *closes at Sandfield* with the payment of such deficiency; and he appointed his son Richard sole executor of his will. The testator by a codicil revoked the devise of the Arnold property to his son Richard. The will was proved by the executor, who exhausted the personal estates in payment of debts, except the mortgage debt charged on Rutland

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(*a*) Gosling *v.* Carter, 1 Coll. Ch. R. 644.

(*b*) And see Curtis *v.* Fulbrook, 8 Ha. 25, 278.

(*c*) 6 Exch. 223.

(*d*) See also Kenrick *v.* Beauclerk, 3 B. & P. 175; Doe *v.* Claridge, 6 C. B. 641.

(*e*) 17 B. 592.

Place. The *executor also sold the* two closes in Sandfield to Nathaniel Sulley (*in whom the legal estate in fee simple was vested as a trustee for the testator and his heirs*). The purchaser had notice of the will. The defendant Lowater derived his title to Sandfield from Nathaniel Sulley. The plaintiffs, the children of the testator's daughter Elizabeth, filed a bill, insisting that the Sandfield property was still liable in the hands of the defendant Lowater to pay off the mortgage on the Rutland Place property, which still remained unpaid. *Romilly*, M. R., dismissed the bill with costs. "The case of *Doe* d. *Jones* v. *Hughes*" (*a*), said his Honour, "is relied upon to show that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery"; and he referred to *Ball* v. *Harris, Forbes* v. *Peacock, Gosling* v. *Carter*, supra. "Before," he went on to say, "the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised gave the executors an implied power of sale, because, to use the expression of Sir *J. Leach*, in *Bentham* v. *Wiltshire* (*b*), the power to sell is 'implied, from the produce having to pass through their hands in the execution of their office, as in the payment of debts or legacies.' I am of opinion, therefore, that a good title was made to the purchaser Nathaniel Sulley, and that the defendants claiming under him are entitled to hold it, discharged from all claims in favour of the plaintiffs" (*c*). During the argument on appeal, *Turner*, L. J., asked: "Does a charge of debts amount to a direction to institute a Chancery suit? Would not that consequence follow from holding that the executor could not sell?" And in giving judgment he made the following observations: "The question is, how and by whom the money was to be raised. The purpose for which it was to be raised being to pay debts, it must have been in the contemplation of the testator that it would have to be raised *immediately*, but no power is given to the devisees to raise it; and the will containing a devise of a life estate with contingent remainders over, it is impossible that, during the subsistence of these contingent remainders, the devisees could themselves raise it. On the face of this will, therefore, it was not the intention of the testator that the money should be raised by the devisees. Then who was to raise it? Surely the persons who would have to apply the fund. It seems to me, therefore, upon the whole scope of this will, without reference to the cases

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(*a*) Supra, 6 Exch. 223.

(*b*) 4 Madd. 49.

(*c*) Affirmed 5 De G. M. & G. 272.

decided upon the subject, that in this case, at least, *it was the intention of the testator that the money should be raised by the executor;* and if by the executor, then the executor must be considered as invested with all the powers necessary to raise it. I think there is abundant reason for the conclusion at which the Master of the Rolls has arrived in this case" (*a*). In *Re Fisher* (*b*), a testator directed his debts to be paid, and that his property (which included real estate) should be sold by his executors; one executor proved, the other renounced. Held, the acting executor could sell and convey the real estate (*c*).

The conclusion seems to be this, that where there is a *general* charge of debts upon real estate, the executors have in *equity* an *implied* power to sell it, and they alone can give a valid receipt for the purchase-money, but as they do not take by implication a legal power to sell, and cannot therefore convey the legal estate, the persons in whom it is vested (if it be not already in the executors by devise or otherwise) (*d*) must concur with them in the conveyance. This conclusion reconciles all the cases in equity with the apparently conflicting authority of *Doe* d. *Jones* v. *Hughes* (*e*). See also *Hodkinson* v. *Quinn* (*f*), *Hooper* v. *Strutton* (*g*). Where the person in whom the legal estate is vested is under any disability or refuses to concur, recourse has been had to the provisions of the Trustee Acts, 1850, 1852 (*h*). See now the Trustee Act, 1893, ss. 31, 32.

Where, subject to a *charge of debts*, an estate is devised to persons either beneficially or as trustees for special purposes, it appears to be, on the whole, the better opinion, that a sale can be effected by the devisees alone (*i*).

It is, however, clear that where an executor is also devisee of an estate *charged with payment of debts*, he will be able to give a valid title to it, as a *bonâ fide* purchaser or mortgagee may presume that

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(*a*) See also Eidsforth *v.* Armstead, 2 K. & J. 333, and the note thereon, Lewin (1911), p. 549 (*h*); Ogden *v.* Lowry, 25 L. J. Ch. 198; Wrigley *v.* Sykes, 21 B. 337; Sabin *v.* Heape, 27 B. 553; Bolton *v.* Stannard, 6 W. R. 570; Greetham *v.* Colton, 34 B. 615, 11 Jur. (N. S.) 848.

(*b*) 13 L. R. Ir. 546.

(*c*) And see Madden *v.* M., 23 L. R. Ir. 167.

(*d*) *Re* Tanqueray-Willaume, &c., supra, p. 927.

(*e*) 6 Exch. 223.

(*f*) 1 John & H. 303, 309.

(*g*) 12 W. R. 367.

(*h*) See Hodkinson *v.* Quinn (supra); Dart (1905), 636.

(*i*) Eidsforth *v.* Armstead, 2 K. & J. 333; Corser *v.* Cartwright, L. R. 8 Ch. 971; but see the dicta of Lord *Cairns*, L. R. 7 H. L. 737; and Dart (1905), pp. 638 et seq.; Lewin (1911), pp. 548 et seq.

he is dealing with it for the purpose of administration. Such a purchaser or mortgagee therefore will not be bound to look to the application of the purchase-money (*a*).

Where there is an express trust for sale, at a particular period which has arrived, the trustees can sell, without the concurrence of the executors, who might previously have sold under the implied power arising from a general charge of debts: *Hodkinson* v. *Quinn* (*b*), where a testator, after a charge of debts, devised certain real estates, subject to the payment of his said debts, to trustees upon trust for his daughters and their families, and after the death of the surviving daughter, upon trust to sell, with power to give receipts, and to apply the proceeds after satisfying all incumbrances affecting the said real estates, upon certain trusts. The daughters being both dead, *Page-Wood*, V.-C., held on demurrer, that the trustees could make a good title without the executors. "It would," said his Honour, "be a very serious conclusion to hold that this decision of *Robinson* v. *Lowater* has rendered it possible for executors to sell after an actual alienation by devisees. None of the authorities have gone that length. * * * Irrespectively of the reasons afforded by this particular will, I should be inclined to hold generally, that any sale by trustees under a power prior to an actual sale by executors, would be effectual."

Lord St. Leonards' Act.—By 22 & 23 Vict. c. 35, Lord St. Leonards' Act, passed 13th August, 1859, it is enacted that:

Sect. 14. "Where by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and *shall have devised the estate so charged to any trustee or trustees* for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the *said devisee or devisees in trust*, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of

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(*a*) Corser *v.* Cartwright, L. R. 7 H. L. 731, 736; Colyer *v.* Finch, 5 H. L. Cas. 922; West of England, &c., Bank *v.* Murch, 23 C. D. 138; *Re* Henson, (1908) 2 Ch. 356.

(*b*) 1 John. & H. 303.

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interest, and fix such period or periods of repayment, as the person or persons executing the same shall think proper" (*a*).

By Sect. 15 the powers conferred by the last section are extended to survivors, devisees, &c.

Sect. 16. "If any testator who shall have created such a charge as is described in the fourteenth section, shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate" (*b*).

There is no *implied* power in administrators, even with the will annexed, to sell the real estate, and this section does not confer such power (*c*).

Sect. 17. "Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen, and sixteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof."

Sect. 18. "The provisions contained in sections fourteen, fifteen, and sixteen, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation *before the passing of this Act* (13th August, 1859); but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the

(*a*) See *Re* Adams & Perry, (1899) 1 Ch. 554, in which it was held that since the will vested the legal estate in the testator's widow for life, sect. 14 did not apply.

(*b*) As to the operation of this section, see *Re* Wilson, 54 L. T. 600; *Re* Sankey, (1889) W. N. 79; *Re* Barrow-in-Furness, (1903) 1 Ch. 339, and Carson R. P. (1910), p. 419.

(*c*) *Re* Clay, 16 C. D. 3; Ricketts *v.* Lewis, 20 C. D. 745; but see now Land Transfer Act, 1897, Note 7, infra.

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testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do" (*a*).

With reference to Lord St. Leonards' Act, a learned writer observes that the difficulty created by the decisions has been removed in two cases: 1st, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts; and, 2ndly, by giving the executor a power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee. But in cases where the testator died before the 13th of August, 1859, or where there is a devise, subject to a charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before. No testator, then, ought to create a charge of debts upon his real estate, without at the same time expressly creating a trust or power for giving effect to the charge, and without distinctly pointing out the persons by whom the trust or power is to be exercised (*b*).

5. Effect of Settled Land Act on Implied Powers of Executors.

The important point does not seem to have been decided whether an implied power given to executors by a charge of debts would be affected by the power given to a tenant for life by the Settled Land Act, 1882, or whether the consent of the tenant for life is necessary to the exercise of a power given to trustees for raising charges by mortgage or sale. Mr. Wolstenholme is of opinion (*c*) that the trustees would have a title paramount to that of the tenant for life and that his consent would not be necessary (*d*). He points out that the words in sub-s. 2 of sect. 56, "power exerciseable for any purpose provided for in this Act," support the view that the tenant for life's power would be subject to that of the trustees.

It may be observed, however, that if the consent of the tenant for

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(*a*) See Colyer *v.* Finch, 5 H. L. C. 922; *Re* Wilson, supra; *Re* Rebbeck, 63 L. J. Ch. 596; *Re* Barrow-in-Furness, supra, and cf. *Re* Henson, (1908) 2 Ch. 356.

(*b*) Hayes and Jarman, Concise Forms of Wills, by Eastwood, p. 467; and see Dart (1905), p. 641; Lewin (1911), p. 415.

(*c*) Wolstenholme, Settled Land Acts (1905), p. 415; but see Williams, V. & P., 2nd edit., 284.

(*d*) See Settled Land Act, 1882, s. 56, sub-ss. (1) (2), s. 63; Settled Land Act 1884, s. 6, sub-s. (1), s. 7; Settled Land Act, 1890, s. 11.

life would be necessary, his power would be paramount, and the proceeds of sale would be capital moneys, and in such case apparently the trustees could not apply the moneys in payment of debts or charges contrary to the direction of the tenant for life. On the other hand, under sect. 2, sub-s. 7, a person is to be tenant for life notwithstanding that the estate is incumbered or charged in any manner. In *Williams* v. *Jenkins* (*a*), the point apparently was not raised, but *Kekewick*, J., held that the tenant for life had a power of sale though there was in the will a direction which he considered a direction to the trustees to pay debts (*b*).

Even before the Settled Land Act of 1884, it was held that such a consent was not necessary to the exercise by the trustees of a *trust* for sale as distinguished from a *power* (*c*), and that even if such concurrence were necessary, the order of the Court is sufficient to enable the trustees to sell without it (*d*); all difficulty has now been removed in the case of a "trust" for sale by the Settled Land Act, 1884, s. 6.

6. How far Real Estate in the hands of an Alienee of the Devisee or Heir-at-Law is liable for Debts.

Real estate in the hands of an alienee of a devisee, or heir-at-law, where there has been *no charge* of debts by a testator, is discharged from the debts, and the heir or devisee only remains personally liable to the extent of the value of the land alienated (*e*).

But though there be no charge of debts, a conveyance to new trustees is not such an alienation under 3 Will. & M. c. 14, s. 7, or 11 Geo. 4 & 1 Will. 4, c. 47, s. 6, as would prevent the interests so aliened from being affected by an execution at the suit of the creditors of the devisor (*f*). A mortgage, however, by an equitable

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(*a*) (1893) 1 Ch. 700.

(*b*) See the question discussed, Lewin (1911), 553; Dart V. & P., 7th edit., 642.

(*c*) Taylor *v.* Poncia, 25 C. D. 646.

(*d*) Ib. *Re* Harding's S. E., (1891) 1 Ch. 60.

(*e*) 3 Will. & M., c. 14, s. 7; see 11 Geo. 4 & 1 Will. 4, c. 47, ss. 5 & 6 (Debts Recovery Act, 1830), and see Richardson *v.* Horton, 7 B. 112; Spackman *v.* Timbrell, 8 Si. 253; Pimm *v.* Insall, 1 M. & G. 449; Kinderley *v.* Jervis, 22 B. 1; Jones *v.* Noyes, 4 Jur. (N. S.) 1033; Dilkes *v.* Broadmead, 2 De G. F. & J. 566.

(*f*) Coope *v.* Cresswell, L. R. 2 Ch. 112, 122; Carson, R. P. (1910), p. 396.

tenant for life under the will is such an alienation *pro tanto*, that though the creditors might proceed against the trustees and the heir, the interest of the mortgagee would be protected from execution (*a*). And an equitable mortgage by deposit of title deeds with a memorandum of charge, by a devisee, is an alienation which *pro tanto* prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104 (*b*). Following these decisions it has been decided that a *bonâ fide* purchaser from the devisee of an equitable life estate is protected against creditors (*c*).

It has been decided that it was not the object, nor is it the operation of the 3 & 4 Will. 4, c. 104, to give to the simple contracts of a deceased person the effect of mortgages or specific charges over his real estate, but that such debts constitute a *general charge* upon them, and therefore a *bonâ fide* purchaser from the heir or devisee is not bound to see to the payment of debts of the ancestor or testator, whether by specialty or simple contract (*d*), but if he has not paid the purchase-money he may, at the suit of the creditors of the testator or ancestor, be restrained from parting with it (*e*).

Where, however, there *is a charge of debts* upon real estate, a purchaser from the *heir* or *devisee*, or their *alienee*, cannot safely complete without either the concurrence of the executors, or without being satisfied that all the debts have been paid (*f*). In *Austin* v. *Martin* (*g*), real estate was devised to A. B. and his heirs in trust to sell, with power to the trustee or trustees to give receipts for the purchase-money. A. B. was to pay the debts and hold the surplus on certain trusts, and he was appointed sole executor. A. B. having *renounced and disclaimed*, it was held by *Romilly*, M. R., that the heir-at-law, who had taken out administration, could sell the estate and give valid receipts (*h*).

(*a*) Per Lord *Chelmsford*, Coope *v.* Cresswell, ubi supra, at p. 122.

(*b*) See British Mutual, &c., Co. *v.* Smart, L. R. 10 Ch. 567, overruling Carter *v.* Saunders, 2 Drew. 248, *Re* Moon, (1907) 2 Ch. 304; and see *Re* Hedgely, 34 C. D. 379; *Re* Hollingshead, 37 C. D. 651; *Re* Hyatt, 38 C. D. 609.

(*c*) Re Atkinson, (1908) 2 Ch. 307.

(*d*) Higgins *v.* Shaw, 2 Dr. & War. 35; Kinderley *v.* Jervis, 22 B. 1; Price *v.* P., 35 C. D. 297; Carson, R. P., 1910; pp. 404, 405.

(*e*) Green *v.* Lowes, 3 Bro. Ch. 217.

(*f*) See Storry *v.* Walsh, 18 B. 559; Howard *v.* Chaffer, 2 Dr. & Sm. 236.

(*g*) 29 B. 523.

(*h*) But see Robson *v.* Flight, 4 De G. J. & S. 608, 613.

7. Liability of Purchasers of Personal Estate from Executors or Administrators to see to application of the Purchase-money. The Land Transfer Act, 1897, Part I.

However personal estate may be bequeathed, it must be applied, in the first place, by the executors for payment of the debts of the testator, and the costs of administration(*a*), in a due course of administration (*b*). Upon the same principles, therefore, by which a purchaser of real estate, devised for the *general* payment of debts is exempted from seeing to the application of the purchase-money, it is a *general rule* that a person who purchases or takes a mortgage of leaseholds or other personalty from an executor or administrator professing to act as executor or administrator (*c*) is not bound to see to the application of the purchase-money. "After the sale is made, the creditors cannot," as observed by the M. R. in the principal case, "break in upon it" (*d*).

Each executor has complete and absolute control over the property, and it is for the safety of mankind that it should be so. He may sell or pledge the assets of his testator, and give valid receipts (*e*), and nothing which he does can be disputed, except on the ground of fraud and collusion (*f*). So also each administrator has entire control over the personal estate (*g*).

The sale or mortgage of a chattel by an executor will be good against both the residuary pecuniary and specific legatees, as well as the creditors of the testator, whose remedy, in case of the misapplication of the money by the executor, will not be against the purchaser or mortgagee, but against *the executor ;* nor will notice of the will or of the bequest contained in it be prejudicial to the purchaser or mortgagee (*h*).

(*a*) *Re* Whistler, 35 C. D. 561, 566; *Re* Verrell's Contract, (1903) 1 Ch. 65, 69.

(*b*) Oceanic Steam Navigation Co. *v.* Sutherberry, 16 C. D. 236.

(*c*) Solomon *v.* Attenborough, (1912) 1 Ch. 451.

(*d*) See Bonney *v.* Ridgard, 1 Cox, 145; Scott *v.* Tyler, Dick. 725; Andrew *v.* Wrigley, 4 Bro. Ch. 125; M'Leod *v.* Drummond, 17 V. 154; Keane *v.* Robarts, 4 Madd. 357; Ward *v.* W., 4 Ir. Ch. R. 215; Humble *v.* Bill, 2 Vern. 444 (reversed in the House of Lords under the name of Savage *v.* Humble, 3 Bro. P. C. 5); Miles *v.* Durnford, 2 De G. M. & G. 641; Berry *v.* Gibbons, L. R. 8 Ch. 747; Williams' Executors (1905), p. 700; Lewin (1911), pp. 560 et seq.

(*e*) Charlton *v.* Durham, L. R. 4 Ch. 433.

(*f*) Per *Hatherley*, C., in Vane *v.* Rigden, L. R. 5 Ch. p. 668; *Re* Venn & Furze's Contract, (1894) 2 Ch. 101.

(*g*) Smith *v.* Everett, 27 B. 454.

(*h*) Ewer *v.* Corbet, 2 P. W. 148; Burting *v.* Stonard, 2 P. W.

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An executor or administrator may not only pledge or mortgage the assets, but may also give to the mortgagee of leaseholds a power to sell and give receipts for the purchase-money (*a*); and on the same principle he may give to the mortgagee of book debts a power of attorney to get them in (*b*); and where the estate is an infant's, such a power may be inserted (*c*). It is not necessary that specific legatees of personal property should concur in the sale unless there is some evidence that the executor has assented to the bequest (*d*).

"Where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary; and further, the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity" (*e*). Where an executor sells or mortgages part of the estate for his own purposes, and in so doing does not purport to act as executor, and is not known to be an executor by the person acquiring, the latter gets no title (*f*).

Verney, M. R., in the principal case, mentions two exceptions from the rule. As to the first, he observes, "that personal estate may be clothed with such a particular trust, that it is possible the Court, in some cases, may require a purchaser of it to see the money rightly applied." This observation was approved of by *Kenyon*, M. R., in *Bonney* v. *Ridgard* (*g*).

The second exception from the rule, mentioned by the M. R., is, where there is fraud on the part of a purchaser or mortgagee. Thus,

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150; M'Leod *v.* Drummond, 17 V. 163, 169, 11 R. R. 41; Andrew *v.* Wrigley, 4 Bro. Ch. 125; Keane *v.* Roberts, 4 Madd. 332, 357; Gray *v.* Johnston, L. R. 3 H. L. 11; Berry *v.* Gibbons, L. R. 8 Ch. 747.

(*a*) Russell *v.* Plaice, 18 B. 21; and see Cruikshank *v.* Duffin, 13 Eq. 555, where a mortgage with a power of sale by an executor to a building society was held good.

(*b*) Vane *v.* Rigden, L. R. 5 Ch. 663; and see Douglas *v.* D., 9 L. R. Ir. 54; Cook *v.* Dawson, 29 B. 123.

(*c*) Selby *v.* Cooling, 23 B. 418.

(*d*) See judgment of *Kay* J., *Re* Whistler, 35 C. D., p. 565; *Re* Venn & Furze's Contract, (1894) 2 Ch. 101; *Re* Culverhouse, (1896) 2 Ch. p. 253.

(*e*) Per *Stirling*, J., in *Re* Venn &c. Contract, (1894) 2 Ch. at p. 114, cited and applied by *Swinfen Eady*, J., in *Re* Henson, (1908) 2 Ch. 356, at p. 364.

(*f*) Solomon *v.* Attenborough, (1912) 1 Ch. 451; and see *Re* Morgan, 18 C. D. 93, at p. 98, and Williams' Exors. (1905), p. 702 (n), (o).

(*g*) 1 Cox 145. See M'Leod *v.* Drummond, 17 V. 161, 162, 11 R. R. 41; *Re* Johnston, 15 Ir. Ch. R. 260.

where an executor disposes of or pledges his testator's assets in payment of or as a security *for a debt of his own*, the person to whom they are disposed of or pledged will take them subject to the claims of the creditors and of specific and general legatees of the testator, *Hill* v. *Simpson* (*a*), where the defendants shut their eyes against information which, without extraordinary neglect, they could not help receiving (*b*). For the general rule is, that the equity of the estate prevails over such a disposition (*c*).

But where leasehold estates specifically bequeathed to an executor were by him assigned as a security for his own debt, such assignment, no collusion appearing, was established against a creditor (*d*).

Where the executor has sold assets for a fraudulent (*e*) undervalue, or has sold or mortgaged them to one who has notice that the testator had left no debts, or that all debts had been paid, a sale or mortgage of the personal estate by the executor will not be valid (*f*); and this although the executor be specific or residuary legatee (*g*). And generally where the person dealing with the executor has notice, express or to be implied from the nature of the case, that the executor is contriving a devastavit, such dealing will not be upheld; as, for instance, where money is borrowed for the purpose of carrying on the testator's business, no authority being given by the will (*h*).

The rule in *Re Tanqueray-Willaume* (*i*), p. 927, supra, that where an executor is selling *real* estate after twenty years have elapsed

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(*a*) 7 V. 152, 6 R. R. 105.

(*b*) See also Scott *v.* Tyler, Dick. 724; Taylor *v.* Hawkins, 8 V. 209, 7 R. R. 27; Gray *v.* Johnston, L. R. 3 H. L. 1; Haynes *v.* Forshaw, 11 Ha. 93; Wilson *v.* Moore, 1 My. & K. 337; Wilson *v.* Leslie, 5 W. R. 815; Rolfe *v.* Gregory, 11 W. R. 1016; Farhall *v.* F., 7 Eq. 286; Jones *v.* Stöhwasser, 16 C. D. 577.

(*c*) *Re* Morgan, 18 C. D. 93; *Re* Queale, 17 L. R. Ir. 361; *Re* Evans, 34 C. D. 597; Dowse *v.* Gorton, (1891) A. C. 190; Judicature Act, 1873, s. 25, sub-s. 11.

(*d*) Taylor *v.* Hawkins, 8 V. 209, 7 R. R. 27; Miles *v.* Durnford, 2 De G. M. & G. 641; Barrow *v.* Griffith, 11 Jur. (N.S.) 6.

(*e*) See, e.g., Rice *v.* Gordon, 11 B. 265.

(*f*) Ewer *v.* Corbet, 2 P. W. 148; Scott *v.* Tyler, Dick. 725; Drohan *v.* D., 1 Ball & B. 185; Rice *v.* Gordon, 11 B. 265; *Re* Verrell's Contract, (1903) 1 Ch. 65, and see Stroughill *v.* Anstey, 1 De G. M. & G. 635; M'Mullen *v.* O'Reilly, 15 Ir. Ch. R. 251; Hall *v.* Andrews, 20 W. R. 799.

(*g*) Crane *v.* Drake, 2 Vern. 616.

(*h*) Whale *v.* Booth, 4 T. R. 625 (n.); M'Neillie *v.* Acton, 4 De G. M. & G. 744; and see Wilson *v.* Moore, 1 My. & K. 126, where the correspondents of a mercantile firm were held responsible for misapplication by executors, and cf. Keane *v.* Robarts, 4 Madd. 332; Gray *v.* Johnston, L. R. 3 H. L. 1; Connolly *v.* Munster Bank, 19 L. R. Ir. 119; Devitt *v.* Kearney, 13 L. R. Ir. 45 (C. A.).

(*i*) 20 C. D. 465.

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from testator's decease, a presumption arises that the debts have been paid, and that the purchaser is therefore put upon inquiry, does not in general apply to an executor selling leaseholds (*a*), and sales by executors have been supported though made thirty-three years after testator's death (*b*). But where an administratrix, thirty-six years after the death of the intestate, executed a mortgage of leaseholds in which she had a beneficial interest for the purpose of securing a sum borrowed for repairs of the leasehold premises, that was held to be a circumstance which raised a presumption that the mortgage was not raised for payment of debts (*c*).

The exceptions from the general rule, that a purchaser from an executor is not bound to see to the application of the purchase-money, have been well summed up by Lord *Thurlow* in *Scott* v. *Tyler* (*d*). "If," observes his Lordship, "one concerts with an executor, by obtaining the testator's effects at a nominal price or at a fraudulent undervalue (*e*), or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, *or in any other manner* (*f*), contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value" (*g*).

Length of time and acquiescence, as in the principal case, will prevent creditors and legatees from asserting their claims against purchasers, although the sale by the executor was attended with suspicious circumstances of fraud, and *à fortiori* against mesne purchasers (*h*). And the fact of the legacies being contingent will be no sufficient excuse for the legatees lying by when they have such an interest as will entitle them to know what debts the testator owed, and what part of his estate had been applied in payment of them (*i*).

A mere pecuniary legatee can follow the assets into the hands of

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(*a*) *Re* Whistler, 35 C. D. 561; *Re* Venn and Furze's Contract, (1894) 2 Ch. 101; cf. *Re* Verrell's Contract, (1903) 1 Ch. 65.

(*b*) Wrigley *v.* Sykes, 21 B. 337; Sabin *v.* Heape, 27 B. 553.

(*c*) Ricketts *v.* Lewis, 20 C. D. 745, and see Charlton *v.* Durham, L. R. 4 Ch. 438; *Re* Molyneux, 15 L. R. Ir. 383.

(*d*) Dick. 725.

(*e*) Rice *v.* Gordon, 11 B. 269.

(*f*) "Very material words," per *Eldon*, C., M'Leod *v.* Drummond, 17 V., p. 167.

(*g*) And cf. M'Leod *v.* Drummond, 17 V. 170, 11 R. R. 41, in which case *Eldon*, C., reviewed all the cases upon the subject.

(*h*) Bonney *v.* Ridgard, 4 Bro. Ch. 138; cited in M'Leod *v.* Drummond, supra.

(*i*) Andrew *v.* Wrigley, 4 Bro. Ch. 135: Rolfe *v.* Gregory, 11 W. R. 1016.

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a third person (*a*), and in *M'Leod* v. *Drummond* (*b*), *Eldon*, C., concurred in the principle laid down by *Grant*, M. R., in *Hill* v. *Simpson.* "I cannot conceive," said his Lordship, "why a creditor and a specific legatee should be able to follow the assets, and not a pecuniary or residuary legatee."

A person indebted to a testator's estate, who pays a third party by order of the testator's executor, and obtains the executor's receipt without notice that the payment is wrongfully made, will obtain thereby a complete discharge (*c*). And upon the same principle a banker will not be liable for paying the cheque of his customer, being an executor, who misapplies the money, unless a misapplication thereof was intended by the executor amounting to a breach of trust of which the banker was cognisant, and by which he derived personally a profit (*d*). And even if the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque; for if he did so he would be making himself a party to an inquiry as between his customer and third person (*e*).

If, however, an executor or a trustee who is indebted to a banker, or to another person having the legal custody of the assets of a trust estate, applied a portion of them in the payment of his own debt to the individual having that custody, as the person receiving the debt, has at once not only abundant proof of this breach of trust, but participates in it for his own personal benefit, he will be compelled to make restitution (*f*).

Land Transfer Act, 1897—Part I.

It is only necessary for the purposes of this note to consider the effect of Part I of this Act in so far as that part concerns the personal representatives' powers of sale and mortgage. The effect of sects.

(*a*) Hill *v.* Simpson, 7 V. 152; 6 R. R. 105.

(*b*) 17. V. p. 167.

(*c*) Ferrier *v.* F., 11 L. R. Ir. 56.

(*d*) Gray *v.* Johnston, L. R. 3 H. L. 1; cf. *Re* Blundell, 40 C. D. p. 382.

(*e*) Ib. p. 14.

(*f*) Ib. p. 14; and see Pannell *v.* Hurley, 2 Coll. Ch. R. 241; Bodenham *v.* Hoskyns, 2 De G. M. & G. 903; Connolly *v.* Munster Bank, 19 L. R. Ir. 119; Thomson *v.* Clydesdale Bank, Ltd., (1893) A. C. 282; Coleman *v.* Bucks and Oxon Union Bank, (1897) 2 Ch. 243.

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1 and 2 of this Act is subject to certain modifications to give the personal representatives (*a*), of a deceased testator or intestate dying on or after the 1st January, 1898, the same powers and rights over his real estate (*b*), that personal representatives had at the passing of the Act over a testator's chattels real, and of these powers and rights they cannot be deprived by any testamentary disposition, see sect. 1 supra.

The personal representatives have now, when the death occurs after 1897, the same powers of sale and mortgage over the deceased's real estate that they had and have over the deceased's leaseholds. To this the Act makes one great exception. Where there are several executors, any one of them acting alone can sell or give a good title to leaseholds. Under sect. 2 (2) of the Act, however, it is not lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate. Apart from the case of "special executors" (*c*), it would appear that all the persons who are for the time being representatives of the deceased are his "joint personal representatives." In consequence, it was held that where all the executors named in the will had not proved and power had been reserved for the others to prove, those executors who alone had proved were unable to make a title without the authority of the Court (*d*).

The law upon this point has, as to all dispositions made on or after January 1st, 1912, whether probate was granted before or after that date, been altered by sect. 12 of the Conveyancing Act, 1911. Under that section, when probate has been granted to one or more persons named as executors, power being reserved to others or another to prove the will, the proving executors can sell, transfer, or dispose of the real estate without the authority of the Court, as

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(*a*) See *Re* Cohen's Executors & L. C. C., (1902) 1 Ch. 187, where it was held that in the case of a will appointing general executors and special executors for Australian assets, that since the special executors were not entitled to probate in England and therefore chattels real in England would not vest in them, their concurrence in a sale of real estate by the general executors would not be required.

(*b*) Real estate is not defined in the Act, but the expression "real estate" is by s. 1 (4), not to be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(*c*) See *Re* Cohen's Executors & L. C. C. supra.

(*d*) *Re* Pawley & London & Provincial Bank, (1900) 1 Ch. 58.

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effectually as if all the persons named as executors had concurred therein.

The following points in reference to the personal representatives' power of sale and mortgage may be noticed.

It appears that the twenty years' rule recognised in *Re Tanqueray-Willaume*, &c., supra, p. 927, will have no application to sales or mortgages by personal representatives under this Act (*a*).

Personal representatives exercising their power of sale of real estate will be trustees for sale within the Trustee Act, 1893, and in consequence will have the ancillary powers given by sect. 13, and the immunities from liability for depreciatory conditions given to trustees by s. 14 of that Act.

As above noted (*b*) copyholds and customary freeholds are excluded from the operation of the Act (*c*). As to these the law applicable to real estate before the Act will apply.

(*a*) See *Re* Venn and Furze's Contract, (1894) 2 Ch. 101.

(*b*) p. 944, note (*b*).

(*c*) Equitable interests belonging to the testator in copyholds vest in the personal representative. *Re* Somerville & Turner's Contract, (1903) 2 Ch. 583.

But [illegible]

MACKRETH *v.* SYMMONS.

1808. 15 V. 329; 10 R. R. 85.

Vendor's Lien for Unpaid Purchase-money.

A vendor has a lien for purchase-money against the vendee, volunteers, and purchasers with notice, or having equitable interests, only claiming under him: unless clearly relinquished.

The bill stated, that, in the years 1783 and 1784, the plaintiff was indebted to John Manners in several sums, amounting in the whole to 13,500*l.*; for which sums John Martindale, as surety, joined the plaintiff in bonds. In 1790, Martindale, having, upon a settlement of accounts with the plaintiff in 1785, taken credit for payment to Manners of 3,000*l.*, undertook to discharge the remaining 10,500*l.*; and they settled an account accordingly. Other accounts were afterwards settled between them—the last in February, 1792; upon which a balance of 54,000*l.* was due to Martindale, including 10,393*l.* 17*s.*, *the value of annuities* granted by the plaintiff; against which Martindale agreed to indemnify the plaintiff, in consideration of the plaintiff's agreeing to pay him the amount. *A bond for* 20,000*l. was given accordingly;* and a mortgage in fee was executed by the plaintiff to Martindale for the balance of 54,000*l.*

By indentures of lease and release, dated the 30th and 31st of October, 1793, reciting an agreement by the plaintiff to sell the reversion of the mortgaged estates to Martindale, which was valued at 60,000*l.*, composed of the principal and interest due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs to the use of the plaintiff for life, with remainder to John Martindale in fee.

The bill further stated, that John Martindale *did not, according to his undertaking, pay the sum of* 13,500*l. to Manners,* nor *the value of the annuities;* which sums constituted part of the consideration for his purchase of the reversion of the estate. In September, 1797, a commission of bankruptcy issued against him, under which Manners'

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representatives proved the debt upon the bonds, and received dividends; the plaintiff being obliged to pay the remainder of the debt on account of those bonds, being 14,128*l.* 3*s.* 9*d.*, besides costs, and several sums on account of the annuities.

John Martindale, before his bankruptcy, had contracted to execute a mortgage to the defendant of the reversion comprised in the indentures of 1793; and the plaintiff, claiming a lien upon the estate for the payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the commission. In 1798, Symmons obtained a decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the plaintiff's claim; and afterwards filed a bill of foreclosure against the assignees, and obtained a decree; Mackreth not being a party to that suit. *The legal estate was vested in Coutts*, as a trustee, under a conveyance by Mackreth and Martindale in 1793, to secure annuities of 2,000*l.*

The bill, filed by Mackreth, prayed a declaration, that the plaintiff has a lien upon the reversion of the estates, sold to Martindale and mortgaged to Symmons, for the payments he had been obliged to make, and those sums which he may hereafter pay in respect of annuities, &c.

The defendant Symmons, by his answer, denied that he had any notice, prior to his entering into the agreement with Martindale, that the plaintiff had not received full consideration; and submitted that he had no lien.

Sir *Samuel Romilly* and Mr. *Wriottesley*, for the plaintiff.—The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman* v. *Tanner* (*a*), to *Nairn* v. *Prowse* (*b*), *Austen* v. *Halsey* (*c*). * * * * There are but two periods to which the point of notice can apply: first, the time when the consideration was advanced; secondly, when the conveyance was executed; and even where a consideration has actually passed (*d*). * * * In this case it is essential that there should not

(*a*) 1 Vern. 267.

(*b*) 6 V. 752, 6 R. R. 37.

(*c*) 6 V. 475; see 483.

(*d*) Wigg *v.* W., 1 Atk. 382.

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have been notice at the latter period, before which notice is clearly established. The estate was never properly out of the hands of the plaintiff. He had not taken a security carved out by himself, which might preclude the equitable lien he once had, which therefore still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien, as in the case of a purchaser for valuable consideration actually paid in that transaction, who is affected by notice.

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Mr. *Richards*, Mr. *Alexander*, and Mr. *William Agar*, for the defendant.— * * * In the case of *Chapman* v. *Tanner* (*a*), there was a special agreement : the title-deeds were kept by the vendor, a deposit of the title-deeds of itself amounting to an equitable charge. Other cases, besides those which have been mentioned, in which this point arose, either directly or incidentally, are *Bond* v. *Kent* (*b*)—the case of a mortgage of a purchased estate for part of the money, and a note for a remainder; *Pollexfen* v. *Moore* (*c*)—a very perplexed case, often cited; *Fawell* v. *Heelis* (*d*); *Blackburn* v. *Gregson* (*e*)—which is merely the opinion of Lord *Loughborough*, who desired to have the point further considered; *Trimmer* v. *Bayne* (*f*). The result of all of them is, that, where a security is given, there is no place for this equity, the purchaser certainly having to show that it does not exist. Here, a bond was given by Martindale : the security stipulated between the parties ; and, therefore, the lien, substituted by equity, where there is no stipulation for a particular security, cannot be raised.

Sir *Samuel Romilly*, in reply.—The plaintiff being called upon, and obliged to pay the debt, against which Martindale undertook to indemnify him, that undertaking forming the consideration of Martindale's purchase, he cannot, upon the ground of fraud, be permitted to retain the estate. The lien, therefore, is clear in respect of the 10,500*l*. The distinction as to the annuities rests upon the single

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(*a*) 1 Vern. 267.

(*b*) 2 Vern. 281.

(*c*) 3 Atk. 272.

(*d*) Amb. 724; 1 Bro. Ch. 422, (n.); Dick. 485.

(*e*) 1 Bro. Ch. 420.

(*f*) 9 V. 209.

circumstance, that a security by a bond of indemnity was taken, which is confined to the annuities.

* * * * *

Nov. 26*th*, 1808.

Lord Chancellor Eldon, having stated the case very particularly, and observing that the legal estate in the premises was, before the assignees of Martindale executed the agreement for a mortgage to Symmons, vested, under a former conveyance by Mackreth, in a trustee to secure annuities granted by him, pronounced the following judgment :—

This case, when it was argued, and since, has appeared to me to involve a question of very great importance, with regard to which I am not able to find any rule which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory ; as, when a rule, so plain, is once communicated, the vendor, not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be that it is to depend, not upon the circumstances of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a Court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities : from which it is clear that different Judges would have determined the same case differently ; and, if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right.

This bill insists upon a lien in respect of these annuities ; to be paid all that the plaintiff himself has paid : and either as to the original value, or the present value, or the future payments. I state that claim in these different terms, as, to determine what is the lien, it is necessary to point out the amount of it, and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee ; but it was not carried far ; and it is too late to raise a doubt upon it : but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time.

[His Lordship then carefully considered many cases to which it is no longer necessary to refer, and continued :] From all these authorities the inference is, *first, that, generally speaking, there is such a lien ; secondly, that in those general cases in which there would be the lien as between vendor and vendee, the vendor will have the lien against a third person, who had notice that the money was not paid.* Those two points seem to be clearly settled. I do not hesitate to say, that, if I had found no authority that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle, as I cannot perceive the difference between this species of lien and other equities, by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee ; and C. taking from him, and having notice of the payment by A., would also be a trustee, and many other instances may be put (*a*).

The more modern authorites upon this subject have brought it to this inconvenient state—that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken.

In this case, having, as other Judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances which I have endeavoured to collect. I must say I have felt from the first, that there is, upon the part of the plaintiff, that natural justice and equity, which excite a wish, that I could enforce the lien throughout ; but, first, as to the annuities, I am persuaded that, with reference to that part of the case involving the question of lien as to the consideration, or any part of it, or any sum of money, the quantum of which is to be estimated with reference to the present value, or the past or future payments, this is a case in

(*a*) See Dyer *v.* D., p. 820, ante.

which the plaintiff intended to rely entirely upon the personal security, the bond for 20,000*l.*; and that was the conception of Martindale also; by whose default of payment, therefore, the estate is not now subject to the lien in respect of the consideration of the annuities, or any allowance in respect of it. See how it stands. In 1790, the plaintiff, as principal, and Martindale, as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations; Martindale to be the principal, and the plaintiff to be surety; in consideration of which the plaintiff agrees to give 9,000*l.*, secured by a mortgage. It rests upon that until 1793, when the transaction takes this course: that Martindale shall be no longer a mortgagee, but owner of the reversion in fee, and, which is material, of the reversion expectant upon the plaintiff's life estate. The annuities remain upon the old footing; that is, some payments were made, or arrears accrued, between 1792 and 1793, and payments were to arise from time to time. The value given to Martindale, in 1792, by the mortgage of 9,000*l.*, for taking the liability upon himself, was a value which merely, by the lapse of time, betweeen 1792 and 1793, must have varied. If the annuities had been paid there must have been a difference in the estimation; also, *de anno in annum*, the value was decreasing, not only as the annuities were wearing out, but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties dealing for the consideration of annuities and the purchase of a reversion, which might not take effect in possession until all the annuitants were dead, relied on that reversion as security, in addition to the indemnity by the bond for 20,000*l.*; in the original transaction the estate being pledged for the sum of 9,000*l.*, as if actually paid.

Then, as to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments—that, one sum being paid, it does not attach? another sum not being paid, it does attach? a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made? And is that inference to be drawn where a conveyance was executed without the least notice of such an intention—a security taken, not of itself sufficient to exclude the purpose of such a lien? but the nature of the subject, connected with the fact of that security taken, is decisive proof against such an intention; and it appears accordingly in the other cause, *Symmons* v. *Rankin*, that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of 2,000*l.*, without the least reference to such an intention.

I admit, that the opinion of Lord *Loughborough* (*a*) that the case, before Lord *Camden* (*b*), went upon the ground of lien, is an authority very considerably against my opinion; and I cannot say upon what the case did proceed, if not upon that ground; as the estate, given by the wife to her husband for his life, after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is actually represented, Lord *Camden's* opinion seems to have been that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time; and, so understanding it, I cannot bring my mind to the conclusion that it is an authority which ought to lead me to determine, that, with reference to these annuities, there is a lien, either for the original value, the present value, or the future payments, which may or may not become due.

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the sum of money due to Manners. My individual opinion is that the intention was the same as to both; but, with regard to the latter, the cases authorise the lien; unless it is destroyed by particular circumstances, which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of Sir *Thomas Clarke* (*c*), which is very sensible; that, where the conveyance, or the payment, has been made by suprise, there shall be a lien. This plaintiff understood at the time of the conveyance, that this money was to be paid on his account to Manners; which is the same as if it was to have been paid to himself, and was not paid; and then the only question is, whether, as, from the special circumstances as to the value and nature

(*a*) See Blackburn *v.* Gregson, 1 Bro. Ch. 420.

(*b*) Tardiffe *v.* Scrughan, cited 1 Bro. Ch. 423.

(*c*) Burgess *v.* Wheate, 1 Black. 150.

of the annuities, I am to infer that a lien was not intended as to them, I must make the same inference with respect to this gross sum ; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum, my judgment is, that the plaintiff has a lien.

It is contended that there are other circumstances in this case: that the defendant, Symmons, has a conveyance of the estate without notice, or, rather, a contract; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money; though there is no doubt the defendant, when he took his conveyance, had notice from the recitals in his title-deed of Mackreth's rights and Martindale's obligations, as vendor and vendee. Neither is it necessary to go into the consideration of another argument; that the defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment as attaching upon the land, and a special agreement by a creditor for a security upon the land. It is not, however, necessary to determine such questions; as neither the plaintiff nor the defendant Symmons has the legal estate, which appears in the other cause, *Symmons* v. *Rankin*, to be in Coutts, under the *conveyance* of 1793, in which Martindale and Mackreth joined; and then, between equities the rule "*Qui prior est tempore potior est jure*," applies (*a*).

The result of this case is, that the bill must be dismissed as it regards the annuities, and is right as to the other part of the claim; and, being right in one point, and wrong in the other, the decree must be without costs.

This case was mentioned by way of motion to vary the minutes, upon a misunderstanding as to the costs.

Lord Chancellor Eldon, having repeated the ground upon which no costs were given, made the following additional observations:—

Since the judgment was pronounced, I have met with a case which was not cited in the argument, but is referred to in Mr. Sugden's

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(*a*) This rule only applies when the equities are equal. See Russell *v.* R., ante, p. 109; Rice *v.* R., 2 Drew. 73.

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work (*a*), which seems to me to be a book of considerable merit, in which this subject is considered with much attention, and he comes to a conclusion different from mine. I looked into the Registrar's Book for that case, the name of which I do not recollect; and it does seem to me that his inference is not the necessary inference, arising from the circumstances of that case, as I find it in the Registrar's Book. I mention this, to show that I have not withdrawn from the opinion I have expressed upon this subject; as to which, conceiving it to be of great importance, I should, if convinced, be very ready to retract; but, having endeavoured to collect all the doctrine of the Court upon it, I am sure I am right in that. I wish I was as sure in the application of the evidence.

NOTES.

1. Generally.
2. Lien against a railway or other company, p. 958.
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4. Cases in which the lien is determined or does not attach, p. 964.
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6. Vendee's lien for purchase-money, p. 971.

1. Generally.

A vendor's lien for unpaid purchase-money is a charge upon the property sold, created by construction of equity independently of any supposed agreement (*b*). It applies in a sale of personal (*c*) as well as in a sale of real property, and apparently extends "to all cases in which the property sold is of such a nature as that the Court will decree specific performance of the contract for the purchase of it"(*d*).

(*a*) The case alluded to by the Lord Chancellor appears to be Comer *v.* Walkley, stated 356, 2nd edit.; 465, 866, 11th edit., Sugd. V. & P.

(*b*) Cf. Story (1892), 1217, 1220; Toft *v.* Stephenson, 5 De G. M. & G. 735.

(*c*) Davies *v.* Thomas, (1900) 2 Ch. 468 (C. A.) *Re* Stucley, (1906) 1 Ch. 67; and see *Re* Patent Carriage Co., 2 Eq. 349; Dansk Rekylriffel, &c. *v.* Snell, (1908) 2 Ch. 127 (cases of sales of patents).

(*d*) *Re* Stucley, ubi. cit., supra; per Stirling, L. J., at p. 79.

The lien attaches upon copyholds and leaseholds (*a*), and extends to machinery affixed to the land (*b*).

It "arises whenever there is a valid contract of sale, and the time for completing that contract has arrived and the purchase-money is not duly paid" (*c*).

The doctrine is thus stated by *Eldon*, C., in the principal case (*d*):—"Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of a contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid" (*e*). And it applies on possession being given, whether the conveyance has been executed or not (*f*).

Before the Judicature Act, 1873, possession was essential to the existence of the lien, and after the vendor had executed an absolute conveyance, his lien on the land or the deeds was gone at law (*g*). Where, however, the conveyance stated contrary to the fact that the purchase-money had been paid, then though the estate passed at law, it did not pass in equity until the actual payment (*h*); and now the equity rule prevails, Judicature Act, 1873, s. 25, s.-s. 11.

The trustee in bankruptcy of a bankrupt vendor, or his assignees by parol assignment, are also entitled (*i*).

The principle would also apply to the case of a mortgagor who

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(*a*) Winter *v*. Anson, 3 Russ. 492; Matthew *v*. Bowler, 6 Ha. 110; Wrout *v*. Dawes, 25 B. 369.

(*b*) *Re* Vulcan Ironworks, (1888) W. N. p. 37.

(*c*) Kettlewell *v*. Watson, 26 C. D. p. 507 (C. A.).

(*d*) This extract is taken from the observations of *Eldon*, C., before delivering his final judgment; see 15 V., p. 337.

(*e*) See also Chapman *v*. Tanner, 1 Vern. 267; Austen *v*. Halsey, 6 V. 475.

(*f*) Smith *v*. Hibbard, Dick. 730; Smith *v*. Evans, 28 B. 59.

(*g*) Goode *v*. Burton, 1 Exch. 189; Esdaile *v*. Oxenham, 3 B. & C. 229.

(*h*) Winter *v*. Anson, 1 S. & S. 434, 3 Russ. 488; Jersey *v*. Briton, &c. Co., 7 Eq. p. 413. See also Coppin *v*. C., 2 P. W. 291; Hawkins *v*. Gardiner, 2 S. & G. 441; Leman *v*. Whitley, 4 Russ. 423; as to which see *Re* Marlborough, (1894) 2 Ch. p. 146. A receipt in the body of the deed is now the equivalent of the indorsed receipt, Conveyancing, &c. Act, 1881, s. 54.

(*i*) Grant *v*. Mills, 2 V. & B. 309, 13 R. R. 101; Dryden *v*. Frost, 3 My. & C. 670; Lacey *v*. Ingle, 2 Ph. 413.

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has not received the mortgage money, although the deed contains an acknowledgment, and a receipt has been indorsed. As against the mortgagee, the mortgagor would be entitled to redeem, on payment of what should be found to have been actually advanced, with interest (*a*); as against transferees of the mortgage taking in good faith for value the mortgagor would be bound by the acknowledgment (*b*).

It has been said that the lien will also extend to money advanced by the unpaid vendor to the purchaser for improvements (*c*), but the decision does not seem to go as far as this.

The lien prevails against the purchaser, his heirs, and all volunteers claiming under him (*d*); against second purchasers for value with notice (*e*); against second purchasers for value *without* notice, unless such purchasers have the legal estate (*f*), or a better equity than the vendor (*g*).

The trustee in bankruptcy of a purchaser will be affected by the equitable lien, although he may have had no notice of it; for it is a clear principle that trustees in bankruptcy take subject to all the equities attaching to the bankrupt (*h*). So, also, will the assignees under a general assignment for the benefit of creditors of the purchaser (*i*).

In *Barker* v. *B.* (*k*), a testator gave a legacy to his daughters on condition that they should convey to his sons certain shares in real estate. The daughters conveyed, but they were not paid the legacies, *Romilly*, M. R., after some doubt, held the transaction was not a sale, that a mere personal obligation was created, and that the daughters had no lien on the land conveyed.

The vendor's lien, like any other equitable chose in action, is

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(*a*) Bickerton *v.* Walker, 31 C. D., 151, at p. 157.

(*b*) Bickerton *v.* Walker, supra; Powell *v.* Browne, 97 L. T. 167; Bateman *v.* Hunt, (1904) 2 K. B. 530; Conveyancing Act, 1881, s. 55, see p. 957, infra.

(*c*) *Ex. p.* Linden, 1 Mont. D. & De G. 428.

(*d*) Mackreth *v.* Symmons; Leman *v.* Whitley, 4 Russ. 423; Harris *v.* Tubb, 42 C. D. 79, at p. 80.

(*e*) Ibid.; and Frail *v.* Ellis, 16 B. 350.

(*f*) Ibid.; and Frere *v.* Moore, 8 Price, 475; Harris *v.* Tubb, 42 C. D. 79; Wilson *v.* Kelland, (1910) 2 Ch. 306; and see note infra "Purchaser for value," &c., p. 960.

(*g*) Rice *v.* R., 2 Drew. 73, cited infra, p. 961; Kettlewell *v.* Watson, 26 C. D. 501.

(*h*) *Ex. p.* Hanson, 12 V. 349, 8 R. R. 335; Grant *v.* Mills, 2 V. & B. 306, 13 R. R. 101; *Ex. p.* Peake, 1 Madd. 346, 16 R. R. 233.

(*i*) Fawell *v.* Heelis, Amb. 724; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Bowles *v.* Rogers, 6 V. 95 (n.).

(*k*) 10 Eq. 438.

assignable even by parol (*a*), but the assignee will take it subject to any prior incumbrances created by the vendor (*b*).

A bequest to a charity, of money due upon a vendor's lien, was within the Mortmain Act (*c*), and therefore void as savouring of realty.

The mere fact that the vendor's lien still subsists will not prevent the vendor from being deemed in equity a trustee for the purchaser (*d*). Accordingly, on the death of a vendor whose lien still subsists if the title has been accepted by the purchaser, and the contract is valid and binding on both the parties, the case will apparently fall within s. 30 of the Conveyancing, &c., Act, 1881 (*e*).

"The right which the owner of an express charge possesses to have the charge raised by a sale or mortgage of the property charged extends to a lien arising under general principles of equity, such as a vendor's lien" (*f*).

A judgment entered up against the vendor after a contract for sale may be enforced against the unpaid purchase-money by equitable execution (*g*).

Where an agent is authorised to receive the purchase-money, the lien is not lost where in fact no actual payment of the purchase-money is made, but only a payment by account (*h*).

By the Conveyancing and Law of Property Act, 1881, after the 31st December, 1881, a receipt for consideration money in the body of the deed shall be sufficient, without any further receipt for the same being endorsed on the deed (s. 54); and by s. 55, "A receipt for consideration money or other consideration in the body of a deed or indorsed thereon, shall, in favour of a subsequent *purchaser*

(*a*) Dryden *v.* Frost, 3 My. & C. 670; see Vol. I., ante, p. 142.

(*b*) Lacey *v.* Ingle, 2 Ph. 413; Mangles *v.* Dixon, 1 Mac. & G. 437, 3 H. L. Cas. 702; Rayne *v.* Baker, 1 Gif. 241; Peto *v.* Hammond, 29 B. 91.

(*c*) 9 Geo. 2, c. 36; Harrison *v.* H., 1 Russ. & M. 71. See now 51 & 52 Vict. c 42; 54 & 55 Vict. c. 73; 55 Vict c. 11.

(*d*) See Lysaght *v.* Edwards, 2 C. D. 506, as to the sense in which the vendor is a trustee for the purchaser, see also Shaw *v.* Foster, L. R. 5 H. L. 321, 338, 356; Rose *v.* Watson, 10 H. L. C. 672; Rayner *v.* Preston, 18 C. D. 1, 13; Ridout *v.* Fowler, (1904) 1 Ch. 658, at p. 661; *Re* Stucley, (1906) 1 Ch. 67, at pp. 78 and 79; Williams, V. & P., 2nd edit., pp. 505 et seq.

(*e*) See Lysaght *v.* Edwards, supra; cf. *Re* Pagani, (1892) 1 Ch. 236; and see Williams, V. & P., 2nd edit., p. 530.

(*f*) Per Vaughan-Williams, L. J., in *Re* Stucley, (1906) 1 Ch. 67, at p. 76, citing Munns *v.* Isle of Wight, &c., L. R. 5 Ch. 414; and see Levy *v.* Stogdon, (1898) 1 Ch. 478.

(*g*) Brown *v.* Perrott, 4 B. 585; cf. Robinson *v.* Hedger, 14 Jur. 784; Edwards, Execution (1888), p. 322.

(*h*) Wrout *v.* Dawes, 25 B. 369; Wilson *v.* Keating, 4 De G. & J. 588.

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not having notice that the money or other consideration thereby acknowledged to be received, was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof" (*a*). These sections apply only to deeds executed after the commencement of the Act (31st December, 1881).

Marshalling.—See Vol. I., ante, p. 51.

Statutes of Limitation.—A vendor's lien for unpaid purchase-money on a sale of real estate may be barred at the end of 12 years (*b*). A vendor's lien on personal estate like any other charge on personal estate is not subject to any Statute of Limitations, and therefore a claim for the sum unpaid, with interest thereon, is not barred by lapse of time (*d*).

Real Estate Charges Acts (*e*).—The personal estate of a deceased purchaser, whether dying testate or intestate, is no longer primarily liable to discharge a lien for unpaid purchase-money, whether in respect of freeholds (*f*) or of leaseholds (*g*). In *Re Kidd* (*h*), a building agreement provided that the lessor should grant leases of certain land at ground rents, and that after leases with ground rents of 180*l.* total annual value had been granted, the lessor should either convey the land remaining unleased to the lessee for a nominal sum, or should grant leases of that land and purchase ground rents to be created thereout at a certain price. The lessor elected to grant the further leases and to purchase, but died before completion. The lessor was held to be a purchaser of these further ground rents and the devisees liable to discharge the amount due.

2. Lien against a Railway or other Company.

A vendor of land to a railway company is, with respect to his lien, in no different position from a vendor of land to any other

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(*a*) Bickerton *v.* Walker, 31 C. D., p. 195; see Lloyds Bank *v.* Bullock, (1896) 2 Ch. 192; Rimmer *v.* Webster, (1902) 2 Ch. 163; Bateman *v.* Hunt, (1904) 2 K. B. 530, and see as to section 55, supra, p. 45, supra. Where there is no receipt clause or receipt indorsed, the purchaser must pay expense of proving there is no vendor's lien; *Re* Scott & Alvarez's Contract, (1895) 1 Ch. 596.

(*b*) Real Property Limitation Act, 1874, ss. 8 and 9; the Trustee Act, 1888, ss. 1 and 8; Toft *v.* Stephenson, 5 De G. M. & G. 735.

(*d*) *Re* Stucley, (1906) 1 Ch. 67; Levy *v.* Stogdon, (1898) 1 Ch. 478, and cf. Mellersh *v.* Brown, 45 C. D. 225; *Re* Hancock, 59 L. T. 197.

(*e*) 17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, s. 2, 40 & 41 Vict. c. 34. See Vol. I., pp. 23 to 31, where they are printed.

(*f*) *Re* Cockcroft, 24 C. D. 94.

(*g*) See *Re* Kershaw, 37 C. D. 674.

(*h*) (1894) 3 Ch. 558.

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person (*a*), and will have a lien thereon in respect of unpaid compensation as well as purchase-money (*b*), unless that compensation is the subject of a separate agreement between him and the company (*c*), and he is not deprived of his lien by a deposit and bond under the 85th section of the Lands Clauses Consolidation Act, 1845 (*d*), nor by accepting a deposit in the names of trustees in lieu of the statutory deposit, if the purchase and compensation moneys exceed the deposited sum (*e*). The lien also extends as against another company, lessee of the company which made the purchase (*f*)

And a mortgage of part of the land under a Railway Act will not oust the vendor's lien (*g*).

The vendor of land to a railway company has the ordinary remedies for enforcing his lien (*h*), and the Court will, although the railway may have been made over the land, and opened for public use, enforce the lien by sale (*i*), or decree rescission of the contract and possession (*k*). But it is now ultimately settled that the Court will not, *before judgment* in the action, grant an *injunction* to restrain the company from running trains or engines over the land until the payment of the purchase-money of the land agreed to be taken (*l*), unless, perhaps, the company were destroying the property (*m*); but it would seem in such a case that it would be more proper to apply to have the purchase-money paid into Court (*n*).

In *Allgood* v. *Merrybent, &c. Ry. Co.* (*o*), after judgment that the unpaid vendor was entitled to his lien, it being clear that a sale would be useless, an injunction was granted restraining the defendant company from running trains over the land and from continuing in

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(*a*) Per *Selwyn*, L.J., Wing *v.* Tottenham, &c. Ry. Co., L. R. 3 Ch. 740; Allgood *v.* Merrybent, &c. Ry. Co., 33 C. D. 574.

(*b*) Walker *v.* The Ware Ry. Co., 1 Eq. 195.

(*c*) Ibid.

(*d*) 8 & 9 Vict. c. 18; Ibid.

(*e*) Ibid.

(*f*) Bishop of Winchester *v.* Mid-Hants Ry. Co., 5 Eq. 17; Cosens *v.* Bognor Ry. Co., L. R. 1 Ch. 594.

(*g*) Nash *v.* Worcester Improvement Commissioners, 1 Jur. (N. S.) 973.

(*h*) Wing *v.* Tottenham, &c. Ry. Co., L. R. 3 Ch. 740.

(*i*) Ibid; Walker *v.* The Ware, &c. Ry. Co., 1 Eq. 195.

(*k*) Allgood *v.* Merrybent, &c. Ry. Co., 33 C. D. p. 574.

(*l*) Pell *v.* Northampton, &c. Ry. Co., L R. 2 Ch. 100; Munns *v.* Isle of Wight Ry. Co., L. R. 5 Ch. 414; Lycett *v.* Stafford, &c. Ry. Co., 13 Eq. 261; and see and consider Bishop of Winchester *v.* Mid-Hants Ry. Co., 5 Eq. 17; Latimer *v.* Aylesbury, &c. Ry. Co., 9 C. D. 385.

(*m*) Pell *v.* Northampton &c. Ry. Co., L. R. 2 Ch. 101, per *Turner*, L. J.

(*n*) Ibid. 102, *Cairns*, L. J.

(*o*) 33 C. D. 571.

possession of it (*a*), and *Williams* v. *Aylesbury, &c. Ry. Co.* and *Munns* v. *Isle of Wight Ry. Co.*, supra, were discussed.

The Court will not generally appoint a receiver before judgment (*b*), but it will do so at the hearing (*c*).

Where land is taken by a railway company, and the purchase-money, ascertained by *arbitration* under the Lands Clauses Consolidation Act, 1845 (*d*), has been paid, the vendor is not entitled to a lien on the land sold for the *costs of the arbitration* payable to him by the company (*e*). Nor is a vendor entitled to a lien for costs on the sum deposited by a railway company under the 85th section of the Lands Clauses Consolidation Act (*f*), and upon due performance of the condition of the bond, mentioned in the same section, the company are entitled to have the money paid out to them, notwithstanding the pendency of a question between them and the vendor with respect to such costs (*g*). And where the sale to the railway company is in consideration of a *rent charge* of the company, under the 10th and 11th sections of the Land Clauses Consolidation Act, it has been held, on the principle of *Winter* v. *Anson* (*h*), that there will be no lien for unpaid purchase-money (*i*).

3. Purchaser for Value without Notice.

Although the equitable lien for unpaid purchase-money will, as is laid down in *Mackreth* v. *Symmons*, bind the estate not only in the hands of the purchaser and his heirs, and persons taking from them as volunteers, but also in the hands of purchasers for valuable consideration, who bought *with notice* that the purchase-money remained unpaid (*k*), yet the lien will not prevail against a *bonâ fide* purchaser acquiring the legal estate

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(*a*) Seton (1901), p. 2293, Forms 5, 6, 7. And see the judgment in Marshall *v.* Scarborough, &c. Ry. Co., (1889) W. N. 73.

(*b*) Latimer *v.* Aylesbury, &c. Ry. Co., 9 C. D. 385.

(*c*) Munns *v.* Isle of Wight Ry. Co., L. R. 5 Ch. 414; Williams *v.* Aylesbury Ry. Co., 28 L. T. 547.

(*d*) 8 & 9 Vict. c. 18.

(*e*) Ferrers *v.* Stafford and Uttoxeter Ry. Co., 13 Eq. 524.

(*f*) 8 & 9 Vict. c. 18.

(*g*) *Re* L. & S. W. Ry. Co., 2 Ph. 772; *Re* Neath, &c. Ry. Co., L. R. 9 Ch. 263.

(*h*) 1 S. & S. 434.

(*i*) Jersey *v.* Briton, &c. Dock Co., 7 Eq. 409. But see Eyton *v.* Denbigh, &c. Ry. Co., 6 Eq. 14; Ibid. 7 Eq. 439.

(*k*) Hearle *v.* Botelers, Cary 35; Gibbons *v.* Baddall, 2 Eq. Ca. Abr. 682 (n.): Elliott *v.* Edwards, 2 B. & P. 183; Walker *v.* Preswick, 2 Ves. Sen. 622; Hughes *v.* Kearney, 1 Sch. & L 135; 9 R. R. 30; Winter *v.* Anson, 1 S. & S. 434; 24 R. R. 205; Frail *v.* Ellis, 16 B. 350.

who bought *without notice* that the purchase-money remained unpaid (*a*); and although the title is deduced from the first vendor, in recital, still that will not be sufficient to affect the purchaser with notice, if the recital does not show that the estate was not paid for (*b*).

The fact of the vendor remaining in possession of the estate as lessee, where he has acknowledged the receipt of the purchase-money in the body of the deed and by indorsement will not be *notice* of the purchase-money remaining unpaid, so as to cause the lien to attach (*c*). But if the vendor claiming a lien retains the conveyance and the title-deeds, a subsequent purchaser or mortgagee (although he may have acquired the legal estate) may be affected with notice of the lien, and therefore bound by it where the Court imputes to him fraud or gross and wilful negligence, for omitting all inquiries as to the deeds (*d*).

If the legal estate is outstanding, then, as the second purchaser has only an equitable interest, subsequent to that of the equitable lien, the maxim, "*Qui prior est tempore potior est jure*," may, as in the principal case, apply; and the equitable lien will have precedence (*e*). But where the equity of a second purchaser or mortgagee having only an equitable interest is better than that of the vendor claiming a lien for unpaid purchase-money, such a purchaser or mortgagee will be entitled to priority over the vendor's lien. In *Rice* v. *R.* (*f*) certain leasehold property was assigned to a purchaser, *by a deed which recited the payment of the whole purchase-money, and had the usual receipt indorsed on it*, and the *title-deeds were delivered up to the purchaser*. Some of the the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deed, the purchaser

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(*a*) Cator *v.* Pembroke, 1 Bro. Ch. 302; Harris *v.* Tubb, 42 C. D. 79.

(*b*) Cator *v.* Pembroke, supra; Eyre *v.* Sadleir, 14 Ir. Ch. R. 119. See, however, Davies *v.* Thomas, 2 Y. & C. Ex. 234, a doubtful case, see the remarks thereon, Sugd V. & P 819, 11th ed.

(*c*) White *v.* Wakefield, 7 Si. 401; Price *v.* Blakemore, 6 B. 507, and see now sections 54 and 55 of the Conveyancing Act, 1881, and see p. 45, supra.

(*d*) See Le Neve *v.* Le N., ante, note "Not inquiring for title deeds," p. 211, and Worthington *v.* Morgan, 16 Si. 547; Peto *v.* Hammond, 30 B. 495; and see Hewitt *v.* Loosemore, 9 Ha. 449; Finch *v.* Shaw, Colyer *v.* Finch, 19 B. 500; 5 H. L. Cas 905.

(*e*) Frere *v.* Moore, 8 Price 475.

(*f*) 2 Drew. 73 See as to the present position under s. 55 of the Conveyancing Act 1881, Capell *v.* Winter, (1907) 2 Ch. at p. 381.

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deposited the assignment and title-deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded, without paying either the vendors or the equitable mortgagees :—*Kindersley*, V.-C., held that the defendants, the equitable mortgagees, having the better equity, were entitled to payment out of the estate in priority to the claim of the vendors for their lien. "In a contest," said his Honour, "between persons having only equitable interests, *priority of time is the ground of preference last resorted to* (*a*); *i.e.*, a Court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds, upon an examination of the relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are *in all other respects equal;* and that if one has, on other grounds, a better equity than the other, priority of time is immaterial. . . . So far as relates to the nature and quality of the two equitable interests, abstractedly considered, they seem to me to stand on an equal footing; and this I conceive to have been the ground of Lord *Eldon's* decision in *Mackreth* v. *Symmons*, where, in a contest between the vendor's lien for unpaid purchase-money, and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time. . . . If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there anything in the special circumstances of the present case to give to the one a better equity than the other? One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title-deeds. . . . We have here ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are precisely of the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And applying this rule to the present case, it appears to me that the equitable interests of the two parties being, in their nature and quality, of equal worth, the defendant, having possession of the deeds, has the better equity; and that there is, therefore, in this case, no room for the application of the maxim, "*Qui prior est tempore potior est jure*," which is only applicable

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(*a*) See as to this Taylor *v.* Russell, (1891) 1 Ch., p. 17; Kettlewell *v.* Watson, 26 C. D. 501, and cases cited in Russel *v.* R., ante, p. 109, note (*e*).

where the equities of the two parties are, in all other respects, equal. I feel all the more confidence in arriving at this conclusion, inasmuch as it is in accordance with the opinion expressed by Lord *St Leonards* in his work on Vendors and Purchasers. And I have no doubt, that in *Mackreth* v. *Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title-deeds from his mortgagor, Lord *Eldon* would have decided in his favour.'' And his Honour, after guarding against the supposition that he meant to express an opinion that the possession of the title-deeds would, in all cases, and under all circumstances, give the better equity, and after referring to *Allen* v. *Knight* (*a*), says:—" It appears to me that in all cases of contest between persons having equitable interests, *the conduct of the parties and all the circumstances* must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance by which they declared, in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase-money had been duly paid. They might still have required that the title-deeds should remain in their custody with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; and if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute, legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth, it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorised and enabled him to do. The defendant who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity."

(*a*) 5 Ha. 272.

4. Cases in which the Lien is determined or does not attach.

By Express Agreement.—Express stipulations inconsistent with the retention of a lien will of course exclude it (*a*).

By Taking Security.—The mere taking of personal security, e.g., bills of exchange (*b*), is not sufficient to take away the lien. The question in each case is, does the evidence show an intention on the part of the vendor to rely not upon the security of the estate, but solely upon the personal credit of the vendee? "The more modern authorities upon this subject have brought it to this inconvenient state, that the question is not a dry question upon the fact whether a security was taken, but it depends upon *the circumstances of each case*, whether the Court is to infer, that the lien *was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken*" (*c*).

Sometimes the decision will turn upon the particular circumstances of the bargain between the parties (*d*), sometimes upon the nature of the property sold or the purpose for which it was sold (*e*), sometimes, as in *Nairn* v. *Prowse* (*f*) and *Mackreth* v. *Symmons*, upon the nature of the security taken.

It lies on the vendee to show that the vendor agreed to rest on the security and to discharge the land (*g*), and evidence may be given to show the real nature of the transaction (*h*).

It is now settled, that a mere personal security for the purchase-money, as a bond (*i*), a bill of exchange (*k*), although with a surety (*l*), or a promissory note (*m*), whether negotiated or not (*n*), will not, without more, be sufficient evidence of the intention of the

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(*a*) *Re* London and Lancashire Paper Mills Co., 58 L. T. 798.

(*b*) Grant *v.* Mills, 2 V. & B. 306; 13 R. R. 101.

(*c*) Per *Eldon*, C., supra, p. 950; Nairn *v.* Prowse, 6 V. 752, 6 R. R. 37; Winter *v.* Anson, 3 Russ. 488; *Ex. p.* Loaring, 2 Rose, 79.

(*d*) Clark *v.* Royle, 3 Si. 502; Buckland *v.* Pocknell, 13 Si. 406.

(*e*) Jersey *v.* Briton, &c., Dock Co., 7 Eq. 409; *Re* Brentwood Brick, &c., Co., 4 C. D. 562, infra p. 967.

(*f*) Supra.

(*g*) Hughes *v.* Kearney, 1 Sch & L. 132, 9 R. R. 30.

(*h*) Frail *v.* Ellis, 16 B. 350.

(*i*) Hearle *v.* Botelers, Cary, 35; Winter *v.* Anson, 3 Russ. 488; Collins *v.* C., 31 B. 346.

(*k*) Teed *v.* Carruthers, 2 Y. & C. Ch. 31; Grant *v.* Mills, supra.

(*l*) Hughes *v.* Kearney, 1 Sch. & L. 136; Grant *v.* Mills, supra.

(*m*) Gibbons *v.* Baddall, 2 Eq. Ca. Abr. 682 (n.); Hughes *v.* Kearney, supra; *Ex p.* Peake, 1 Madd. 346.

(*n*) *Ex p.* Loaring, 2 Rose, 79.

vendor to give credit exclusively to the purchaser, or to his security, so as to take away the lien.

In *Winter* v. *Anson* (*a*) there was an agreement for the sale of an estate, by which it was, amongst other things, agreed that the amount of the consideration-money should be secured by the bond of the purchaser to the vendor, with interest at 4*l.* per cent., and should remain so secured, *during the life of the vendor,* on the regular payment of interest. A conveyance was executed, *in pursuance of the agreement, and in consideration of the purchase-money therein expressed to have been paid,* and the vendor's receipt was indorsed upon it. Part only of the purchase-money had, in fact, been paid, and the residue was secured by bond conditioned to be void on payment by the vendee, to the executors, administrators, or assigns of the vendor of the residue of the purchase-money within twelve months next after the decease of the vendor, with interest at 4*l.* per cent. *Leach*, M. R., although he at first decided in favour of the lien, afterwards decided against it, upon the ground that the case was, in principle, the same as if the conveyance had stated the real contract of the parties; and that by the effect of that contract, the vendor agreed to part with his estate *in consideration of the bond for the future* payment of the price; and that, when such bond was executed the estate passed to the vendee in equity, as well as at law. This decision was reversed by *Lyndhurst*, C., who held that the circumstance, that the money was secured to be paid at a future day, did not affect the lien. "I do not think," said his Lordship, "that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford *such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee,* as would be necessary in order to get rid of the lien" (*b*). An appeal was lodged against this decision, but it was afterwards withdrawn (*c*). In *Jersey* v. *Briton Ferry Co.* (*d*) a man conveyed a piece of land for the construction of a public work in consideration of an annual payment. *James,* V.-C., followed the principle as stated by *Leach*, M. R., in the above case, thinking that it was not affected by the judgment on the appeal, and held it would be quite contrary to the intention of the parties to suppose the vendor was reserving to himself a right at some future time to enter and destroy the public work if the annual rent should fall into arrear.

(*a*) 1 S. & S. 434.

(*b*) 3 Russ. 488.

(*c*) Sugd. V. & P. 258, 11th edit.

(*d*) 7 Eq. 409.

Where an estate is conveyed, in *consideration of an annuity*, the vendor may have a lien upon the land for the annuity, *although a bond or covenant* is given to secure the payment of the annuity (*a*). In *Matthew* v. *Bowler* (*b*), where there was a sale and assignment of a life interest in leaseholds in *consideration of a weekly sum*, to be paid to the vendor during her life, with *a covenant by* the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease, *Wigram*, V.-C., held that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment for the weekly payment.

But where the Court is satisfied, from the particular circumstances of the case, that the vendor *intended* to substitute the vendee's personal security for his lien, the latter is gone (*c*).

In *Clark* v. *Royle* (*d*), where the conveyance was made in consideration of the vendee entering into covenants therein contained for payment of an annuity to the vendor, and 3,000*l*. to certain persons in the event of the vendee's marrying, *Shadwell*, V.-C., distinguishing the case from *Tardiffe* v. *Scrughan* (*e*), held that there was no lien, on the ground that the deed plainly marked out, that the *consideration on the one side was the conveyance of the estate, and on the other, the entering into the covenants.*

So in *Parrott* v. *Sweetland* (*f*), where a receipt was given by the vendor *for a bond*, as the consideration for an estate, the lien was gone, as the parties in effect bargained for a security, and not for a stipulated sum.

So in *Buckland* v. *Pocknell* (*g*), where A. agreed to sell an estate to B. for an annuity of 200*l*., to be paid to him for his life, and an annuity of 92*l*., to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to A. and his son, and covenanted to pay them; and by a conveyance of even date,

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(*a*) Tardiffe *v*. Scrughan, 1 Bro. Ch. 423, a case which has been much criticised; see Mackreth *v*. Symmons; Clark *v*. Royle, 3 Si. 502; Matthew *v*. Bowler, 6 Ha. 110; but the authority of which is now established, Dart, (1905), 734; Blackburn *v*. Gregson, 1 Bro. Ch. 420.

(*b*) 6 Ha. 110.

(*c*) Mackreth *v*. Symmons, Nairn *v*. Prowse, 6 V. 752, 6 R. R. 37, supra; *Re* Albert L. A. Co., 11 Eq., p. 178.

(*d*) 3 Si. 499.

(*e*) Supra.

(*f*) 3 My. & K. 655.

(*g*) 13 Si. 406, see Frail *v*. Ellis, 16 B. 350.

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but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in *consideration of the premises and of the annuities having been so granted as thereinbefore recited*, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A., his son's annuity, which had been assigned to the plaintiff, became in arrear. *Shadwell*, V.-C., held that there was no lien for the annuity.

So, likewise, in *Dixon* v. *Gayfere* (*a*), where the purchaser contracted to buy an estate from the vendor, and upon an assignment being made to grant to the vendor an annuity of 50*l.* per annum, during three lives, "*to be secured by bond*," *Romilly*, M. R., held, that the vendor had no lien on the estate for payment of the annuity. The decree, however, was varied by *Cranworth*, C., who, agreeing with his Honour that the vendor had no lien on the estate for payment of the annuity, held that he was entitled (the purchaser being dead and there having been no conveyance) to have the annuity secured by a valid and effectual bond before he could be called upon to convey the estate (*b*).

So in *Re Brentwood Brick, &c. Co.* (*c*), where a leasehold brickfield was assigned to a company in consideration of 6,000*l.* to be paid to the vendor as thereinafter mentioned, viz., 50 per cent. on all moneys to be received from sale of shares, and 50 per cent. on all moneys borrowed by the Company by way of capital, until the 6,000*l.* was paid. The Company became abortive. No money was received by sale of shares, or borrowed, and ultimately the Company was ordered to be wound up. It was held by the Court of Appeal, that the nature of the contract was such as to exclude the vendor's lien, and that the vendor had no lien on the leasehold premises. "The vendor," said *James*, L. J., "got for his property a charge upon, and a right to the capital of the Company to the extent of 6,000*l.*, when it came in. To my mind it is clear that he intended to rely on that fund for payment, *and intended that the Company should have the means of borrowing*. This is quite inconsistent with a lien, which would probably make the Company unable to pledge their property" (*d*).

(*a*) 17 B. 421; 21 B. 118.

(*b*) Dixon *v.* Gayfere, 1 De G. & J. 655. See also Dyke *v.* Rendall, 2 De G. M. & G. 209; Frail *v.* Ellis, 16 B. 350; Stuart *v.* Ferguson, Hayes, 452; *Re* Albert L. A. Co., 11 Eq., p. 178; Jersey *v.* Briton Ferry, &c. Co., 7 Eq. 409.

(*c*) 4 C. D. 562. Cf. *Re* Durrow Brick Co., (1904) 1 Ir. R. 530.

(*d*) See also, and consider, *Re* Patent Carriage Co., 2 Eq. 349; and the remarks thereon of *Baggallay*, L. J., in *Re* Brentwood Brick, &c. Co., supra.

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An actual agreement, though by parol, to accept a security, and rely upon it alone, will discharge the vendor's lien for unpaid purchase-money. In *Winter* v. *Anson* (*a*), *Leach*, M. R., observes, "It is the vendor who in the first place attempts to raise an equity against the allegation of the deed: and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made." Where there was a stipulation that the purchase-money should be paid within two years after a resale, the lien was held gone (*b*); and see *London, &c. Paper Mills Co.* (*c*) where an express stipulation had been substituted for the lien.

If a vendor take a totally distinct and independent security, as for instance, a mortgage of a long annuity or of another estate for the unpaid purchase-money, it will then become a case of substitution for the lien, instead of a credit given (*d*). But the mortgage must be given under such circumstances as are laid down in the principal case, namely, that the *intention* of the vendor to give up the lien, can be therefrom *clearly and satisfactorily implied* (*e*). And, where a bond was given for the unpaid purchase-money, and a mortgage *on part* of the purchased estate, the intention, that the lien should not extend over the rest of the estate, was held to be sufficiently clear (*f*).

So where the vendor took a mortgage of the estate for part of the purchase-money, and a note for the remainder, it was held that he had no lien for the money due on the note, "because," as was observed by Lord *Redesdale*, in commenting on that case (*g*), "it was *manifestly the intention of the parties* that the amount of the note should not be a lien on the lands, else they would have had a mortgage for the whole: the seller took the estate for his debtor for part of the purchase-money, and was content with the note for the remaining part" (*h*).

(*a*) 1 S. & S. 445; supra p. 965.

(*b*) *Ex p.* Parkes, 1 G. & J. 228.

(*c*) 58 L. T. 798.

(*d*) Nairn *v.* Prowse, 6 V. 752, 6 R. R. 37.

(*e*) See Cowell *v.* Simpson, 16 V. 278, 10 R. R. 181; a case of solicitor's lien, as to which see Angus *v.* McLachlan, 23 C. D. 330; *Re* Taylor, (1891) 1 Ch. 590; Groom *v.* Cheesewright, (1895) 1 Ch. 730; Saunders *v.* Leslie, 2 Ball & B. 515.

(*f*) Capper *v.* Spottiswoode, Taml. 21.

(*g*) Bond *v.* Kent, 2 Vern. 281.

(*h*) See Hughes *v.* Kearney, 1 Sch. & L. 135, 9 R. R. 30; Eyre *v.* Sadleir 14 Ir. Ch. R. 119, 15 Ib. 1. Compare Grant *v.* Mills, 2 V. & B. 306, 13 R. R. 101.

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Loss of Lien as against Third Persons by Conduct, &c.—Where the purchaser with the concurrence of the vendor mortgaged the estate for a sum which the vendor received in part payment of his purchase-money, taking bills, which were ultimately dishonoured, for the remainder, it was held that the vendor had no lien on the purchase-money arising from a second sale, made in pursuance of an agreement between all the parties, in preference to the mortgagee (*a*). And if a vendor who knows the purchase-money is trust-money, suffers one of the trustees to retain part of it, without the knowledge of the co-trustees or the *cestui que trust*, he has no lien on the estate for the part so retained (*b*). Upon the same principle in *Muir* v. *Jolly* (*c*), a trustee having purchased an estate on behalf of the trust, the vendor executed a conveyance to the trustee, which recited the trust, and that the trustee had called in trust-moneys sufficient to pay the purchase-money, and it contained a receipt for the whole purchase-money. In fact, only a part was paid, and the trustee gave his bond and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete. *Romilly*, M. R., held that the vendor had no lien on the title deeds in his possession for the unpaid purchase-money. And where the vendor, without receiving the purchase-money, executes a conveyance, in pursuance of an arrangement with an intending mortgagee, for the purpose of enabling the purchaser to execute a mortgage, he will lose his lien on the estate against the mortgagee (*d*).

A vendor of land in a Register County (except York), part of whose purchase-money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers, who have notice of it, actual or constructive (*e*). But the vendor, although he retains the purchase-deed, will, in such case, lose his lien, as against sub-vendees, when his solicitors, at the request of the vendees, register the purchase-deed with the receipt for the purchase-money endorsed, thereby enabling the vendees to represent to the sub-vendees that the land is free from incumbrances (*f*).

(*a*) Cood *v.* Pollard, 9 Price, 544.

(*b*) White *v.* Wakefield, 7 Si. 401; and see Price *v.* Blakemore, 6 B. 507.

(*c*) 26 B. 143.

(*d*) Smith *v.* Evans, 28 B. 59.

(*e*) Kettlewell *v.* Watson, 21 C. D. 685, 26 C. D. 501. See notes to Le Neve *v.* Le N.

(*f*) Kettlewell *v.* Watson, 26 C. D. 501. See now the Yorkshire Registries Act, 1884, which enables a lien to be registered. See ante p. 243.

In cases where registration is made compulsory under the Land Transfer Acts, 1875 and 1897, registration of the lien as an incumbrance prior to registration is advisable in all cases before the registration of the transfer. If the purchaser subsequently registers with absolute title the lien will be destroyed. Registration with a qualified or possessory title would not affect the lien, but that registration might be followed by a registration with absolute title (*a*).

As to notice, constructive and otherwise, see the notes to *Le Neve* v. *Le N.*, supra, p. 197. Section 55 of the Conveyancing Act, 1881, is dealt with on pp. 45 and 957, supra.

5. Enforcement of Lien.

A vendor's lien may be enforced by action for specific performance, claiming a declaration that the vendor is entitled to a lien. This declaration may subsequently be enforced by an order made on motion under the liberty to apply (*b*). Such orders may be for sale, or for rescission of the contract (*c*), and injunction and delivery of possession, or for payment of purchase-money into Court, and in default, delivery of possession (*d*). The person entitled to a vendor's lien is a secured creditor for the amount due (*e*) with interest thereon at four per cent. per annum (*f*), and a receiver may be appointed at his instance (*g*).

Where the purchase-money of an estate is payable by instalments, a vendor in an action for specific performance may obtain a declaration that he is entitled to a lien for the entirety of the unpaid purchase-money, and future instalments, with liberty to apply for an order for payment, and also with liberty to apply in respect of future instalments as they become due (*h*). It seems,

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(*a*) Williams, V. & P., 2nd edit., p. 1029.

(*b*) Seton (1901); Rome *v.* Young, 4 Y. & C. Ex. 204. See the judgment in Marshall *v.* Scarborough, &c. Ry. Co., (1889) W. N. 73.

(*c*) Baker *v.* Williams, 41 W. R. 375.

(*d*) Seton (1901), p. 2290.

(*e*) Levy *v.* Stogdon, (1898) 1 Ch. 478.

(*f*) See Chapman *v.* Turner, 1 Vern. 267; Rose *v.* Watson, 10 H. L. C., at p. 682, and see for statement of general principle on which equitable charges bear interest, *Re* Drax, (1903) 1 Ch. 781.

(*g*) See per *Vaughan Williams*, L. J., in *Re* Stucley, (1906) 1 Ch. at p. 76, and see Munns *v.* Isle of Wight Ry. Co., L. R. 5 Ch. 414; Williams *v.* Aylesbury &c. Ry. Co., 21 W. R. 819; Boehm *v.* Wood, 2 J. & W. 236; Bishop of Winchester *v.* Mid-Hants Ry. Co., 5 Eq. 17; Judicature Act, 1873, s. 25, (8). See R. S. C. (1883), O. 50, r. 6.

(*h*) Nives *v.* N., 15 C. D. 649; Seton (1901), p. 2291.

however, that if the property the subject of the contract were situated abroad, no decree enforcing the lien would be made, at any rate in the absence of special circumstances (*a*).

The declaration should be expressly asked for both in the writ and in the statement of claim, or else, in default of appearance or pleading, a difficulty may arise (*b*). Unless a declaration of lien is made charging the land, no order can be made under the liberty to apply (*c*), except it is clear that the interests of subsequent incumbrancers and others could not be affected thereby (*d*).

6. Vendee's Lien for Purchase-money.

Sir *Thomas Clarke*, M. R., in *Burgess* v. *Wheate* (*e*), lays down the rule thus: "Where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representative of the purchaser" (*f*).

In *Rose* v. *Watson* (*g*) the vendor sold part of an estate to the plaintiff; part of the purchase-money was payable and paid at the date of the contract, the balance was made payable three years later, with interest on that balance in the meantime. The vendor afterwards mortgaged the whole of the estate to X. who gave notice of his mortgage to the plaintiff; after that notice the plaintiff made further payments of interest to the vendor. Ultimately the plaintiff declined to complete on the ground that certain representations on the faith of which he had purchased had not been fulfilled. An action for specific performance was brought against him and failed. He then filed a bill claiming a lien on the property for all sums paid by him under the contract with interest thereon. It was held that since on payment of the purchase-money the vendor becomes trustee for the purchaser, so on payment of a part, to that extent the vendor becomes a trustee for the purchaser (*h*); that a lien arose *under the contract* (*i*) in respect of each payment of

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(*a*) Norris *v.* Chambers, 29 B. 246; see also Watson *v.* Rose, 10 W. R. 745, 10 H. L. Cas. 672.

(*b*) Tacon *v.* National &c. Co., 56 L. T. 165; Stone *v.* Smith, 35 C. D. 188.

(*c*) A.-G. *v.* Sittingbourne, &c., Ry. Co., 1 Eq. 636.

(*d*) Heriot *v.* L. C. & D. Ry. Co., 16 L. T. 473.

(*e*) 1 Eden, 177.

(*f*) And see Mackreth *v.* Symmons, supra, p. 952, Cator *v.* Pembroke (Earl of), 1 Bro. Ch. 302, Wythes *v.* Lee, 3 Drew. 396.

(*g*) 10 H. L. Cas. 672.

(*h*) Ibid., per Lord *Westbury*, at p. 678; per Lord *Cranworth*, at p. 684.

(*i*) The dictum of *Kay*, L. J., in Rodger *v.* Harrison, (1893) 1 Q. B. 161, at p. 173, is inconsistent with the decision in Rose *v.* Watson, supra. See money made under it, whether of principal or interest; that all sums of money so paid formed part of the purchase-money, and were principal sums, and that in consequence of the *subsequent failure* of the vendor, the plaintiff was entitled to claim interest in respect of them. The mortgagee could only take subject to the rights of the plaintiff, and since he had not required payment to himself the plaintiff was unaffected by the mortgage.

The right of the vendee to a lien or charge upon the property purchased is dependant upon the trusteeship (*a*) of the vendor, but the vendor is not a trustee for the vendee when the latter has by his default barred himself from compelling completion of the contract, and from recovering moneys which he has paid under it (*b*).

On the other hand the vendee's lien arises under the contract and does not arise on the vendor's default; that default merely gives rise to the necessity for enforcing the lien. "The purchaser has a lien, both when the contract goes off for want of title and when the contract is rescinded under a condition enabling the purchaser to rescind." (*c*)

The principle is not confined to a case of simple purchase; in *Middleton* v. *Magnay* (*d*) A. agreed to grant a lease to B., who was to enter at once and expend money in repairs, with a proviso that if A. could not within a certain period grant a valid lease he would repay B. his outlay, and the agreement should cease. A. was unable to grant the lease, and B. filed a bill for specific performance, or in the alternative, for repayment of the money expended by him. It was held that B. was entitled to a lien on the property to the extent of A.'s interest therein (*d*).

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per *Farwell*, J., in Whitbread & Co., Ltd. *v.* Watt, (1901) 1 Ch. 911, at p. 915; affirmed (1902) 1 Ch. 835.

(*a*) See as to this trusteeship cases cited note (*d*), p. 957, supra.

(*b*) Ridout *v.* Fowler, (1904) 1 Ch. 658, (1904) 2 Ch. 93; and see as to the vendee's loss of right to recover his deposit, Soper *v.* Arnold, 14 A. C. 429; *Ex p.* Barrell, L. R. 10 Ch. 512; Cato *v.* Thompson, 9 Q. B. D. 616; Howe *v.* Smith, 27 C. D. 89.

(*c*) Per *Farwell*, J. (1901) 1 Ch. 911, at p. 915, affirmed (1902), 1 Ch. 835; and see Turner *v.* Marriott, 3 Eq. 744; Aberaman Ironworks *v.* Wickens, L. R. 4 Ch. 101. See the form of order Seton (1901), p. 2249.

(*d*) 12 W. R. 706.

LAKE *v.* GIBSON.

1729. 1 Eq. Ca. Abr. 294, Pl. 3.

LAKE *v.* CRADDOCK.

(*On an Appeal from the Decree at the Rolls in* LAKE *v.* GIBSON.)

1732. 3 P. W. 158.

Joint Purchasers.

Where several persons make a joint purchase for the purposes of a joint undertaking or partnership, either in trade or any other dealing, although they are joint tenants at law, in equity they will be considered as tenants in common, and the survivors as trustees for those who are dead.

Five persons purchased West Thorock Level from the Commissioners of Sewers, and the purchase was to them as joint tenants in fee; but they contributed rateably to the purchase, which was with an intent to drain the Level; after which several of them died. They were held to be tenants in common in equity; and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, on terms.

The case was thus: Great part of the lands in West Thorock, in Essex, having been overflowed by the river Thames near Dagenham, and the landowners not thinking it worth their while to pay the assessments made on them by the Commissioners of Sewers, the Commissioners decreed the lands to be forfeited, and conveyed them to three trustees in trust to sell, and raise money for the draining of these overflowed lands.

The defendant Craddock's father, the plaintiff Lake, and three others, five in all, having entered into an undertaking to drain the level or overflowed banks of West Thorock, the trustees for the sale, by the consent and direction of the Commissioners of Sewers, did

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by deed, indented and enrolled, dated the 8th of February, 1695, in consideration of 5145*l*, paid to the Commissioners by the five purchasers, convey this level to the defendant Craddock's father, the plaintiff Lake, the three others, and their heirs; upon which several sums of money were expended in carrying on the undertaking; and in 1699, the defendant Craddock's father paid his last contribution, which, with what he had advanced before, came in all to 1025*l*.

Afterwards, it seeming to be an enterprise which would prove very expensive, and there being some uncertainty as to the success of it, the defendant Craddock's father wholly deserted it, and never more concerned himself therewith.

The four other undertakers were advised that some neighbouring lands would be of service to their design; upon which, in April, 1703, they purchased the manor of Porretshalls, in West Thorock, of the Lady Smith, for 2550*l*., and in February following purchased the moiety of the rectory and titles of West Thorock for 1400*l*. of Sir Charles Tyrrell; which two purchases were thought useful in the undertaking, and were made in the names of the four undertakers, omitting Craddock; nor did it appear that he was ever consulted therein, or desired to contribute to the purchase. Craddock, the father, died, leaving the defendant Craddock, the son, his *heir* and *executor*.

The plaintiff, Sir Bibye Lake, one of the original partners, brought this bill against the rest of the partners, or their representatives, for an account and division of the partnership estate. And on the first coming on of the cause, at the Rolls, his Honour referred it to the Master to state a case between the parties, for the judgment of the Court. And the Master having made his report, the cause was thereupon heard, when the principal, or rather the only question was, whether these five purchasers having made this purchase jointly, so as to become in law joint tenants, the same should survive in equity?

Jekyll, M. R. (*a*), on debate, decreed that the survivorship should

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(*a*) The judgment of the M. R. is thus reported in 1 Eq. Ca. Abr. 294. *Jekyll*, M. R., held that they were tenants in common, and not joint tenants, as to the *beneficial interest* or *right* in those lands, and that the survivor should not go away with the whole; for then it might happen that

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not take place; for that the payment of money created a trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss was in the nature of merchandising, when the *jus accrescendi* is never allowed; that supposing one of the partners had laid out the whole of the money, and had happened to die first, according to the contrary construction, he must have lost all, which would have been most unjust. Wherefore, it was decreed that these five purchasers were tenants in common, not only as to the level lands which were first purchased, but also with respect to the lands bought afterwards by the four undertakers of the Lady Smith and Sir Charles Tyrrell; but that the defendant Craddock ought not to have the benefit of this tenancy in common, *unless* he would pay so much money as would make up what had been already advanced by his father equal to what had been contributed by each of the other partners, together with interest for the same from the respective times that Craddock, the father, ought to have made those payments; and on the defendant Craddock's paying the same, then all the said lands to be divided into five parts, the defendant Craddock to have one-fifth: but, on default of payment, the defendant Craddock to be excluded, and the lands to be divided and distributed into four parts among the four other partners.

Argument for the Appellant.—Craddock appealed, insisting that he ought either to receive back the 1025*l.*, which it was admitted

some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole estate.

And his Honour held, that when two or more purchase lands, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, that this is a joint tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are *not equal*, and this appears in the deed itself, this makes them *in the nature of partners;* and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them.

So, if two or more make a joint purchase and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and at trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead.

his father expended in this undertaking, or to be allowed to come in for a share of the level only, and not to be bound to contribute towards the two purchases made by the four other undertakers of the Lady Smith and Sir Charles Tyrrell: that the four other undertakers had chosen to make these two purchases in their own names only, by which they seem to have excluded Craddock from all concern therein, and of which, had it proved never so beneficial, he would have had no means of forcing them to admit him to a share; and therefore, now that it had turned out a losing bargain, there could be no reason to compel him to bear a proportion of the loss. Besides, there was nothing in the articles empowering the partners, or the major part of them, to buy lands; and, by the same reason that they would oblige Craddock to pay his share towards these purchases, they might, if they had fancied buying half the country, have compelled him to contribute to that also. That it was difficult to conceive how the uplands thus purchased, much less the tithes, could be of any use in the undertaking; though, as to the charge of draining the level, exclusive of the two purchases, the defendant Craddock was willing to advance his proportion.

That the decree was unreasonable, on account of its having directed that the defendant Craddock, in order to be admitted to one-fifth, should pay not only his proportion of those two purchases, but also of the interest of the purchase-money, from the time that his father ought to have made these payments: whereas the direction ought to have been, that an account should be taken of the profits of these two purchases, which profits might have amounted to as much as the interest, or, if not quite so much, yet that the defendant Craddock ought to pay no more towards such interest than the deficiency of the quantum of the profits would come to.

Argument for the Respondent.—That, as the defendant Craddock's father and himself had for so long a time (near thirty years) relinquished and abandoned the partnership, and in regard that the defendant Craddock had no manner of right thereto but through the indulgence of a Court of equity (it being, by law, a joint tenancy, and as such, belonging to the survivors), it was a favourable decree to let him in upon any terms; and surely the terms now offered him must appear reasonable, viz., that he should upon his contributing to all the expenses that had been contracted and incurred by reason of any purchases or otherwise, in the prosecution of the undertaking, be admitted to one-fifth of the partnership; that had the defendant Craddock brought his bill for the benefit of such undertaking, he could not have hoped to succeed on any other conditions: that it was still stronger against him, in that he now seemed to decline meddling with the undertaking, so that here was rather great favour shown him than any hardship imposed: that he was not absolutely and at all events bound by this decree to pay his proportion towards the new purchases, but had it in his election whether he would do it or no: that, as to the interest which was required of him previous to his being admitted into the partnership, it was reasonable he should pay it for his default in not having contributed his share of the principal before, which if he had done, he would not have been charged with the interest: and this was some disadvantage to the other four partners, who had been deprived of their arrear of interest for near thirty-five years: that, in truth, the design of the defendant Craddock appeared to be to delay matters, and to defer the bringing in of his money and interest till such time as this long account of the profits should be taken, which would require many years; and that if the defendant's share of the profits of these two purchases should exceed his proportion of the interest, the surplus, on the making up of the accounts, must be paid him.

Lord Chancellor King (*a*) said, that this was plainly a tenancy in common *in equity*, though otherwise *at law*: and the defendant Craddock having only a title in equity, that he must do equity, and that this was equitable in all its branches: for he had his election to drop all claim, or to take it on the same foot with the rest of the partners: and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election.

(*a*) This judgment is from Sugd. V. & P. 903, 11th edit., and is there stated to have been taken from unprinted MS.

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NOTES.

1. Rule at law and in equity as to joint purchases.
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1. Rule at Law and in Equity as to Joint Purchases.

It is an invariable rule at law, that, when purchasers take a conveyance to themselves and their heirs, they will be joint tenants: and upon the death of one of them, the estate will go to the survivor (*a*).

The same rule prevails in equity. But if there are any circumstances from which it can be inferred that the *intention* of the parties was that a joint tenancy should not exist between them, then equity will depart from the letter of the agreement, and decree them to be tenants in common (*b*). The following are some of the principal of such circumstances.

Circumstances pointing to a Tenancy in Common.—Where persons have entered into a joint *contract* for the purchase of an estate to them and their heirs, and have paid or contracted to pay the purchase-money in *equal* proportions, equity will not, upon the death of one of them, decree a conveyance to the survivor and the heirs of the deceased purchaser as tenants in common; for if both parties to the contract contribute *equally* towards the purchase-money, the surviving purchaser will be solely entitled to the benefit of the contract, and to have a conveyance of the estate decreed to himself alone. See *Aveling* v. *Knipe* (*c*), where *Grant*, M. R., observed that a doubt had been suggested whether a Court of equity would in any case execute such an agreement by a conveyance in joint-tenancy. "It would not," observed his Honour, "if there were *any circumstances from which it could be collected that a joint-*

(*a*) See Litt. s. 280. As to husband and wife, see *Re* March, 27 C. D. 166; *Re* Jupp, 39 C. D. 148; Thornley *v.* T., (1893) 2 Ch. 229; Palmer *v.* Rich, (1897) 1 Ch. 134.

(*b*) See Aveling *v.* Knipe, 19 V. 441, 13 R. R. 240; Robinson *v.* Preston, 4 K. & J. 505; *Re* Jackson, 34 C. D. 732; *Re* Hughes, 19 W. R. 468; and the judgment of *Jekyll*, M. R., supra, p. 974; *Re* Rowe, 61 L. T. 581 (C. A.); Jud. Act, 1873, s. 25, s.s. 11.

(*c*) 19 V. 441, 13 R. R. 240.

tenancy was not in contemplation; but I have no conception that it is of course upon a controversy between two purchasers to depart from the letter of the agreement, and decree them to be tenants in common" (*a*).

But equity will give effect to the intention, although the money may have been advanced in *equal* proportions (*b*).

In *Lake* v. *Gibson*, *Jekyll*, M. R., lays it down as a general rule, that, where two or more purchase lands and advance the purchase-money in *unequal* proportions, *and this appears on the deed itself*—this latter qualification is omitted in *Rigden* v. *Vallier* (*c*)—this makes them *in the nature of partners*, and, however the legal estate may survive, yet the survivor will be considered in equity but as a trustee for the other, in proportion to the sums advanced by each of them (*d*). But the inequality in the advance must not be the result of a mere temporary arrangement between the parties at the time of completion (*e*). The soundness of the distinction between *equal* and *unequal* advances is doubted by Mr. *Vesey*, in a note to *Jackson* v. *J.* (*f*). But it has been supported by Lord *St. Leonards* (*g*).

And it seems that parol evidence of *facts* as to subsequent dealings and of surrounding circumstances, is admissible on a purchase by two persons contributing equally to the cost of it, to prove an intention to hold in severalty; but such evidence of *statements of intention* is not admissible (*h*); but an affidavit as to intention was admitted in *Devoy* v. *D.* (*i*).

2. Mortgages.

Again, where money is advanced by persons, either in *equal* or *unequal* shares, who take a mortgage to themselves jointly, although the debt and security will at law belong to the survivor, in equity there will be a tenancy in common, the survivor being a trustee for

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(*a*) And see Davis *v.* Symonds, 1 Cox, 402, 1 R. R. 63.

(*b*) See supra, p. 978, note (*b*).

(*c*) 3 Atk. 735; and see Harrison *v.* Barton, 1 John. & H., p. 293; Hill *v.* H., 8 Ir. R. Eq. 140.

(*d*) See also Rigden *v.* Vallier, 3 Atk. 735, 2 Ves. Sen. 252.

(*e*) Aveling *v.* Knipe, 19 V. 445, 13 R. R. 240.

(*f*) 7 V. 535, 9 V. 591, p. 597.

(*g*) See Sugd. V. & P., 14th edit., 698. But cf. Harris *v.* Fergusson, 16 Si. 308; explained in Robinson *v.* Preston, 4 K. & J. 515; and see Bone *v.* Pollard, 24 B. 283; *Re* Hughes, 19 W. R. 468; *Re* Jackson, 34 C. D. 732.

(*h*) Davis *v.* Symonds, 1 Cox, 402, 1 R. R. 63; Harrison *v.* Barton, 1 John. & H. 287.

(*i*) 3 Sm. & G. 403; but see O'Brien *v.* Sheil, 7 Ir. R. Eq. 255; Dart, V. & P. (1905), p. 960.

the personal representatives of the deceased mortgagees (*a*). For "equity says it could *not be the intention* that the interest should survive. Though they take a joint security, each means to lend his own and to take back his own" (*b*). And, although the ground for this distinction between purchases and mortgages is not particularly clear, it is settled: see *Robinson* v. *Preston* (*c*).

The personal representatives of the deceased mortgagees were therefore necessary parties to a bill of foreclosure or redemption (*d*); and although the entire legal estate was in the survivor, they were necessary parties to a reconveyance, in order that they might give a valid discharge for their share of the mortgage-money. Hence it became usual, where trustees advanced money on mortgage, to insert a declaration, that, if one of the mortgagees died before the money was paid off, the receipt of the survivor should be a sufficient discharge; and that the concurrence of the personal representative of the deceased mortgagee should not be requisite. But even the insertion of the joint account clauses will not prevent the mortgagees as between themselves being held to be tenants in common if the intention to be so is shown (*e*).

These objects are now effected by the 61st section of the Conveyancing and Law of Property Act, 1881 (*f*), which enacts that where in a mortgage or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum advanced or owing *is expressed* to be advanced by or owing to more persons than one out of money, or as money belonging to them *on a joint account*, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, *jointly*, and *not in shares*, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, *as between them and the mortgagor or obligor;* and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for

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(*a*) Petty *v.* Styward, 1 Ch. R. 31; Eq. Ca. Abr. 290; Rigden *v.* Vallier, 3 Atk. 735, 2 Ves. Sen. 258; *Re* Jackson, 34 C. D. 732; Steeds *v.* S., 22 Q. B. D., p. 541.

(*b*) Per *Alvanley*, M. R., in Morley *v.* Bird, 3 V. 631, 4 R. R., p. 109; Vickers *v.* Cowell, 1 B. 529; overruling Brazier *v.* Hudson, 9 Si. 1.

(*c*) 4 K. & J. 511.

(*d*) Vickers *v.* Cowell, 1 B. 529.

(*e*) *Re* Jackson, 34 C. D. 733 (advance by persons beneficially entitled, the joint account clause being employed).

(*f*) 44 & 45 Vict. c. 41.

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all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

This section applies only if and as far as a contrary intention is not expressed in the mortgage, &c. (sub-s. 2), and only to a mortgage, &c., made after the commencement (from and immediately after the 31st December, 1881) of the Act (sub-s. 3). The section applies either where the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares, so that an expression of the joint account is not necessary, though it is convenient, as a direct statement of the rights of the mortgagees (*a*), and the Court will not go behind it as between mortgagees and a purchaser (*b*). As between the mortgagees and the mortgagors the debt is to be deemed due on a joint account, but as between the persons entitled to the money it may be shown to have been their intention to treat the money as belonging to them as tenants in common (*c*).

If mortgagees, tenants in common, purchase or foreclose the equity of redemption, they will hold it in equity, as tenants in common, "because their intent is presumed to be so," and the purchase was founded on the mortgage (*d*).

Although payment of a bond debt to one of two trustees who are joint creditors binds both at law and extinguishes the debt (*e*), yet in case of a mortgage to two jointly a payment to one would not discharge the estate in equity unless that one were wholly entitled to the benefit of the debt (*f*). This equitable rule did not rest upon the ground that the debt was due to creditors entitled in common and not jointly, but upon the principle that the Court only "interferes for the benefit of the mortgagor upon the terms that he does equity." The fact that the debt was extinguished at law did not affect the mortgagor's liability on his asking for equitable relief to perform his contract, and accordingly it was only to the extent to which the person to whom he paid was beneficially entitled that the mortgagor was discharged (*g*). "The proviso for redemption in a

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(*a*) Wolstenholme, Con. Act, 9th edit., p. 126.

(*b*) *Re* Harman, &c., 24 C. D. 720; but see *Re* Blaiberg and Abrahams, (1899) 2 Ch. 340; and see supra at pp. 226 et seq.

(*c*) *Re* Jackson, supra.

(*d*) Rigden *v.* Vallier, 3 Atk. 735, 2 Ves. Sen. 258. See also Edwards *v.* Fashion, Pr. Ch. 332, and the comments therein of *Grant*, M. R., in Aveling *v.* Knipe, 19 V. 444, 13 R. R. 240; cf. Jud. Act, 1873, s. 25, s.s. 11.

(*e*) Husband *v.* Davis, 10 C. B. 645.

(*f*) Matson *v.* Dennis, 4 De G. J. & S. 345; Hall *v.* Franck, 11 B. 519.

(*g*) Powell *v.* Brodhurst, (1901) 2 Ch. 160, explaining Matson *v.* Dennis, supra; Steeds *v.* S., 22 Q. B. D 537.

mortgage to several is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagees or the survivor of them; and if a mortgagor pays to one, although such payment may be a good discharge in law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly" (*a*).

Accord and satisfaction made with one of the joint creditors, now extinguishes the debt at law since the Judicature Act, 1873 (*b*), as it did before that Act in equity (*c*). But neither payment to, nor accord and satisfaction with, one of two or more creditors entitled in *common* will extinguish the debt as to the others, for each is entitled in severalty. The equitable rule that certain creditors, though in form joint creditors, are to be presumed to be entitled in common now applies at law as in equity, and so a conflict of presumptions may arise, and it is then for the Court to ascertain whether the debt is to be deemed joint or common and apply the appropriate rule (*d*).

3. Joint Undertaking and Partnership.

Another rule laid down by the Master of the Rolls in *Lake* v. *Gibson* is, that, in all cases of a joint undertaking or partnership, either in trade or *in any other dealing*, two or more persons who make a joint purchase will be considered in equity as tenants in common, and the survivors will be deemed trustees for the representatives of those who are dead. For the ground of the decision in the principal case was that a joint speculation in improving land, on a hazard of profit and loss, is treated in equity as in the *nature of merchandise*, and the *jus accrescendi* is not allowed (*e*). For in favour of merchandise the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*f*). But the doctrine of non-

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(*a*) Per *Farwell*, J., Powell *v.* Brodhurst, (1901) 2 Ch. 160, at p. 167.

(*b*) Steeds *v.* S., supra.

(*c*) Webb *v.* Hewitt, 3 K. & J. 438.

(*d*) See Powell *v.* Brodhurst, ubi supra, at p. 164.

(*e*) See *Re* Ryan, 3 Ir. R. Eq. 222, 232.

(*f*) Co. Litt. 182 (a); and see Nelson *v.* Bealby, 4 De G. F. & J. 321; Ambler *v.* Bolton, 14 Eq. 427; M'Clean *v.* Kennard, L. R. 9 Ch. 336.

survivorship does not extend to societies not having gain for their object, and the members of which are merely joint tenants of the property they hold (*a*).

It has been held with some conflict of opinion, that if two persons take a lease of land for the purpose of farming it in partnership, at any rate where the lease is merely accessory to the partnership, the partners will be considered in equity as tenants in common not only of the stock of the farm but of the lease, and the survivor of the two would consequently be trustee for the personal representatives of the deceased partner (*b*). In *Elliot* v. *Brown* (*c*) there was a lease of a farm to two partners; one partner dying, the other agreed to a division of stock with the representatives of the deceased partner, but insisted on holding the lease by survivorship; *Thurlow*, C., however, thought the lease was *accessory* to the trade in which the parties were embarked, and granted an injunction to restrain the surviving partner from proceeding by ejectment to obtain possession of the farm (*d*). So, where two persons took a building lease, and laid out money in erecting houses, *Thurlow*, C., held them to be partners in respect of this property; and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased partner (*e*). And now by the Partnership Act, 1890, which came into operation 1st January, 1891, it is enacted:

S. 20 (1). "All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business, are called in this Act partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement."

(2) "Provided, that the legal estate or interest in any land (*f*), or in Scotland, the title to and interest in any heritable estate which belongs to the partnership, shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, *but in trust*, so far as necessary for the persons beneficially interested in the land under this section."

(3) "Where co-owners of an estate or interest in land or in

(*a*) See Brown *v.* Dale, 9 C. D. 78.

(*b*) Jeffereys *v.* Small, 1 Vern. 217; Jackson *v.* J., 9 V. 596.

(*c*) 3 Swans. 489 (n).

(*d*) From Lord *Colchester's* MSS. See also 1 Vern. 217, n. (3).

(*e*) Lyster *v.* Dolland, 1 V. 431; Crawshay *v.* Maule, 1 Swans. 508; *Re* Ryan, Ir. R. 3 Eq. 222.

(*f*) See Interpretation Act, 1889, s. 3.

Scotland of any heritable estate not being itself partnership property are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them in the absence of an agreement to the contrary, not as partners but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase" (*a*).

S. 21. "Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."

A deceased partner may, however, have so conducted himself by repudiating a contract, as for instance a lease of ground for a building speculation, as to preclude his executors from claiming a share in the lease (*b*).

And though the conveyance of real estate be taken in the name of one of the partners, if it has been purchased with partnership funds, it will, in the absence of any agreement to the contrary, be part of the partnership property (*c*).

The question whether property purchased with partnership assets is partnership property or the separate property of the partners depends upon the circumstances under which and the purposes for which it was bought, though under s. 21 it is to be deemed partnership property, unless a contrary intention appears. Thus, in the *Bank of England Case* (*d*), one of two partners carrying on the business of leather factors bought lands for the purpose of erecting a residence on part of it, and selling the remainder to a railway company. He offered a share to his partner, who was also desirous of building a house out of town for his residence. The offer was accepted, and the purchase-money paid out of the partnership assets; but the conveyance was to the partners in undivided moieties, to uses to bar dower. The partners at their individual expense built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partner-

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(*a*) See Davis *v.* D., (1894) 1 Ch. 393; Pollock, Partnership (1905), p. 69.

(*b*) Reilly *v.* Walsh, 11 Ir. R. Eq. 22; Norway *v.* Rowe, 19 V. 143, 12 R. R. 157; Clements *v.* Hall, 24 B. 333; Rule *v.* Jewell, 18 C. D. 660.

(*c*) Smith *v.* S., 5 V. 193, 5 R. R. 22; Clegg *v.* Fishwick, 1 Mac. & G. 294; Tibbits *v.* Phillips, 10 Ha. 355; Nerot *v.* Burnand, 4 Russ. 247; Wedderburn *v.* W., 2 B. 208.

(*d*) *Ex p.* M'Kenna, 3 De G. F. & J. 645.

ship assets. It was held that the whole of the land was partnership property. "Questions of this nature," said *Turner*, L. J., "depend, as I apprehend, generally, if not universally, upon the circumstances. It cannot, I think, be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade . . . [or] for the purpose of a mere speculation on account of the partnership, for I know nothing which can prevent partners from speculating in land, if they think proper to do so, as freely as they may speculate in mere articles of commerce, though foreign to their trade. Again, they may have been bought without reference to the purposes of the trade or the benefit of the partnership, with the intention of withdrawing from the trade the amount employed in the purchase, and converting that amount into separate property of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase. The form of the conveyance in these cases does not settle the question, for in whatever form the conveyance may be, there may be a trust of the land which may follow the money, liable, however, as other trusts are, to be rebutted by evidence. Where land purchased is not merely paid for out of the partnership assets, but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, and accordingly in these cases we find the decisions almost if not entirely uniform—that the purchased land forms part of the joint estate of the partnership; but where the land is not purchased for those purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchase show that it was made on account of the partnership, or of any one or more of them individually, in whose name the land may have been bought. . . . I am of opinion that, looking at the case with reference to the whole of the estate, this purchase must be taken to have been made by way of speculation on account of the partnership" (*a*).

(*a*) See Smith *v.* S., 5 V. 193; Darby *v.* D., 3 Drew. 495, and *Re* Walton *v.* Butler, 29 B. 428. Cf. Hulton, 61 L. T. 467.

Where property is *not purchased* by persons for partnership purposes, but is *devised* to them as joint tenants, although they make use of it for partnership purposes, they will not be held tenants in common in equity, unless by express agreement, or by their course of dealing with it for a long period, it may be inferred that they meant to sever the joint tenancy (*a*). So in *Morris* v. *Barrett* (*b*), a testator *devised and bequeathed* the residue of his real and personal estate to his two sons, their heirs, executors, and administrators. The two sons, after their father's death, during the period of twenty years carried on the business of farmers with that estate, and kept the moneys arising therefrom in one common stock, and, with part of such moneys, *purchased other estates* in the name of one of them, but never in any manner entered into any agreement respecting the farming business, or ever accounted with each other. One of the brothers died. It was held that the devised farms were not partnership property, but that the purchased farms were: see *Waterer* v. *W.*, infra, p. 987.

A partnership agreement between A. and B. that they should be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds; and such an agreement being proved, A. or B. may establish his interest in the land, the subject of the partnership, without such interest being evidenced by any such writing (*c*).

Conversion of Real Estate held by Partners.—Where partners held real estate for partnership purposes, a question arose, which was not decided in *Lake* v. *Gibson*, and *Lake* v. *Craddock* (in which case the defendant Craddock, it will be observed, was both heir-at-law and executor of his father), whether the real estate was not, even in the absence of any expressed intention of the partners, so absolutely converted into personalty as to be held by the surviving partners, not in trust for the heir-at-law, but for the personal representatives, of the deceased partner.

(*a*) Jackson *v.* J., 9 V. 591. See also Brown *v.* Oakshot, 24 B. 254; Waterer *v.* W., 15 Eq. 402, cited infra, p. 987; Ward *v.* W., L. R. 6 Ch. 789; and see the cases reviewed by *North*, J., in Davis *v.* D., (1894) 1 Ch. 393.

(*b*) 3 Y. & J. Exch. 384.

(*c*) See Forster *v.* Hale, 5 V. 308, 4 R. R. 128; Dale *v.* Hamilton, 2 Ph. 266; and Darby *v.* D., 3 Drew. 495; but see Caddick *v.* Skidmore, 2 De G. & J. 52; Smith *v.* Matthews, 3 De G. F. & J. 139, 151; Gray *v.* Smith, 43 C. D., p. 211; *Re* De Nicols, (1900) 2 Ch. 410; Isaacs *v.* Evans, 16 T. L. R. 113.

It was clearly settled, that where real estate was purchased *with partnership capital*, for the *purposes of partnership trade*, it would, in the absence of any express agreement, be considered as absolutely converted into personalty; and, upon the death of one of the partners, his share will not go to his heir-at-law, nor be liable to dower, but will belong to his personal representatives. "I confess," observed *Leach*, M. R., in *Phillips* v. *P.* (*a*), "I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, *purchased with partnership capital for the purposes of the partnership trade*, continued to be partnership capital, and to have, to every intent, the quality of personal estate" (*b*). And the same rule applies to land acquired with partnership funds for the purpose of a joint speculation in selling it at a profit (*c*). But if the land has been acquired for the purpose of being held as land, there will be no conversion (*d*); and the rule does not apply to cases of joint ownership, as distinguished from partnership (*e*).

This principle is now embodied in the Partnership Act, 1890, which provides:—

S. 22. "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner, and his executors, or administrators, as personal, or movable, and not real, or heritable estate."

And it is immaterial, where real property has been *substantially involved* in a business, how it may have been acquired by the partners, whether by descent or devise. Thus, in *Waterer* v. *W.* (*f*), J. Waterer was seised of real estate, upon part of which he carried on the business of a nurseryman, under the name of J. Waterer & Sons. He was assisted by his three sons in his business, but they were not in reality partners. J. Waterer, having contracted for the purchase

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(*a*) 1 My. & K. 649.

(*b*) See Broom *v.* B., 3 My. & K. 443; Morris *v.* Kearsley, 2 Y. & C. Ex. 140; Bligh *v.* Brent, 2 Y. & C. Ex. 268; Houghton *v.* H., 11 Si. 491; *Re* Ryan, 3 Ir. R. Eq. 232; *Re* Bourne, (1906) 2 Ch. 427.

(*c*) Darby *v.* D., 3 Drew. 495; Essex *v.* E., 20 B. 450; Waterer *v.* W., 15 Eq. 402; Steward *v.* Blakeway, L. R. 4 Ch., p. 609; cp. *Re* Wilson, (1893) 2 Ch. 342.

(*d*) See *Re* Hulton, 61 L. T. 467, 62 L. T. 200; distinguishing Darby *v.* D., *Re* Wilson, supra.

(*e*) Steward *v.* Blakeway, L. R. 4 Ch. 603; Crawshay *v.* Maule, 1 Swans. 523; London Financial, &c. *v.* Kelk, 26 C. D. 107.

(*f*) 15 Eq. 402.

of a house and farm for the purpose of his business, died on the 2nd of November, 1868, having by his will devised his real estate, and his residuary personal estate, to his three sons as tenants in common. After his death, the contract for the purchase of the farm was carried into effect by his three sons, to whom the land was conveyed as tenants in common. For a short time the business was carried on by the three sons under the same style as before. It appears that the residuary real and personal estate of the testator (except invested property) was employed in the business. In April, 1869, Michael, one of the sons, retired from the partnership, and the two others purchased his one-third share in the residuary and real estate, and of the goodwill in the business, for a sum which was paid for partly out of the estate, and partly out of moneys borrowed on the land. The two continuing partners carried on the business of nurserymen under the old style, upon the same land as their father, and also on the purchased land. The share of Michael was purchased only in order to enable the other two brothers to carry on the business. On the 4th of October, 1871, one of the partners died intestate, leaving a widow and children. It was held by *James*, L. J., that both the devised and the purchased land employed in the business was converted into personalty. "I am of opinion," said his Lordship, "that this case is governed by that class of cases in which Lord *Eldon* said that where property became *involved in partnership dealings*, it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the two surviving partners, whether by descent or devise, if, in fact, it was substantially involved in the business" (*a*).

The principle upon which cases of this kind proceed appears to be this: that as a general rule, inherent to the contract of partnership, and without any special stipulation, upon the dissolution of partnership all the property of the partnership, whether real, or personal, is subject to an implied trust for sale (*b*), and is therefore personal property, and the proceeds of the sale, after discharging all the partnership debts and liabilities, must be divided among the partners, according to their respective shares in the capital, and no

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(*a*) See Cooper *v.* C., 26 W. R. 785; Davies *v.* Games, 12 C. D. 813; Murtagh *v.* Costello, 7 L. R. Ir. 428; and cf. Davis *v.* D., (1894) 1 Ch. 393.

(*b*) See *Re* Bourne, (1906) 2 Ch. 427, per *Romer*, L. J., at p. 432. The surviving partner has power to sell or *mortgage* partnership property, real or personal, for payment of partnership debts free from the lien of the deceased partner's estate: ibid., applying the principle of *Re* Langmead's Trusts, 20 B. 20, to real estate.

one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his share of it in specie. It follows then that any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty, and that, not merely as between the partners to the extent of discharging the partnership debts, but as between the real and personal representatives of deceased partners (*a*).

Modification of Rule by Agreement.—The rule of law, and the statutory enactment, may be superseded by agreement. Thus, in *Smith* v. *S.* (*b*), real estate was purchased for the purposes of a partnership, and paid for out of the partnership capital, but there was an agreement between the partners that it was to be the separate property of one of them, who took a conveyance thereof in his own name: *Eldon*, C., held he was a debtor to the partnership, and that the property bought was not partnership property, and that his wife was entitled to dower out of the whole. But in the case of partnership property, land can be remitted to its original character only by virtue of such an agreement made between the partners as withdraws the land from the partnership assets, and puts an end to the implied trust for sale; and the agreement must be one which becomes binding before the death, so as to take effect at the death (*c*). In *Re Wilson* (*d*) it was held that, on the agreement between the parties, there was no trust or contract by virtue of which land held for a common object was to be converted.

In *Myers* v. *M.* (*e*), A. and B., being tenants in common of certain freeholds, entered into partnership in 1873 as builders for ten years, the freeholds and plant being made partnership property. In 1877 the plant was sold, and the proceeds divided: the freeholds were let to tenants, and no new contracts entered into. In 1888 A. died, and it was held that the partnership terminated in 1877; that by the termination of the partnership the right to call for a sale was taken away, and that the property must be considered as realty.

(*a*) See Darby *v.* D., 3 Drew. 495, 503, 506; *Re* Wilson, (1893) 2 Ch. 340; A.-G. *v.* Hubbuck, 13 Q. B. D., p. 289.

(*b*) 5 V. 193, 5 R. R. 22.

(*c*) Per *Bowen*, L. J., A.-G. *v.* Hubbuck, 13 Q. B. D. pp. 290, 291; and see Rowley *v.* Adams, 7 B. 548; Steward *v.* Blakeway, L. R. 4 Ch. 603.

(*d*) (1893) 2 Ch. 340.

(*e*) 61 L. T. 757.

So also partners may agree between themselves to convert partnership property into the several property of any one or more of the partners, or to convert the several property of any partner into partnership property. If *bonâ fide*, such conversion is effectual, not only as between the partners, but as between the creditors of the firm and the partners (*a*), *unless* bankruptcy or insolvency occurs before the agreement is completely executed (*b*).

Mortmain.—The interest of a deceased partner in real estate held as partnership property was, so far as it comprised moneys to arise from the sale of such real estate, *an interest in land.* The reason for this was, that though the share of the deceased partner was not a share in any specific part of any specific lands held by the partnership, yet the amount due to him was a charge or lien on the lands comprised in the partnership assets. Under the so-called Mortmain Act (*c*), the bequest of such moneys to a charity was accordingly void (*d*). By the Mortmain and Charitable Uses Act, 1891, s. 3, "land" is not to include "money secured on land; or other personal estate arising from or connected with land." A bequest of such moneys is therefore not now a bequest of land.

Legacy Duty, &c.—The share of a deceased partner in real estate purchased with partnership capital and used for partnership purposes in trade is held to be converted into personalty, not only as between the partners and the real and personal representatives of a deceased partner, but also for fiscal purposes, and the Crown is entitled to the benefit of such equitable conversion, and can claim legacy and formerly could claim probate duty (*e*) in respect of the property which at the death of the partner was existing as real estate: *Forbes* v. *Steven* (*f*), where it was held by *James*, V.-C. (overruling the law supposed to have been established in *Custance* v. *Bradshaw* (*g*)), that legacy duty was payable upon a share of a deceased partner—a domiciled Englishman, in the proceeds of freehold

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(*a*) Pollock, Partnership (1890), pp. 65, 66; Campbell *v.* Mullett, 2 Swans., pp. 575, 584.

(*b*) See Lindley, Partnership, 7th ed. pp. 372 et seq., and the cases collected, Wace, Bankruptcy, pp. 142—144.

(*c*) 9 Geo. 2, c. 36, repealed. See 51 & 52 Vict. c. 42, 54 & 55 Vict. c. 73, 55 Vict. c. 11.

(*d*) Ashworth *v.* Munn, 15 C. D. 363; see as to the nature of this lien or charge, *Re* Bourne, (1906) 2 Ch. 427.

(*e*) No longer payable where death occurred on or after August 1st, 1894; see Finance Act, 1894, ss. 1 and 24, and first schedule to the Act. See as to death duties in relation to conversion, notes to Fletcher *v.* Ashburner, Vol. I., p. 369.

(*f*) 10 Eq. 178, 189.

(*g*) 4 Ha. 315.

Lake v. Gibson.—Lake v. Craddock.

property in Bombay used for the purposes of the partnership, and forming a partnership asset, and the reasoning upon which the decision proceeded is equally applicable to show that it was liable to probate duty (*a*). And the time when the death takes place is the moment at which it has to be decided whether the property in question is realty or personalty (*b*).

(*a*) See also A.-G. *v.* Brunning, 8 H. L. Cas. 243; A.-G. *v.* Lomas, L. R. 9 Ex. 29, 34.

(*b*) See judgment of *Bowen*, L. J., in A.-G. *v.* Hubbuck, 13 Q. B. D. 275 (C. A.), in which Custance *v.* Bradshaw, 4 Ha. 315, and Matson *v.* Swift, 8 B. 368, are discussed.

WASTE.

GARTH *v.* SIR JOHN HIND COTTON.

1750. 1 Ves. Sen. 524, 546; Dick. 183 (*a*).

Equitable Waste.

A., tenant for ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and other sons in tail; remainder to B. in fee. A. (before a son born) and B., according to agreement, cut down timber, and divided the profits between them. A. afterwards had a son, who was held entitled to recover from the representatives of B. what he had so received as his share of the money arising from the sale of the timber.

Rights, powers, and duties of trustees to preserve contingent remainders.

Mr. Garth (*a*), tenant for ninety-nine years, if he should so long live, *without impeachment of waste, excepting voluntary waste; remainder to trustees during his life, to preserve contingent remainders;* remainder to his first and every other son in tail; remainder to the defendant, Sir John Hind Cotton, in fee.

Garth having been long married without having children, enters into an agreement with the defendant, to cut down timber on the estate, and divide the profits between them.

He has afterwards a son by another wife, who, after his father's death, when of age, and having suffered a recovery, brings this bill to

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(*a*) S. C. 3 Atk. 751; Reg. Lib. 1752, A., fol. 240. The statement of the case and Lord *Hardwicke's* first opinion, August, 1750, are taken from 1 Ves. Sen. 524, 546. The judgment, p. 994, given after further argument in December, 1750, is here given complete. It is taken from Dick. 183, where it is stated to have been copied from Lord *Hardwicke's* MS.: and the decree is taken from 3 Atk. 758.

oblige the defendant, Sir John Hind Cotton, to refund 1,000*l.* received by him as his share of the money arising from sale of the timber, with interest.

The arguments, for which see 1 Ves. Sen. 524, are omitted.

LORD CHANCELLOR HARDWICKE.—Although I have taken a great deal of pains, I cannot yet form an opinion, from an apprehension of breaking in upon the rules of law, or establishing a dangerous precedent in a Court of equity. The case is admitted to be entirely new. The strength of the arguments for the plaintiff is on the authority of *Pye* v. *George* (*a*) and *Mansell* v. *M.* (*b*), where the Court has considered trustees to preserve contingent remainders as trustees to all other purposes, so as to be affected by breach of trust and all the consequences: and therefore, if they have been negligent in not bringing a bill to restrain the waste, it should not turn to the prejudice of the remainders, when *in esse.* But it deserves to be considered, whether they have any trust to preserve the timber, because their legal estate is not at all for that purpose, being only an estate *pour autre vie*; by which there is no interest in or power over the timber, and which is at an end as soon as the first tenant for life dies. It is said, they might bring a bill for an injunction to stay waste, before the contingent remainders vested: and I am of that opinion: but I do not know that arises out of their trust for the timber. It is a bill by *amicus curiæ;* as in a bill on behalf of an infant in *ventre sa mere*, to stay waste. Till the estate attaches in possession they have nothing to do with the timber. If, indeed, there is a forfeiture by the first tenant for life, they would have a right to the shade, &c., but nothing to do with it during the life of the tenant for life. This is no opinion, but only my doubts from the breaking in on the rules of law on the one hand, and on the other the laying down a precedent in equity which might be dangerous. Let it, therefore, be spoke to again next term. I can find no case where the Court has preserved the timber, though cut down by wrong, for the benefit of the contingent remainders. In *Whitfield* v. *Bewit* (*c*) it was not by accident, but by wrong; and though Peere

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(*a*) 2 Salk. 680.

(*b*) 2 P. W. 678; sed vide Birch-Wolfe *v.* Birch, 9 Eq. 683.

(*c*) 2 P. W. 240.

Williams has not mentioned whether there were trustees to preserve, &c., I have looked into it, and find there were.

Michaelmas Term, 1750, it was argued again.

Lord Chancellor Hardwicke took further time to consider of it: and Sir John Hind Cotton having died pending the suit, and the cause revived against his representatives, his Lordship gave judgment 5th February, 1753.

Lord Chancellor Hardwicke.—The end of the bill is, that the defendant may account, and make satisfaction to the plaintiff, for all such sums of money as he hath received by a fall of timber upon the estate in question, in the year 1714, with interest.

The case is this: Richard Garth, Esq., being seised in fee, by will devised to Richard Bovey, father of the plaintiff, for ninety-nine years, if he should so long live, *without impeachment of waste, voluntary waste excepted*, on condition he took upon himself the surname of Garth; and from and after the forfeiture or determination of that estate, *to the use of trustees during the life of the said Richard Bovey in trust to preserve contingent estates*, but, nevertheless, to permit the said Richard Bovey, at and after his full age of twenty-one years, to receive the rents, issues, and profits thereof during his life, with remainder to his first and other sons in tail male. After this there are remainders to Avery Garth and his sons in like manner (all which determined soon after the testator's death), with the ultimate remainder to Sir John Hind Cotton, the defendant's grandfather, in fee simple.

Of this will the testator made Catherine, his wife, executrix.

On the 18th July, 1700, the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of Garth.

Sir John Hind Cotton, the defendant's grandfather, died, whereby the remainder in fee descended to the last Sir John Hind Cotton, his son and heir, and in whom the remainder of inheritance was become vested.

On the 12th February, 1713, the plaintiff's father executed a letter of attorney to Reginald Marriot, authorising him to come to an

Garth v. Sir John Hind Cotton.

agreement with Sir John Hind Cottton, the remainderman in fee, for a fall of timber on the estate.

On the 16th of July, 1714, articles were entered into between the plaintiff's father, by Mr. Marriot his attorney, on the one part, and Sir John Hind Cotton, the defendant's father, on the other part, reciting that the plaintiffs father was seised for life (which is not true, for his estate was only for ninety-nine years, determinable on his life), with remainder to all his sons in tail male, with remainder to Sir John Hind Cotton in fee; that the plaintiff's father had then no issue male; that he had desired Sir John Hind Cotton to consent to the cutting down and selling part of the timber then standing and growing upon the premises.

Upon these recitals it is agreed that some person authorised by the plaintiff's father, and some person authorised by Sir John Hind Cotton, should view, and mark what timber trees were then fit to be cut down; that then the parties should agree, and appoint by writing under their hands, how many of the trees so marked should be cut down, and sold for the best prices that could be got.

That Sir John Hind Cotton should not take any advantage of the cutting of the timber, nor should it be esteemed waste, nor any advantage taken thereof on pretence of its being waste.

The first trust of the money to arise by sale of the timber is, that it shall be applied to pay all such debts as were owing by the testator at his death, together with the legacies by him given, which have not been nor shall be paid out of the personal estate (although it is admitted, by the answer of the original defendant, Sir John Hind Cotton, the defendant's father, that the estate devised was not subject to the payment of the testator's debts); that the residue of the money arising by the sale of the timber should be divided into moieties between the plaintiff's father and the late Sir John Hind Cotton.

The articles then take notice, that there was a sum of 1,787*l.* 5*s.* 6*d.* then in the hands of one of the Masters of this Court, being the produce of timber sold off the estate by Sir John Hind Cotton, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money shall be paid out of Court, and applied to the same purposes as the money to arise by the timber then to be felled.

It is further agreed that the death of the plaintiff's father without issue male, or, his having issue male, on the death of Sir John Hind Cotton, should make no alteration in the terms thereby agreed on; but that the parties, their executors or administrators, should, notwithstanding any death or alteration, have the like share and benefit of the wood and timber to be felled and cut down as if all such wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir John Hind Cotton, before such death or alteration.

Then follows a clause for applying the testator's personal estate, in the first place to the payment of his debts and legacies.

Sir John Hind Cotton, the original defendant, admits, by his first answer (which is not replied to), that he received about the sum of 1,000*l.* for his share of the money for which the timber was sold.

At the time of entering into these articles, and when the timber was felled and disposed of, *the plaintiff was not born*, but his father was then married to Mary Pullen, his first wife; and it is sworn by the first answer, that he had been married to her for several years without having any issue, and was not then likely to have any by her.

In September, 1716, she died without ever having had any issue; and some time after, the plaintiff's father intermarried with Elizabeth Emerson.

On the 26th of May, 1724, the plaintiff was born, which was about ten years after entering into the articles.

On the 11th of January, 1727, the plaintiff's father died, leaving the plaintiff, his only son, an infant, who then became entitled to the estate as tenant in tail in possession.

On the 26th of May, 1745, the plaintiff attained his age of twenty-one years, and in Trinity term following suffered a recovery of the estate to the use of himself and his heirs.

On the 20th of May, 1748, the original bill was brought by the plaintiff against Sir John Hind Cotton, who dying before a determination, the suit hath been revived against the defendants, his executors, and the same relief is prayed out of his assets, and assets are admitted.

Upon this case the general question is, whether the plaintiff is entitled to satisfaction for so much as Sir John Hind Cotton, the father, received out of the inheritance by the fall and sale of timber, before the plaintiff came *in esse*, and consequently before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility.

This hath been admitted at the bar, on all sides, to be entirely a new question, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted, also, that the plaintiff can have no remedy at law, either in his own name or in the names of the trustees to preserve contingent remainders, but that his only possible remedy is in a Court of equity.

This made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent after the invention of trustees to preserve contingent remainders, now about a hundred years since, and which may have extensive consequences as to other cases that may arise.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be necessary to take several matters into consideration—to lay down some that are plain, and to clear and establish others that appear more doubtful.

First, that the stripping of this estate of the timber was a wrongful act, is clear from the nature of the limitations.

The *plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to or interest in the timber, other than the mast, and shade, and necessary botes.*

The defendant's father had no *present* right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come *in esse*; and in that quality the timber part of the inheritance was vested in him, but he had no present right to take and use it. The trustees, who were seised of the freehold, might have restrained him in this Court by injunction, and the plaintiff might have brought an action of trespass against him for his entry and tortious act.

Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainderman, when he should come *in esse;* for between the tenant for years and the lessor, or the remainderman of the inheritance, there is a privity; and before the statute of *Quia emptores terrarum* a tenure arose: and this makes a tenant for years a kind of fiduciary for the lessor, or the remainderman, who stands in his place.

As this act was wrongful, both in Mr. Garth, the plaintiff's father, and the late Sir John Hind Cotton, so this wrong was committed collusively between them: when I say collusively, I do not mean an injurious intention, for they might mistake their right; but that will not vary the case in respect of the right of others. This appears by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to do this, the plaintiff's father is recited to have the freehold, which he had not. A colour is given to the transaction, as if it were for payment of the debts of the father, to which it is admitted the estate was not liable; and it is expressly stipulated that, even in case the plaintiff's father should die, leaving issue male, before all the timber should be felled and the money divided, the parties to these articles (*i.e.*, the tenant for years, and the remote remainderman) should have the same shares as if all the timber had been felled and the money divided before such death or alteration had happened.

Can there be a stronger proof of collusion than this? The tenant for years enters into an agreement, not only contrary to his general privity and trust (if I may so speak), but both the parties bind themselves in plain terms to injure the remainderman, even after his estate should become vested, if that event should happen before this destruction was completed.

The *next* thing which is plain and self-evident is, that this wrongful collusive transaction hath turned to the damage and loss of the plaintiff.

The next inquiry is, whether the plaintiff is entitled to any remedy in this Court upon the principles of equity.

At law, it is admitted, as I said before, that he can have none; and it must be admitted further, that if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainderman vested; and there could have been no pretence for this Court to interpose to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore, the stress and foundation of the *plaintiff's equity depends entirely upon the estate limited to the trustees to preserve the contingent uses*, and the consequences from thence.

In order to determine concerning the force and operation of this in the present case, I will consider—

First, what is the intention and use of creating limitations to trustees for preserving contingent remainders.

Secondly, what estate such trustees take in point of law, and what actions they may maintain at common law.

Thirdly, what is the nature and extent of this trust in equity, and what remedy they may pursue in this Court.

Fourthly, how far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or *laches*, in breach of their trust.

First, the intention of limitation to trustees to preserve contingent uses took its rise from the determination of two great cases, reported by Lord *Coke*, in his first volume—*Chudleigh's Case* (*a*), Hil. 31 Eliz., and *Archer's Case* (*b*), Mich., 39 Eliz.; though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures for what was then called treason and delinquency was an additional motive to it.

(*a*) 1 Co. 120, Poph. 70, and 1 And. 309, where it is best reported.

(*b*) 1 Co. 63.

Let us see, then, what were the claims and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in *Chudleigh's Case* was concerning the power of feoffees to uses, created since the Statute of Uses (*a*), to destroy contingent uses by fine or feoffment before the contingent use came into being.

In order to determine this, the judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over—in all those cases no estate at all is left in the feoffees, but the whole estate is divested and drawn out of them by the Statute of Uses.

But then came the question respecting the contingent uses to the sons not *in esse*. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if, by reason of *disseisin* or disturbance of the estate, there should be occasion; for, say they, no use can be executed by the statute unless there be a person seised to the use, and also a *cestui que use*. And, if any *disseisin* or disturbance of the estate should happen, the right to the use cannot be executed within the statute: therefore, lest these contingent uses should be destroyed and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the judges.

Others of the judges were of opinion that there was not only no estate left in the feoffees, but no power or right to enter, nor anything to do with the land; but that they were at first only conduit-pipes, and the estate that was in them was by the statute wholly transferred to serve the uses which were *in esse*, with a pregnancy and prospect to the contingent remainders, if they should arise in their due time.

It must be observed, that one thing which weighed much with the majority of the judges, to be of opinion for leaving a right of entry

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(*a*) 27 Hen. 8, c. 10.

in the feoffees to preserve the contingent uses, was their fear of perpetuities, and of having contingent estates by way of use in persons not *in esse*, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that at that time the law was not settled that the destruction of the particular estate by the feoffment or conveyance of the *cestui que use* for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterwards came *Archer's Case*, in which case this point was solemnly settled, and they were relieved from their apprehensions; for, though *Archer's Case* is placed in the reports before *Chudleigh's Case*, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases is stated by Mr. *Pollexfen*, in his argument of the case of *Hales* v. *Risley*, in Pollexfen, 385, from whence I have taken it.

From this deduction you will see what were the chasms and defects to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses *ad libitum*, and here was a power in the *cestui que use* for life to destroy them.

How were those defects to be supplied and filled up? By vesting a limitation in certain trustees *eo nomine*, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the *cestui que use* in contingency, in like manner as trustees to uses ought to do before the Statute of Uses, when they were but trusts to be executed in this Court. And, as things then stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the *cestui que trusts* in remainder, either vested or contingent.

Secondly. Consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of *Cholmondeley's Case* (*a*), where it is held, that, if there is a lease to A. for life, remainder to another during the life of A., this is a good remainder; for by possibility the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture; and so in the book, 41 Edw. 3, Fitzh., tit. "Waste," 83; and this is followed by the late case of *Duncomb* v. *D.* (*b*), which was one of the first cases wherein the operation of such limitation to trustees to preserve contingent uses came into question.

If this be so upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant: because in the last case it comes (the first estate of freehold) to the trustees, as was rightly reasoned by *Lee*, L. C. J., in the case of *Smith* v. *Dormer*, and *Packhurst* (*c*).

It is plain, therefore, that these trustees had the immediate freehold in them—an estate *pur autre vie;* and at law they alone could maintain or defend any action concerning the freehold.

If a *disseisin* was committed they must bring the assize, and they must defend in all *præcipes:* for the possession of the tenant for years was, in law, their possession: for this reason they had in law an interest in the timber, not, indeed, to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession, by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste; the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance, and the Statute of Gloucester gave the writ of waste to the same persons. But in this respect such trustees are in no other condition than all other remaindermen for life.

Thirdly. Consider, in the next place, what is the nature and

(*a*) 2 Co. 50 a.

(*b*) Hil., 7 Will. 3, C. B., 3 Lev. 437.

(*c*) Mich., 14 Geo. 2, B. R., 8 Vin. Ab. 417; Willes' Rep. 327, 3 Atk. 135, 6 Bro. P. C. 351.

extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right, to construe their trust in the most liberal manner. In the case of *Mansell* v. *M.* (*a*), (which must be more particularly mentioned by and by,) it was expressly laid down by Lord *Raymond*, as I took it from his own mouth—"It is only positive law that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to preserve them; they are the creatures of the Court, and properly under its direction and control."

The first trust is declared to preserve the contingent estates thereinafter limited. How to preserve them? To preserve the inheritance as entire as possible—to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates the timber is the most valuable part—in more, the mines; and the destruction of the one, or the exhaustion of the other, might take away, or be an alienation of, the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber or mines, because the estate of the trustees cannot support any action of waste.

This might, in many instances, be to preserve the shell without the kernel, and brings it to the question, what remedies they may, in virtue of this trust, pursue in this Court.

These trusts are equally declared to make entries and bring actions, as the case shall require. Here it is expressly to do all and every such lawful act and acts, by entry or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity.

For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom. Therefore, if, after a forfeiture committed, and an entry made for that forfeiture, such

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(*a*) 2 P. W. 678; Ca. t. Talb. 252.

trustees wanted any assistance of a Court of equity in support of their trust, and not to break in upon the right of the tenant for life to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here. As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

In the present case they were remaindermen *pur autre vie*, and immediate owners of the freehold in law. In the case of *Dayrell* v. *Champneys* (*a*), a remainderman for life was admitted to maintain such a bill without making the owner of the inheritance a party; and although it was observed upon that case by Mr. *Clarke*, that it appears by the state of it in the book that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recital of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remaindermen of the legal estate *pur autre vie*, surely their trust, which affects their conscience, and, according to Lord *Raymond's* opinion, makes them creatures of this Court, would not make their case the weaker here.

But the books go further, and say a bill may be brought for an injunction to stay waste on behalf of an infant *en ventre sa mère* (*b*). And so is *Musgrave* v. *Parry* (*c*), which is liable to much more difficulty, for that must be as *amicus curiæ* on the unborn child's behalf.

I, therefore, hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father and the late Sir John Hind Cotton.

Pursue this, then, into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled: this had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. *Solicitor-General* (*d*) very properly put in his argument—on what terms should they be discharged? This Court could not have fined them: therefore, certainly,

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(*a*) 1 Eq. Ca. Abr. 400, Trin., 1700.

(*b*) See Lutterell's case, cited Pr. Ch. 50; Scatterwood *v.* Edge, 1 Salk. 229.

(*c*) 2 Vern. 710.

(*d*) *Murray*, afterwards Lord *Mansfield*.

only on the terms of making satisfaction. That satisfaction could not have been made by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor the remote remainderman in fee, for he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, justice could not have been done.

Fourthly. It comes next to be considered, how far and in what cases such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or *laches*, in breach of trust.

Notwithstanding the saying of Mr. *Pollexfen*, *arguendo* at the bar (*a*), "that trustees to preserve contingent remainders were never punished in equity, when they broke their trust" (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord *Harcourt*, in the case of *Pye* v. *George* (*b*), Mich., 1710, where he declared that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts": and he said, if there was no precedent in the case, he would make one.

Then came *Tipping* v. *Pigot* (*c*), in Mich., 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said it would be dangerous for such trustees themselves to make the experiment. Thus it stood till the great case of *Mansell* v. *M.*, which was first decreed by Sir *Joseph Jekyll*, at the Rolls, in January, 1731, and afterwards by Lord *King*, assisted by Lord *Raymond* and Lord Chief Baron *Reynolds*, Dec. 12, 1732 (*d*).

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable in

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(*a*) Pollex. 250.

(*b*) Pr. Ch. 308; 1 P. W. 128; 2 Salk. 680; 7 Bro. P. C. 221.

(*c*) 1 Eq. Ca. Abr. 385; Gilb. Eq. R. 34.

(*d*) 2 P. W. 678; Ca. t. Talb. 252; 2 Eq. Ca. Abr. 747.

equity to make satisfaction for such a breach of trust; and also, that a voluntary alienee, or a purchaser for a valuable consideration, with notice of the trust, shall be decreed in equity to restore the estate; and in that case it was decreed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build: suppose these trustees had consented to the felling and sale of the timber—had joined with Mr. Garth and Sir John Hind Cotton in the articles, and expressly covenanted that they would bring no bill for an injunction—would the trustees in that case have been liable? Clearly so; for it was agreeing to alien part of the inheritance; and it plainly shows from the principle on which the Court founded itself in *Mansell* v. *M.* Lord *Raymond* said, "It was strange in natural reason to say, that where a man hath created a trust to preserve his estate, the trustees may break that trust, and give away the estate with impunity; and that there wanted no particular precedent for it, because it is founded on all the general rules of trust."

If the trustees had joined in the articles thus to break their trust, would Mr. Garth, the father, or the late Sir John Hind Cotton, have been affected by this express act, done in breach of their trust? This, to me, is also as clear; for then they would have had notice of this breach of trust, and have reaped the benefits of it; which is expressly within the rules of *Mansell* v. *M.* And here I cannot help repeating some remarkable words of Lord *King*, who was not disposed to amplify the jurisdiction of this Court. "If it is," said his Lordship, "a breach of trust, and the trustees convey the estate over, a Court of equity is not to sit still and let others profit by the spoil."

This position is very apposite to the present case; all the difference is, that here is no positive act of the trustees, but only a *laches* or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme or attempt to strip the estate of the timber; but how will it excuse the others, who, as Lord *King* expressed it, have profited by the spoil? By no means.

In all cases of alienation the alienees are not affected merely by the act of the trustees, but by notice of the trust: and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles. Therefore, in this case the actual notice of the trust operates to make the *laches* of the trustees affect them as much as their express act would have done in the other: and it would be strange to say that the plaintiff's and defendant's father would have been liable for the timber if the trustees had concurred in the destruction and sale of it, but shall be in a better condition because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a re-conveyance: indeed, it plainly follows by analogy from thence. Suppose an estate with valuable mines in it, unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation, with notice. Afterwards such a purchaser, with notice, opens the mines, and exhausts them, putting a great sum of money into his pocket. Then a son is born, who is tenant in tail: the tenant for life dies, and the son brings a bill for a re-conveyance: if, according to the authority of *Mansell* v. *M.*, the Court had decreed a re-conveyance, would the justice have been complete without decreeing satisfaction for so much of the inheritance as was carried off by exhausting the mines? Clearly not. It would be a necessary, unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the bar. It was done at a time when the contingent remainderman had neither *jus in re* nor *jus ad rem*, before he was *in rerum naturâ*; and no wrong can be done to a person non-existent. But these are colourable objections only: for, if equity ought to wait, and expect the vesting of the estate for his benefit and restore him that estate, it ought to do it completely.

I have chosen to go through the general reasoning (which hath, upon the maturest consideration, convinced me that the plaintiff ought to be relieved in this Court), before I state the objections made on the part of the defendant, the rather because the clearest answer to these objections will arise from the right application of that reasoning.

First objection.—That the interposition and allowance of trustees to preserve contingent remainders was not intended, nor has been suffered, to alter the legal rights of the tenants for life and the first remainderman of the inheritance vested, either in respect of the timber or other property of, or powers over, the estate.

Answer.—This objection assumes too much; for I have already proved, and it is demonstrable, that the very intention of interposing this new invented limitation was to alter and abridge the legal rights both of the tenant for life and the first remainderman vested, to abridge the legal right of the former, to defeat and destroy the contingent use of the inheritance whilst it remains contingent and eventual, to abridge the legal right of the latter, to destroy it by accepting a surrender of the estate for life: all which are as much legal powers as the cutting down of timber or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger or of the tenant for life alone, the owner of the first remainder of inheritance vested shall have the benefit of it. So was the case of the timber blown down on the late Duke of Newcastle's estate, and the case of *Whitfield* v. *Bewit* (*a*); but the ascertaining of the ground of these resolutions is sufficient to distinguish them from the present case.

The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowles' Case* (*b*) and *Udall* v. *U.* (*c*), an estate in contingency is as no estate till the contingency happens. And when the trees are severed the property must vest immediately in somebody, and that can only be in the first remainderman of inheritance vested; and on the foundation of that property he may maintain trover for them.

This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of *the collusion* in this case. The destruction being made *by contrivance and collusion*

(*a*) 2 P. W. 240; 2 Eq. Ca. Abr. 589.

(*b*) 11 Co. 79.

(*c*) Aleyn, 81.

with the remainderman, and affecting his conscience, obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards : for, *in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation.*

Second Objection.—That the relief sought by the bill is contrary to all the rules of law, which allows no remedy for waste to any person who hath not an immediate reversion or remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions even at common law. But, if it were true at common law in the latitude with which it was laid down, it would not govern this case, which depends *upon principles of equity arising from the collusion and covin between the tenant for years and the remote remainderman,* which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem,* I will endeavour to show how far the opinion I have given coincides with, and is supported by, the reason of some cases concerning waste.

It is clear, that when there is a tenant for life (*a*), with remainder over in fee or tail, and tenant for life commits waste, the remainderman in fee, or in tail, can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited ; and, if it should be recovered by the owner of the inheritance (being under a limitation of the party), it would never go back again.

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance ; nay, in case the remainderman for life dies, living the remainderman of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder

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(*a*) "With remainder to another tenant for life." Evidently omitted.

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or reversion in fee, and the remainderman, or reversioner in fee, grants over his remainder, or reversion, to A. for the life of A.; then the tenant for life commits waste, and afterwards, the grantor (*a*) of the remainder, or reversion for life, dies, this remainderman, or reversioner in fee, may maintain an action of waste, though he had parted with his remainder, or reversion for that time, by his own voluntary act.

All this appears by *Paget's Case* (*b*), and the case of *Udall* v. *U.*; and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and, therefore, though it be requisite in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison; yet, if the estate were out of him by wrong, and then come into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the lessee for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done: yet, as it was out of him by tort, when it is revested, he shall have this remedy (*c*).

But there is another case at law, the reason of which seems to me to be more analogous to the present case; as that of a bishop, after the restitution of temporalities to him and his successors, in right of his church. When he dies, during the vacancy the right is in the king; and when a new bishop is invested in the temporalities, the fee is in him. Suppose, then, a tenant for life, or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done (*d*).

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law; and that the Statute of Marlebridge (*e*), against depredations upon the possessions

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(*a*) Query grantee.

(*b*) 5 Co. 76 b.

(*c*) Co. Litt. 356 a.

(*d*) Co. Litt. 356; Fitzh. N. B. 112.

(*e*) 52 Hen. 3, c. 29. Repealed as to E. Stat. Law Rev. Act, 1863; as to I. Stat. Law (I.) Rev. Act, 1872.

of ecclesiastical persons, gave this remedy; and for this some countenance may be drawn from what Fitzherbert says, in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute doth not include bishops or their possessions; and of this opinion is Lord *Coke*, in his reading of the Statute of Marlebridge (*a*). His words are: "This Act extendeth only to abbots, priors, and other prelates, that be religious and regular, and not to bishops and other ecclesiastical persons, being secular; for in the second clause of this Act, *hujus modi religiosorum* is mentioned for the distinction between religious and secular; and the reason of this diversity is, that the abbots and priors, and other religious persons, are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament; and therefore, the church, or religious house, is holden always one; in respect whereof, the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor, and an action of waste for waste done in his predecessor's time; but so shall not a bishop, dean, archdeacon, or the like, who are ecclesiastical persons secular, because the church, by their death, hath an alteration, and is not always one."

That the opinion of Lord *Coke* was, that the action is not founded on the Statute of Marlebridge (*b*), is clear by other cases; for if bishops were within the statute, then they as well as abbots might have an action of waste for waste done, not in time of vacancy, but in their predecessor's time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled that they cannot (*c*). From hence I infer, that this remedy was given, not by particular statute, but by the policy of the law, which would not permit an estate, which it allowed to be created, and whilst it was in *gremio legis*, as it were, to be destroyed or stript without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on

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(*a*) 52 Hen. 3; 2 Inst. 151.

(*b*) 52 Hen. 3, c. 29.

(*c*) 39 Edw. 3, 15; 2 Hen. 4, 2; 2 Roll. Abr. 8, 24; Pla. 3, 4, 5, 6, 7.

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principles of equity; and equity hath always gone further to restrain waste and destruction than the common law hath done.

Therefore, the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction, and this *ab antiquo*, according to the case in Moore, 554; where Lord *Ellesmere* says, he had seen a precedent for it so long ago as in the reign of Richard II. (*a*), and many cases in practice.

And although the tenant in tail, after possibility of issue extinct, is at law dispunishable for waste, by reason of the inheritance, which was once in him, yet Lord Chancellor *Nottingham* was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber, which grew for the ornament of a mansion-house (*b*). In the same book there is the like case, before Sir *John Trevor*, M.R. (*c*); and this hath been followed since, by several cases of tenants for life *without impeachment of waste generally*, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter or ornament of the mansion-house.

But this Court hath gone still further, and in the case of *Abraham* v. *Bubb*, Lord *Nottingham* cites the case of a Lady Evelyn, where there was tenant for life, remainder to the first son for life without impeachment of waste, with remainders over; and the first son, by leave of the lessee of the tenant for life, came upon the land and felled timber, which was not under the description of trees growing for shelter or ornament; and this Court granted an injunction against him, though no action whatsoever could be maintained at law: and upon the same ground I did the like in the case of *Fleming* against the late *Bishop of Carlisle and others*. There the bishop was tenant for life, remainder to his eldest son for life, *without impeachment of waste*, with remainder over in fee; the eldest son, by permission of the bishop, entered and began to cut down the timber, and the reversioner in fee brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the

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(*a*) 1 Roll. Abr. 377; Tracy *v.* T., 1 Vern. 23.

(*b*) Abraham *v.* Bubb, 2 Freem. 53; 2 Show. 69; S. C. 2 Eq. Ca. Abr. 757.

(*c*) 2 Freem. 278, Hil. 1704.

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estate to which this privilege was annexed came into possession; and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself, by collusion, into possession of the timber before his time.

The case of *Robinson* v. *Litton* (*a*) went still further than the common law: that cause was heard in this Court, the 12th December, 1744. There was a devise to the defendant and his heirs; and if he should die before the age of twenty-one years, leaving no issue, then to the testator's first &c. daughters in tail, remainder to the testator's own right heirs; but if the defendant should live to attain the age of twenty-one years, then the estate should be sold and the money to be applied for the benefit of the testator's daughters. The defendant being under the age of twenty-one years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet by reason of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

Third Objection.—That, suppose a bill might have been maintained by the trustees to support the contingent remainders, to stay this waste before it was committed, yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party: but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction.

In support of this notion, only one case was cited—*Jesus College* v. *Bloome* (*b*), which was before me November 13, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some stones and materials of the premises, and converted them

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(*a*) 3 Atk. 209; 2 Eq. Ca. Abr. 528.

(*b*) 3 Atk. 262; Amb. 54, where the reports of the case differ from the account of it given here by Lord *Hardwicke*, and the bill was, it seems, dismissed with costs.

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to his own use; the term was expired, and a new lease granted to a stranger, and the college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintainable, without praying an injunction to stay the waste, and it stood over to another day, to produce precedents; none were produced, and the bill was dismissed, without costs; but the point was not absolutely determined, nor was that the only ground of the dismission: but I was of opinion, that, at the utmost, it was in the discretion of the Court, and if the college had a right, they might clearly bring an action of trover at common law; and it being a matter of small value, I did not think fit to countenance such bills in this Court, after the lease expired. This is widely different from the present case in all its circumstances, and particularly that it is admitted that *the plaintiff here, though greatly damnified, can have no remedy at law*, which is a substantial difference.

Fourth Objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured and laid out in land for the benefit of the contingent remainderman; and this could not be done, even upon a bill by trustees to preserve contingent remainders before the waste completed; and for this the case of *Whitfield* v. *Bewit* (*a*) was relied on.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield* v. *Bewit* is *the collusion and covin between the tenant for years and the remote remainderman in fee;* whereas in that case, the remainderman in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed: but it was solely the tortious act of the tenant for life; and I think I have proved that in some cases of destruction of contingent remainders, or alienations of part of the inheritance, to the prejudice of the contingent remainderman, such an account and compensation must be decreed, in order to attain adequate justice.

(*a*) 2 P. W. 240.

On this I rely for an answer to that objection.

Fifth Objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer.—But though there is length of time in the case, no statute of limitations stands in the way, nor is there any *laches* to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after; but the plaintiff was not born till May, 1724: his father lived till 1727, and he did not attain the age of twenty-one years till May, 1745; and this bill was brought in May, 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainderman in fee, after the death of a mesne remainderman for life, for waste done in his lifetime? That life may have lasted forty, fifty, or sixty years afterwards, and yet this the law allows. Besides, in this case the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth Objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar, and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder, which was in him by the will, and gained a new use; that this might have been a bar to a proper action of waste at law, for waste done precedent, and, by parity of reason, ought to take away his remedy in this Court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit that in Co. Litt. 53 b., Lord *Coke* lays it down, that, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the waste done, the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if A. grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable; and so of the like, because the estate of the reversion continueth not, but is altered, and, consequently, the action of waste, for waste done before, which consists in privity, is gone.

This is undoubtedly law; but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee, which, in Lord *Derwentwater's Case*, before the judges and delegates, Hil., 6 Geo. 1, was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the Statute de Donis; and this was agreeable to the resolution of the case of *Abbot* v. *Burton* (*a*), and to the case of *Martin* ex dem. *Tregonwell* v. *Strachan*, adjudged in B. R. (*b*), and affirmed in the House of Lords in February, 1743 (*c*).

But I go further still, and hold that, even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property, in the timber severed before, would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh Objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant: that an action of waste dies with the person; and, if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover: *pari ratione* he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste dies with the person; and I also admit, that I cannot find any authority or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his lifetime: though, as to this point I give no opinion; for thus much is certain, that an action of trover will lie for an executor, upon a conversion by the defendant in the lifetime of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual, even at the common law.

However, I will admit, for argument's sake, that the action of

(*a*) 2 Salk. 590; 11 Mod. 181; Com. Rep. 160. Trin., 7 Anne, C. B.

(*b*) Hil., 16 Geo. 2.

(*c*) 2 Stra. 1179; 4 Bro. P. C. 486.

trover for the timber was, as well as the strict action of waste would have been, gone, at the common law; but, notwithstanding that, I am of opinion that the plaintiff is entitled to the same relief in this Court.

There have been several determinations in this Court, where, by force of the rule, *actio personalis moritur cum personâ*, the remedy at law hath been extinguished (*a*): yet equity hath given the like satisfaction.

It is well known that, at common law, before the statute of 30 Car. 2, c. 7 (*b*), and 4 & 5 Will. & Mary, c. 24, s. 12 (*c*), no action or remedy could be had against the executor of an executor for a devastavit committed by the first executor of the goods of the original testator. But, notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor out of his assets.

This is laid down as a rule in equity by *Nottingham*, L.C., in the case of *Price* v. *Morgan* (*d*). His words are, "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last; and, therefore, whatever estate of the original testator is come to the wasting executor's representative, or to the hands of the wasting executor, which the latter wasted, the personal estate of such wasting executor, in the hands of his executor, shall answer."

When Lord *Nottingham* said the common law would come to it at last, he was a true prophet; for this case was decided in the 28th of Car. 2; and the law was altered by Act of Parliament in the 30th of Car. 2.

In 1 Ch. Cas. 121, *Eton College* v. *Beauchamp and Biggs* (*e*), the provost and fellows of Eton were possessed of a rent or pension of 1*l*. 14*s*. per annum, granted by King Henry VI. to that college, issuing out of the lands. The defendant, Biggs, was executor of the tenant, and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the college

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(*a*) See now 3 & 4 Wm. 4, c. 42, s. 2.

(*b*) Rep. in part, Stat. Law Rev. Act, 1863.

(*c*) Rep. Stat. Law Rev. Act, 1867.

(*d*) 2 Ch. Cas. 215.

(*e*) S. C. 1 Eq. Ca. Abr. 32.

did not know the lands out of which the rents were issuable, and so could not distrain; and, though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the testatrix's personal estate was augmented, and therefore the Master of the Rolls, Sir *Harbottle Grimstone*, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

In 2 Mod. 293, *Anon. Error* (*a*), in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices, the case was, the plaintiff had declared against the defendant as executor of Edward Nicholls, who was executor of the debtor. The defendant pleaded, that the said debtor died intestate, and administration of his goods was granted to a stranger, *absque hoc* that Edward Nicholls was ever executor; but did not say by his plea, "or ever administered as executor"; for, in truth, he was executor *de son tort.* The plaintiff replied, that before the administration granted to the stranger, Edward Nicholls possessed himself of divers goods of the debtor, and made the defendant executor, and died; and to this replication the defendant demurred. Judgment was given for the plaintiff, in the Court of Exchequer, but reversed in the Exchequer Chamber: for an executor of an executor *de son tort* is not liable at law; though *Nottingham*, L.C., said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon. But I go further, and hold, *that in all cases of fraud the remedy doth not die with the person;* but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For, as *equity disclaims the maxim, that a personal remedy dies with the person wherever the demand is proper for that jurisdiction*, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction (*b*). Now, collusion between two persons, to the prejudice and loss of a third, is, in the eye of the Court, the same as a fraud; and you have observed, that one principal ground of the

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(*a*) Hil., 29 Car. 2.

(*b*) See Phillips *v.* Homfray, 24 C. D. 439, 473.

judgment of the Court in this case is collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavour to avail themselves—I mean the argument *ab inconvenienti*, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged the inconveniences that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remaindermen, springing up at a great length of time; and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down that a contingent remainderman cannot possibly have any remedy in such a case—I say, let them be compared, and the former will weigh nothing, in the opposite scale, against the latter.

Thus far the law allows settlements of estates to go, and no further; and it hath been found to be a convenient medium between perpetuities and too flux and unstable a condition of things. Most of the family estates in this kingdom are under such settlements; and it frequently happens that the first remainderman of the inheritance vested is a remote relation—remote in blood, and remote in the prospect of succession, perhaps after fifty years' contingent limitation of that inheritance.

If what has been done in this case should be determined to be done impunè, without any possible recompense in a Court of equity, what havock would it make, and what a licence would be proclaimed! Every remainderman in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life, or years in possession, or perhaps of his under-tenant, strip the estate, and convert the value of it to their own use. Suppose an estate in the great timber counties of England, in the north, or in Cornwall, where the principal value may consist in timber or mines, all that value may be exhausted and dissipated before a first son is born; and when he is born, he may find nothing but the shell of what was intended for a lasting support of a family of honour.

It will be no answer to this, to say the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know of it, nay, possibly before they can know whether they are trustees or not; for it most frequently happens, that trustees to preserve contingent uses are inserted in settlements and wills without their being made acquainted with it.

From hence it is evident that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here I cannot help adding, that this becomes of the greater importance, from the practice and abuses of the times into which we are fallen, when so many new inventions and contrivances daily show themselves in Courts of justice, to supply or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the judges in *Fermor's Case* (*a*), and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the Statute of Fines (*b*); but the book says: "Lastly, the judges in this resolution did greatly respect the general mischief which would ensue if such fines, levied by practice and covin of persons who had particular interests, should bar those who had the inheritance" (*c*).

The result of the whole is, I must decree satisfaction to the plaintiff for what the late Sir John Hind Cotton received out of his assets; and if the original limitations had been still subsisting, I must have directed this money to have been laid out in lands to the same uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this, the question of interest is material, and I have considered it: the principal money is reckoned by the answer at 1,000*l.*; the cause being heard on bill and answer, and the plaintiff having at the

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(*a*) 3 Co. 79 a.

(*b*) 4 Hen. 7, c. 24.

(*c*) See 3 Co. 79 a.

bar prayed interest from the time it was received, in respect of the possible growth of timber.

But there being no proof, it does not appear what was the condition of the timber: whether, by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs, or destroyed by tempests or accidents; or what young timber may have grown up in its place in the meantime; from these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

"His Lordship declared, that, on all the circumstances of the case, the plaintiff is entitled to recover satisfaction in this Court for so much value of his inheritance as the defendant's testator exhausted and received by virtue or colour of the articles entered into between him and the plaintiff's late father, who was tenant only for the term of ninety-nine years, if he should so long live; and ordered that the Master, to whom he referred it, should compute interest on the sum of 1,000*l.*, admitted by the answer of Sir John Hind Cotton, deceased, to have been received by him, from the time of filing the plaintiff's bill, after the rate of four per cent. per annum, and tax the plaintiff his costs; and that what shall be so found due to the plaintiff for the 1,000*l.*, interest and costs, be considered as a demand by simple contract on the estate of Sir John Hind Cotton, deceased, and be answered and paid to the plaintiff, by the defendants, the executors, they having admitted assets of their testator, Sir John Hind Cotton, by their answer to the bill of revivor."

NOTES (*a*).

1. Generally, p. 1022.
2. Waste as regards particular persons, p. 1028.
   Ecclesiastical waste, p. 1038.
3. "Without impeachment of waste," p. 1040.
4. Equitable waste, p. 1042.
5. To whom the proceeds of waste belong, p. 1050.
6. Remedies in respect of waste, p. 1055.

(*a*) Mr. W. A. Bewes placed his valuable book on "Waste" at the disposal of the editors of the last edition for the purposes of this note. The present editor desires to express his thanks to Mr. Bewes for his kindness in giving the editor the use of notes of further cases upon this subject made by Mr. Bewes.

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1. Generally.

The common law recognised two species of waste, Voluntary and Permissive, the former consisting in some positive act of commission, such as the cutting of timber, the latter being the omission to do something, such as the not doing of repairs whereby a house is suffered to fall into decay (*a*). The question of waste at common law can only arise as between some person entitled to a limited interest in land, not being an estate of inheritance, such as a tenant for life or years, and the person entitled to the next vested estate of inheritance.

Voluntary Waste.—The essential element in an act of voluntary waste is that it alters the nature of the thing (*b*), to the injury or destruction of the inheritance. The law of waste presents many analogies to the rules restricting the user of property by the usufructuary in the Roman law, and is to a great extent based upon the Roman law of usufruct (*c*). Usufruct is thus defined by Paulus: Ususfructus est jus alienis rebus utendi fruendi *salva rerum substantia* (*d*). No exhaustive enumeration of the acts which would constitute a violation of the condition "salva rerum substantia" was possible in the Roman law of usufruct, nor is any such enumeration possible in our law of waste. In regard to certain well-marked classes of acts, such as the cutting of growing wood, and the working of mines and minerals, certain acts done by a limited owner have been held to be waste, and other acts not to be waste, with the result that certain general rules of law applicable to certain specific forms of waste have been established. The question of waste or no waste in any particular case is not, however, an abstract question depending simply upon the applicability of some general rule of law; it depends, in the case of a lease, upon the intention of those who created the relation of landlord and tenant, in the case of a settlement, upon the intention of the settlor. Further, in ascertaining that intention proof of local usage is admissible as illuminating an instrument, whether contract, will, or settlement *inter*

(*a*) See Co. Litt. 53 a; 2 Inst. 145; and see judgment of *Lush*, J., in Woodhouse *v.* Walker, 5 Q. B. D. p. 409.

(*b*) See per *Buckley*, J., in West Ham Central Charity Board *v.* East London Waterworks Co., (1900) 1 Ch. 624, at p. 635, adopting the definition in Darcy *v.* Askwith, Hob. 234.

(*c*) Per *Bowen*, L.J., in Dashwood *v.* Magniac, (1891) 3 Ch. at p. 362.

(*d*) Dig. vii. i. 1.

vivos (*a*). Thus, though by the ordinary law as to timber, a tenant for life is not prevented from cutting beech trees, by local custom timber may include beech, but that local custom may in turn be governed by another local usage under which beech is grown and cut systematically, with the result that a tenant for life may cut according to the recognised system (*b*).

In order that an act may amount to waste there must be a real injury to the inheritance. "Those acts are not waste which are not prejudicial to the inheritance" (*c*). "The law of waste regards substance rather than technicality, and requires an act to be appreciably injurious to the inheritance before it condemns it as waste" (*d*). From very early times it was established that no action of waste lay where the damage caused by the acts complained of was trivial (*e*). The law of waste was, however, until the eighteenth century, strictly applied in the common law Courts; thus the fact that an act of a limited owner, plainly one of waste in itself, was followed by further acts by him which improved the value of the inheritance did not relieve him from liability at law for his first act (*f*).

In the present law it would appear that the destruction of old buildings, followed by the erection of new buildings, would not be waste at law or in equity, unless the value of the property were diminished, or the evidence of title to it impaired by the acts which had been done (*g*). In any case of this character the question whether waste had or had not been committed would turn on whether in fact injury had been done to the inheritance. Thus the erection of dwellings on land let for agricultural purposes may amount to waste (*h*), or the alteration of premises let for the

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(*a*) See per *Lindley*, L.J., in Dashwood *v.* Magniac, (1891) 3 Ch. 306, at p. 352; ibid. per *Bowen*, L.J., at p. 366; and see Tucker *v.* Linger, 8 A. C. 508; Dingle *v.* Coppen, (1899) 1 Ch. 726.

(*b*) See Dashwood *v.* Magniac, supra.

(*c*) Per *Richardson*, C.J., in Barret *v.* B., Hetley, 36.

(*d*) Per *Bowen*, L.J., in Dashwood *v.* Magniac, supra, at p. 360.

(*e*) See, e.g., per Lord *Blackburn* in Doherty *v.* Allman, 3 A. C. at p. 733; Doe *v.* Burlington, 5 B. & Ad. 507.

(*f*) See, e.g., Greene *v.* Cole, (1663) 2 Wm. Saunders, 644, where the pulling down of an old brew-house, though followed by the erection of new houses bearing a greatly increased rent, was held waste; and see Coke's statement, Co. Litt. 53 a, that if a tenant build a new house it is waste.

(*g*) Jones *v.* Chappell, 20 Eq. 539, pp. 541, 542; Doe *v.* Earl of Burlington, 5 B. & Ad. 507; Meux *v.* Cobley, (1892) 2 Ch. 253; Edmund *v.* Martell, 24 T. L. R. 25.

(*h*) Brooke *v.* Mernagh, 23 L. R. Ir. 86 (erection of Land League huts); Brooke *v.* Kavanagh, 23 L. R. Ir. 97 (erection of Plan of Campaign huts); cf. Kehoe *v.* Lansdowne, (1893) A. C. 451.

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purposes of one business into premises designed for another business (*a*), or alterations in a building which entirely change its character (*b*). In cases of waste by rebuilding or alteration, the question is usually complicated by the operation of covenants, and an act, though it may lose its character of waste through its ameliorating character, may nevertheless be unlawful as a breach of covenant (*c*).

In *Doherty* v. *Allman* (*d*), the leading authority on the subject of ameliorating waste, the lessor of certain lands with buildings on them, comprised in two leases, the one granted in 1798 for 999 years, and the other granted in 1824 for 988 years, sought in 1876 to restrain the lessee from converting the buildings, which had for many years been used as corn stores, into dwelling-houses. There was no negative covenant preventing the lessee from changing the use of the premises, but there was a covenant to maintain and support the premises and improvements made in them. The alterations proposed would have much increased the value of the buildings. The Court of Appeal (Ireland) refused the injunction asked for. The House of Lords held that the Court below had made a proper exercise of its discretionary authority in refusing to grant the injunction. It is clear from the speeches of the learned lords (*e*) who took part in the decision, that they all held no legal liability for waste could be established, but their decision turned upon the fact that the case was plainly not one in which the Court should grant an injunction. The lease contained no negative covenant preventing the lessee from changing the user of the premises. Had the lease contained such a covenant, it would not have been in the discretion of the Court to refuse the injunction *on considerations of the convenience or inconvenience* of the parties, though all other considerations governing the grant of injunctions would have been operative (*g*).

(*a*) Maunsell *v.* Hort, 11 Ir. R. Eq. 478; but see Grand Canal Co. *v.* M'Namee, 29 L. R. Ir. 131.

(*b*) See Rose *v.* Spicer, (1911) 2 K. B. 234, per *Cozens-Hardy*, M.R., at p. 243. Alterations in building erected for purposes of a chapel, in order to adapt it for purposes of cinematograph theatre.

(*c*) Rose *v.* Spicer, supra; and see this case stated, supra, p. 290.

(*d*) 3 A. C. 709; and see *Re* Macintosh and Pontypridd, etc., 61 L. J. Q. B. 164.

(*e*) *Cairns*, C., and Lords *O'Hagan* and *Blackburn*.

(*f*) See per *Fletcher Moulton*, L.J., in Rose *v.* Spicer, supra, p. 251.

(*g*) See per *Cairns*, C., Doherty *v.* Allman, 3 A. C. 709, at p. 720; McEacharn *v.* Colton, (1902) A. C. 104; Osborne *v.* Bradley, (1903) 2 Ch. 446, 450; Formby *v.* Barker, (1903) 2 Ch. 539, at p. 553; Rose *v.* Spicer supra; and see infra, pp. 1045-1046.

If the use of a tenement is reasonable and proper, having regard to the class to which it belongs, and damage or destruction ensues from such user, it will not be waste. As for instance, where the lessee of a warehouse, built for the storage of grain, entered and erected machinery, and stored grain therein with the result that the external walls sank and bulged outwards, the Court held that the user having been reasonable and proper there was no waste (*a*).

Instances of Voluntary Waste.—It is waste to cut down trees which are timber by the common law, *e.g.*, oak, ash, and elm, or trees which are such by the custom of the country (*b*). And the cutting down of willows, beech, birch, whitethorns, &c., standing in the defence and safeguard of the house, or upholding a bank, is waste (*c*). So if the tenant convert ancient meadow (*d*) into arable, or arable into meadow or into wood, it is waste, "for it changeth not only the course of his husbandry, but the proof of his evidence" (*e*). Here, however, questions of amelioration arise and in the modern law a beneficial change would not (*semble*) be waste (*f*). If a lessee plough land stored with cunicles, this is not waste, unless it be a warren by charter or prescription (*g*); but if a lease be made of a warren as a rabbit warren, not as land, the lessee is perhaps precluded from ploughing or destroying it (*h*). So, also, it is waste to remove dovecotes if affixed to the freehold (*i*); to suffer the pale of a lawful deer-park to decay whereby the deer are dispersed (*k*), or to break the banks of a fishpond so that the water and fish run out, or to break the banks of a weir (*l*).

Digging for gravel, lime, clay, brick-earth, stone or the like, or for mines of metal, coal or the like, hidden in the earth, and not open when the tenant came in, is waste, but the tenant may dig for gravel or clay for the reparation of the house (*m*).

(*a*) Saner *v.* Bilton, 7 C. D. 815; Manchester Bonded Warehouse Co. *v.* Carr, 5 C. P. D. 507. Bewes, Waste, pp. 10, 11.

(*b*) Honywood *v.* H., 18 Eq. 310; see as to timber, infra, in Note 2.

(*c*) Co. Litt. 53 a; cf. Hampton *v.* Hodges, 8 V. 105; Phillipps *v.* Smith, 14 M. & W. 589.

(*d*) See Goring *v.* G., 3 Swans. 661; Rush *v.* Lucas, (1910) 1 Ch. 437.

(*e*) 2 Rolle's Abr. 814.

(*f*) See Meux *v.* Cobley, (1892) 2 Ch. 253; Bewes, 135 et seq.

(*g*) See Moyle *v.* M., Owen, 66.

(*h*) Lurting *v.* Conn, 1 Ir. Ch. R. 273.

(*i*) Kimpton *v.* Eve, 2 V. & B. 349.

(*k*) Co. Litt. 53 b, and as to a lawful park, 3 Inst. 199; case of Monopolies, 11 Coke, 87 b; Morgan *v.* Abergavenny, 8 C. B. 768; Ford *v.* Tynte, 2 J. & H. 150. Bewes, Waste, pp. 41, 42.

(*l*) Moyle *v.* M., Owen, 66. Bewes, p. 41.

(*m*) Co. Litt. 53 b; 2 Roll. Abr. 815; 816.

Permissive Waste.—This is waste "by reason of omission or not doing" (*a*), as if a man permits a room to be in decay for want of plastering, so that the timber becomes putrid. And it seems that Lord *Coke* included in this description of waste, destruction caused by a stranger through the sufferance of the tenant (*b*). A tenant is not in general responsible for permissive waste where not followed by actual substantial damage to the premises (*c*).

Tenants at will and tenants from year to year are not responsible for such waste (*d*). Lord *Coke* expresses the opinion that a lessee for a term of years is liable for permissive waste (*e*), but if this ever were the law it is doubtful whether it is so now (*f*). A legal tenant for life is not liable for permissive waste (*g*). Against tenants for life, Courts of equity have always declined to interfere with respect to permissive waste, either to prohibit or to give satisfaction (*h*). But such a tenant will not be assisted in recovering moneys expended in repairs, as it is his duty, as between himself and the remaindermen, to keep up buildings (*i*).

Liability for Waste at Law and in Equity.—Lord *Coke* says that before the Statute of Marlborough (1267), 52 Hen. III., no prohibition of waste lay against lessees for life or years, at the common law, for they come in by the act of the lessors, who might have provided,

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(*a*) 2 Inst. 145.

(*b*) See Bewes, Waste, pp. 214, 215.

(*c*) Ibid., p. 213.

(*d*) Countess of Shrewsbury's Case, 5 Co. 13 a; Torriano *v.* Young, 6 C. & P. 8; Leach *v.* Thomas, 7 C. & P. 327.

(*e*) 2 Inst., p. 145; and see per *Lush*, J., in Woodhouse *v.* Walker, 5 Q. B. D. at p. 407.

(*f*) Gibson *v.* Wells, 1 B. & P., N. R. 290; Herne *v.* Benbow, 4 Taunt. 764; *Re* Cartwright, 41 C. D. 532; but see Yellowly *v.* Gower, 11 Exch. 274; Woodhouse *v.* Walker, 5 Q. B. D. 404; Davies *v.* D., 38 C. D. 499. These cases are discussed and Davies *v.* D. doubted in Bewes, pp. 216 et seq. As to permissive waste by a copyhold tenant for life, see Blackmore *v.* White, (1899) 1 Q. B. 293; Galbraith *v.* Poynton, (1905) 2 K. B. 258.

(*g*) *Re* Cartwright, 41 C. D. 532; *secus* when the grantor or devisor imposes the liability of keeping the premises in repair upon the life tenant; *Re* Cartwright (supra); Woodhouse *v.* Walker, 5 Q. B. D. 404; the liability arising from failure to do repairs was there held to be in tort, but see, however, *Re* Williames, 54 L. T. 105, and cf. Blackmore *v.* White, (1899) 1 Q. B. 293.

(*h*) Powys *v.* Blagrave, 4 De G. M. & G. 448; Barnes *v.* Dowling, 44 L. T. 809; *Re* Cartwright, 41 C. D. 532; Dashwood *v.* Magniac, (1891) 3 Ch. 306 (limitation of liability as to the lake).

(*i*) *Re* Leigh, L. R. 6 Ch. 887, and see as to the liability to do repairs as between an equitable tenant for life and the residuary estate, note to Ashburner *v.* Macguire, Vol I., at pp. 874 et seq., ante.

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upon the making of the lease, against waste to be done (*a*). Against the tenant in dower, the tenant by curtesy, and the guardian, writs of waste lay at the common law. The Statute of Marlborough, c. 24, made lessees (*firmarii*) liable in damages for waste, and this was followed by the Statute of Gloucester (1278), 6 Ed. I. c. 5, which provided that a statutory writ of waste should lie against the tenant by curtesy, *or a person holding otherwise for term of life*, or for term of years, or a woman in dower. The person attainted of waste was to lose the thing which he had wasted, and was, moreover, to recompense thrice so much as the waste should be taxed at. The Statute of Marlborough excepted from liability lessees having special licence by writing of covenant, making mention that they might commit waste. From this special licence arose the distinction between the tenant for life *sine impetitione vasti* — without impeachment of waste, and the tenant for life impeachable for waste. The tenant without impeachment was free from all legal liability for acts of waste done by him, however improvident and malicious those acts might be, and was entitled to all things severed by him (*b*). This led in the seventeenth century to the intervention of equity, which interfered to prevent the tenant without impeachment making a wanton or unconscionable exercise of his legal powers, or profiting by such acts when done by him. Through this interference there grew up the body of rules dealing in the main with the cutting of ornamental timber, known as equitable waste (*c*). Apart from this great interference with the legal right of the legal owner, equity profoundly modified the law of waste in several particulars. *First*, as to persons who could bring an action in respect of waste. The common law action could only be brought by a person entitled to a vested estate of inheritance immediately expectant on the estate or interest of the person committing waste. If an estate of freehold were interposed between the estate for life of the person committing waste and the next vested remainder in fee, the action of waste was suspended until the interposed estate determined. If the tenant for life died during the continuance of the interposed estate, the action of waste never arose. In equity, however, the remainderman in fee in such case could obtain an injunction (*d*),

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(*a*) As to this, which became the orthodox view, see Pollock and Maitland, "History of English Law," Vol. II., p. 9, 1st edit.

(*b*) See note No. 3, infra, "Without Impeachment of Waste."

(*c*) See note No. 4, infra, "Equitable Waste."

(*d*) See 1 Rolle's Abr., 377, pl. 13, citing Roswell's Case, 1618.

as could likewise a tenant for life in remainder limited after preceding limitations in tail in favour of the children of a tenant for life in possession who was committing waste (*a*). So also in the leading case waste was restrained at the instance of trustees to preserve contingent remainders. So, again, equity interfered between mortgagor and mortgagee. The mortgagee in an ordinary legal mortgage has a clear legal right to commit waste, but equity, at the instance of the mortgagor, would restrain him from so doing unless his security were insufficient. On the other hand, the mortgagee could restrain the mortgagor from committing waste to the prejudice of the mortgagee (*b*). *Secondly*, as to the right to the proceeds of acts of waste. These, at common law, vested, on severance by a limited owner impeachable for waste, in the owner of the next vested estate of inheritance, who could maintain trover for them, though he might not be able to bring the action of waste owing to the interposition of some estate (*c*). In equity, however, where the waste was done with the collusion of the owner of the next vested estate, the proceeds of the wrongful acts were held subject to the limitations and trusts of the settlement as in the leading case (*d*). Equity, again, prevented the legal owner unimpeachable for waste from retaining for his own advantage the proceeds of his wrongdoing (*e*). *Thirdly*, equity recognised the right of an equitable tenant for life made unimpeachable for waste to commit waste (*f*), and also secured the rights of equitable remaindermen (*g*). *Fourthly*, equity remedied the imperfection of the common law remedies. The writ of waste, which was abolished after June 1st, 1835, by 3 & 4 Will. 4, c. 27, s. 36, had long fallen into disuse, and in practice an action on the case for simple damages had become the almost invariable remedy at common law. This action could be brought by a remainderman, or reversioner for life or years, as well as by a remainderman or reversioner in fee. In equity, however, apprehended waste could be restrained by injunction, and an account could be directed.

2. Waste as Regards Particular Persons.

Tenant for Life impeachable for Waste.—A tenant for life is impeachable for waste, unless the instrument creating his estate

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(*a*) Perrot *v.* P., 3 Atk. 94.

(*b*) See note 2, infra, p. 1037.

(*c*) See Lewis Bowles' Case, 11 Co. 79 b.

(*d*) And see infra, p. 1051.

(*e*) See infra, p. 1054.

(*f*) *Re* Barrington, 33 C. D. 523.

(*g*) Dare *v.* Hopkins, 2 Cox. 110.

provides to the contrary (*a*). "Whenever a settlor has not stated that a tenant for life is not impeachable for waste he is impeachable" (*b*). In this note it is proposed to consider the position of the tenant for life as to the cutting of timber and the working of mines and minerals. The questions as to what persons are entitled to the proceeds of timber cut and minerals worked are considered below in note 5.

Timber.—The question as to what is timber is determined *primâ facie* by the general rule of the common law, according to which oak, ash, and elm of twenty years' standing are timber, but other trees, such as beech, birch, and maple, may be timber by force of local custom and usage. Custom may, again, modify the age at which trees become timber, or may substitute for age some other test, *e.g.*, girth. "Once arrive at the fact of what is timber, the tenant for life impeachable for waste cannot cut it down," and, on the other hand, he can cut all that is not timber (*c*). Each of the rules, (1) that the tenant cannot cut down timber, and (2) that he can cut down everything else, is subject to certain exceptions.

Exceptions to the First Rule.—(1) The rights of the life tenant depend upon the intention of the testator, or settlor, who created his life estate. In construing the devise or grant, local custom and the practice observed by the grantor and his predecessors in the management of the estate must be taken into consideration, and a life tenant impeachable for waste may accordingly be entitled to cut timber, provided he observe the course of cultivation and cutting (*d*). (2) Tenants for life and for years are entitled by law, as incident to their estates, unless restrained by special covenant to the contrary, to three kinds of estovers, namely, housebote of two kinds, that is, for reparation of house and for fire, ploughbote, for repair of agricultural implements, and haybote, for repair of fences. For these botes he can cut timber, but he can only cut for use and not for sale (*e*), and in cutting timber he must act reasonably. (3) Under s. 29 of the Settled Land Act, 1882, a tenant for life under that Act can without impeachment of waste by any remainderman or reversioner,

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(*a*) Pardoe *v.* P., 82 L. T. 547.

(*b*) Per *Fry*, L. J., in *Re* Ridge, 31 C. D. 504, at p. 507.

(*c*) See per *Jessel*, M. R., in Honywood *v.* H., 18 Eq. 306, at pp. 309 and 310.

(*d*) Dashwood *v.* Magniac, (1891) 3 Ch. 306, and see Honywood *v.* H., Pardoe *v.* P., supra. The dicta of Sir G. *Jessel*, M. R., in that case as to "timber estates" must be read subject to the observations of *Lindley*, M. R., in Dashwood *v.* Magniac, ubi supra, at p. 357. As to "silva cædua," or seasonable wood, see ib., judgment of *Bowen*, L. J., p. 363, and Bewes, pp. 75 et seq.

(*e*) See further on this subject, Bewes, Waste, p. 43.

for the purposes of executing any improvement authorised by the Act, cut down and use timber or other trees not planted or left standing for shelter or ornament (*a*). (4) Leases made by a tenant for life under s. 6 of the Settled Land Act, 1882, may be for a purpose involving waste (*b*). The tenant for life impeachable for waste is given powers to cut timber under certain conditions by s. 35 of the Settled Land Act, 1882 (*c*).

Exceptions to the Second Rule.—(1) *Thinnings.* The tenant, "must not cut those trees which, being under the age of twenty years, are not timber, but which would be timber if they were over twenty years of age," for by cutting them down he commits waste, as he prevents the growth of the timber. He may, however, cut down timber trees under twenty years of age for the purpose of allowing the proper development and growth of other timber in the same wood or plantation, for that is not waste, but is in fact for the improvement of the estate, and not for its destruction (*d*). (2) He may not destroy germins, springs, or stools of underwood (*e*), or stub up and destroy hedges (*f*), but he is entitled to cut underwood in due course (*g*), and willows, leaving the stools or butts (*h*), and he may fell fir trees under twenty years of age for the purpose of thinning them (*i*). (3) He may not cut down trees planted or left standing for ornament or shelter (*k*). (4) By s. 28, sub-s. 2 of the Settled Land Act, 1882, the tenant for life, or any of his successors, shall not cut down, except in proper thinning, any trees planted as an improvement under that Act (*l*).

Mines and Minerals (*m*).—Minerals, like timber, are a part of the

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(*a*) Weld-Blundell *v.* Wolseley, (1903) 2 Ch. 664; and see similar power in Improvement of Land Act, 1864, ss. 32, 34, and cf. Agricultural Holdings Act, 1883, s. 41.

(*b*) And see Settled Land Act, 1890, s. 7.

(*c*) As to this section, see infra, p. 1053.

(*d*) Honywood *v.* H.; Dashwood *v.* Magniac, supra; and see Gordon *v.* Woodford, 27 B. 603; Bateman *v.* Hotchkin, 31 B. 486; Cowley *v.* Wellesley, 1 Eq. 656.

(*e*) See for definition of underwood, R. *v.* Ferrybridge, 1 B. & C. 375; and see as to cutting of underwood, Brydges *v.* Stephens, 6 Madd. 279; Hole *v.* Thomas, 7 V. 589.

(*f*) See Co. Litt. 53 a.

(*g*) Hampton *v.* Hodges, 8 V. 105; Humphreys *v.* Harrison, 1 J. & W. 581; Cowley *v.* Wellesley, 1 Eq. 656.

(*h*) Phillipps *v.* Smith, 14 M. & W. 589.

(*i*) Pidgeley *v.* Rawling, 2 Coll. 275; and see *Re* Harrison, 28 C. D. 220.

(*k*) See note 4 on "Equitable Waste," infra, and Honywood *v.* H., supra.

(*l*) Sub-s. (5) of s. 28 makes the tenant for life and his estate liable for acts done without compliance with the section, or in contravention thereof.

(*m*) On the question as to what are

inheritance, and the tenant for life impeachable for waste has *primâ facie* no right to get or work them (*a*). Lord *Coke* says (*b*), "digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth and *not open* when the tenant came in, is waste (*c*); but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees. The law has long recognised the distinction between the 'open' and 'unopened' mine, and in so doing has acted on the well-known principle of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor" (*d*).

The tenant for life has accordingly the right to continue the working of pits or mines previously opened (*e*), though not, perhaps, where they are old and abandoned, or where nothing more than preparations had been made for working them (*f*); or, perhaps, where the minerals had only been worked for some definite and restricted purpose, *e.g.*, for the purpose of fuel, or repair to some particular house (*g*); *secus*, where the use had been general, for use as well as sale is a perception of profits (*h*). It seems that the tenant for life could make new pits or shafts in working a mine already *open*, in order to pursue the same (*i*), or even a new vein (*k*).

So, where gravel pits had been opened in the waste of a manor, it was held that a tenant for life could open and work new pits, the whole of the gravel being deemed one mine (*l*).

So to enable a termor to work mines, where he is not given power to commit waste, or to work mines, it must be shown that the reversioner had commenced working the mines with a view to making a profit,

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minerals, see Hext *v.* Gill, L. R. 7 Ch. 761; Tucker *v.* Linger, 8 A. C. 508.

(*a*) See, e.g., *Re* Ridge, 31 C. D. 504, at p. 510.

(*b*) Co. Litt. 53 b.

(*c*) See Whitfield *v.* Bewitt, 2 P. W. 240; Plymouth *v.* Archer, 1 Bro. Ch. 159; Viner *v.* Vaughan, 2 B. 466.

(*d*) See judgment of *Bowen*, L.J., Dashwood *v.* Magniac, (1891) 3 Ch. p. 360.

(*e*) Dashwood *v.* Magniac, (1891) 3 Ch. 306, at p. 360; Clavering *v.* C., 2 P. W. 389; Viner *v.* Vaughan, 2 B. 466; Campbell *v.* Wardlaw, 8 A. C. 641.

(*f*) Viner *v.* Vaughan, supra; *Re* Kemeys-Tynte, (1892) 2 Ch. 211.

(*g*) Elias *v.* Snowdon, &c. Co., 4 A. C. 465.

(*h*) Ibid.

(*i*) Clavering *v.* C., 2 P. W. 388; Elias *v.* Snowdon, supra; Chaytor *v.* Trotter, 87 L. T. 33; and see *Re* Chaytor, (1900) 2 Ch. 804; *Re* Maynard's Settled Estate, (1899) 2 Ch. 347.

(*k*) Spencer *v.* Scurr, 31 B. 334; Bagot *v.* B., 32 B. 509.

(*l*) Cowley *v.* Wellesley, 1 Eq. 656, at p. 659; and see as to a brickfield, Miller *v.* M., 13 Eq. 268; cf. *Re* North, (1909) 1 Ch. 625.

and there is no difference in this respect between a mine and a quarry (*a*).

Under the Settled Land Act, 1882 (*b*), power is given to the tenant for life to grant mining leases for sixty years, whether *involving waste* or *not*, subject to the regulations therein mentioned (*c*).

By sect. 11 of the Settled Land Act, 1882, "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention (*d*) is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—*where the tenant for life is impeachable for waste* in respect of minerals (*e*), three fourth parts of the rent, *and otherwise* one fourth part thereof, and in every such case the residue of the rent shall go as rent and profits." But where the owner of an estate agreed to lease coal to be worked by instroke from adjoining mines, and died before the leases were granted, the tenant for life under his will, though impeachable for waste, was held entitled to the rents and royalties, this section not being applicable (*f*).

Save in the case of an absolute trust for the benefit of the *cestui que trust*, he is not entitled to possession. An equitable tenant for life accordingly could not enter (*g*) and cut timber without the consent of his trustees (*h*). The Settled Land Acts (1882—1890) confer wide powers of management upon tenants for life under these Acts, and since the Court has a judicial discretion as to giving possession upon proper terms to an equitable tenant for life, the provisions of the Settled Land Acts afford additional ground for exercising the discretion in favour of the tenant for life (*i*).

As to permissive waste by tenants for life, see supra, p. 1026.

Tenants in Tail.—Tenants in tail are unimpeachable for waste of any kind both at law and in equity (*k*); and equity will not interfere with an ordinary tenant in tail, who may, at his pleasure, cut down

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(*a*) Elias *v.* Griffith, 8 C. D. 521; affirmed sub nom. Elias *v.* Snowdon Slate Quarry Co., 4 A. C. 454, 463.

(*b*) 45 & 46 Vict. c. 38, s. 6.

(*c*) Sects. 7, 8, 9, 10.

(*d*) *Re* Newcastle, 24 C. D. 129.

(*e*) *Re* Ridge, 31 C. D. 504.

(*f*) *Re* Kemeys-Tynte, (1892) 2 Ch. 211.

(*g*) See sect. 29 of the Settled Land Act, 1882, giving the tenant for life power *to enter* to execute authorised improvements and power to commit necessary waste.

(*h*) Denton *v.* D., 7 B. 388; Pugh *v.* Vaughan, 12 B. 517; and see Briggs *v.* Oxford, 1 Jur. (N. S.) 817.

(*i*) See *Re* Wythes, (1893) 2 Ch. 369; *Re* Bagot's Sett., (1894) 1 Ch. 177.

(*k*) Wyld *v.* Lewis, 1 Atk. 432; Jervis *v.* Bruton, 2 Vern. 251; Bewes, p. 158.

all timber for whatever purpose planted, or pull down all buildings upon his estate (*a*).

Whether an infant tenant in tail can commit equitable waste does not appear to have been actually determined. It would seem, however, that he has just as much power to do so as tenants in tail prohibited by statute from barring the entail. He has clearly, as against the remainderman, the same right to open mines (*b*), and fell timber (*c*), as a tenant in tail of full age. In *Saville* v. *S.* (*d*), an infant tenant in tail in possession, in a very bad state of health, and not likely to live to full age, by his guardian cut down a great quantity of timber just before his death, to a very great value. The remainderman applied for an injunction, but could not prevail.

Tenants in tail, restrained by statute from barring their issue, or those in remainder with reversion to the Crown, are not, on that account, within the principle of equitable waste; for, "they have all the legal rights and incidents which belong to an estate of this character, *except* where such rights and incidents are specially qualified by the provisions of the statute, and there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber as if they were tenants in fee simple * * * No instance can be stated in which a Court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste." See *A.-G.* v. *Duke of Marlborough* (*e*), in which case it was held on demurrer, that the Duke of Marlborough for the time being is, under the Act 5 Anne, c. 3, bound to maintain Blenheim House for the future residence of those to whom the succession was limited, and that the Court was bound to interfere to prevent the destruction of the house, and of the ornamental timber about it.

Tenant in Tail after Possibility of Issue Extinct.—A tenant in tail after possibility of issue extinct, although unimpeachable of waste at law (*f*), is within the principle of equitable waste, and will be restrained from committing malicious or extravagant waste, such as cutting down ornamental timber, and pulling down houses. "In a Court of law," observes Sir *John Leach*, "a tenant in tail

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(*a*) See the observations of *Leach*, V.-C., in A.-G. *v.* Marlborough, 3 Madd. 532.

(*b*) Lyddal *v.* Clavering, Amb. 371, cited in notes, Blunt's ed.

(*c*) Saville *v.* S., cited in Ambler, p. 371; and see 2 Atk. 458.

(*d*) Supra.

(*e*) 3 Madd. 498, 536, 539.

(*f*) Lewis Bowles' Case, 11 Rep. 79; Williams *v.* W., 15 V. 419.

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after possibility of issue extinct, is, in effect, *a tenant for life without impeachment of waste;* and Courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by the provision of the grantor, but as a legal incident to his estate" (*a*). If, however, he conveys his estate away, it is said that the grantee will be considered as a mere tenant for life (*b*).

Tenants in Common and Joint Tenants.—As each tenant in common has a right to "enjoy as he pleases," short of actually "ousting" the others (*c*), and may, moreover, obtain a decree for a partition, the Court will not in general grant an injunction to restrain any of them from committing either ordinary (*d*) or equitable (*e*) waste, or from working coal mines (*f*), but it will interfere between them to prevent malicious or destructive waste; as, for instance, "against cutting saplings and any timber trees or underwood at unseasonable times" (*g*).

Under special circumstances, however, the Court has restrained a tenant in common from committing ordinary waste. Thus, in *Smallman* v. *Onions* (*h*), the parties interested were only *equitable tenants* in common, and the tenant in common who was committing the waste not only was not entitled to the possession, as the legal estate was vested in a trustee, but was also insolvent and unable to pay to his co-tenants their shares of the money to be produced by the sale; *Thurlow*, C., granted an injunction restraining waste. So in *Twort* v. *T.* (*i*), where one of two tenants in common was in occupation of the land as tenant to the other, *Eldon*, C., granted an injunction restraining him from committing waste, stating expressly in the order that he was occupying as tenant to the plaintiff; and restraining him from committing any waste upon the premises,

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(*a*) A.-G. *v.* Marlborough, 3 Madd. 538. See also, Abrahall *v.* Bubb, 2 Show. 69; Anon., 2 Freem. 278; Cooke *v.* Whaley, or Winford, 1 Eq. Ca. Abr. 400.

(*b*) Co. Litt. 28 a; Rice's Case, 3 Leon. 241.

(*c*) See per Lord *Hatherley* in Jacobs *v.* Seward, L. R. 5 H. L. 464, 472.

(*d*) Goodwyn *v.* Spray, Dick. 667; cf. Wilkinson *v.* Haygarth, 12 Q. B. 837; Arthur *v.* Lamb, 2 Dr. & Sm. 428; Griffies *v.* G., 8 L. T. 758.

(*e*) Hole *v.* Thomas, 7 V. 589; Twort *v.* T., 16 V. 132.

(*f*) Job *v.* Potton, 20 Eq. 84.

(*g*) Hole *v.* Thomas, 7 V. 589, 590, 6 R. R. 195; see also Clegg *v.* C., 3 Gif. 322, 336; Martyn *v.* Knowllys, 8 T. R. 145.

(*h*) 3 Bro. Ch. 621.

(*i*) 16 V. 132.

which he held as such occupying tenant. See also *Jacobs* v. *Seward* (*a*), where the lessee of one co-tenant reaped the whole crop of hay.

After a decree has been made in a suit for partition, the Court will restrain a tenant in common in possession from destructive waste (*b*), but not a tenant in common, bound by no express contract of tenancy, from selling hay and turnips off the soil after a decree for partition, though contrary to the custom of the country between landlord and tenant (*c*), as the relation of landlord and tenant cannot be implied by mere occupation of one tenant in common (*d*).

As to the right of one tenant in common to compel contribution for ordinary repairs, see cases cited in note (*e*).

Landlord and Tenant.—Generally speaking, and in the absence of any exception or agreement to the contrary, the lessee has the fruit, mast, shade and loppings of trees, and the inheritance is in the lessor (*f*).

No user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste; the tenant is entitled to assume that it is fit to be used for the purposes for which it is let, and, in the *absence of agreement* to that effect, a tenant is not liable for the destruction of the property, if such destruction is due to a business-like user of it for the purpose for which it was intended (*g*). Nor is a tenant liable for fair wear and tear (*h*), or for accidental damage not resulting from negligence (*i*). But if he maliciously injure a building, or sever fixtures from the freehold, he will be guilty of a misdemeanour (*k*).

Liberty to a tenant to build, with a proviso that he shall repair and maintain present and future erections, does not prevent him,

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(*a*) L. R. 4 C. P. 328, affir. L. R. 5 H. L. 464.

(*b*) Wright *v.* Atkyns, 1 V. & B. 313.

(*c*) Bailey *v.* Hobson, L. R. 5 Ch. 180; Bewes, 266.

(*d*) M'Mahon *v.* Burchell, 2 Ph. 127; Henderson *v.* Eason, 2 Ph. 308; Bailey *v.* Hobson, supra.

(*e*) Leigh *v.* Dickeson, 15 Q. B. D. 60; Johnson *v.* Wild, 44 C. D. 146; *Re* Jones, (1893) 2 Ch. 461.

(*f*) Liford's Case, 11 Co. 46 b.

(*g*) Cf. Saner *v.* Bilton, 7 C. D. 815; Manchester Bonded, &c. *v.* Carr, 5 C. P. D. 507; Doherty *v.* Allman, 3 A. C. 709.

(*h*) Torriano *v.* Young, 6 C. & P. 8; but see Davies *v.* D., 38 C. D. 499.

(*i*) White *v.* McCann, 1 Ir. C. L. R. 205; Nugent *v.* Cuthbert, Sugden, Real Property, p. 475.

(*k*) 24 & 25 Vict. c. 97, s. 13; see Bewes, 258.

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in the absence of a negative covenant, from pulling down and rebuilding (*a*).

A ground landlord may have an injunction to stay waste against an under-lessee who holds by lease from the original lessee (*b*).

As to the proper mode of estimating damages where a tenant has covenanted not to commit waste, see *Whitham* v. *Kershaw* (*c*).

In *Meux* v. *Cobley* (*d*), under an agricultural lease of a farm near London, the tenant covenanted to yield up the premises at the end of the term, together with all fixtures and "improvements" fixed, &c., during the term, and cultivate "in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The tenant put up glass houses for the production of hothouse produce. The lessor claimed an injunction restraining the lessee from converting the farm into a market garden, alleging breach of covenant and waste. It was proved that the inheritance was not damaged, but benefited by what the lessee had done, and the action was dismissed by *Kekewich*, J., with costs (*e*); and the learned Judge expressed an opinion that the Agricultural Holdings (England) Act, 1883, goes a long way towards getting rid of some of the old common law doctrines as to waste (*f*).

Infants.—An injunction to protect the estate of an infant *en ventre sa mère* may be granted (*g*). The Court, on the application of the trustees of the will or settlement, or of the next friend of the infant, may order money to be spent in repairing the premises, or may authorise the cutting of timber, &c. (*h*). If the instrument under which the infant is entitled comes into operation after December 31, 1881, the Conveyancing Act, 1881, s. 42, will apply, unless a contrary intention is expressed. And see the Settled Land Acts, 1882-1890 (*i*).

Lunatics.—The committee of the estate of the lunatic is the proper person to take any proceedings that may be necessary to protect the estate, but he should obtain, before doing so, the

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(*a*) *Re* McIntosh, 61 L. J. Q. B. 164.

(*b*) Farrant *v.* Lovel, 3 Atk. 723.

(*c*) 16 Q. B. D. 613; and see Conquest *v.* Ebbetts, (1896) A. C. 490.

(*d*) (1892) 2 Ch. 253.

(*e*) Following Jones *v.* Chappell, 20 Eq. 539; Doherty *v.* Allman, 3 A. C. 709.

(*f*) And see Agricultural Holdings Act, 1906, s. 3.

(*g*) Lutterell's case, cited Pr. Ch. 50; Robinson *v.* Litton, 3 Atk. 209.

(*h*) *Ex p.* Grimstone, 4 Bro. Ch. 235; *Re* Colyer, 55 L. T. 344; Hussey *v.* H., 5 Madd. 44.

(*i*) Settled Land Act, 1882, ss. 59, 60.

sanction of a Judge in lunacy (*a*). And the Court will do what is fit and proper for the management of the estate, as regards timber, mines, repairs, &c. (*b*).

Mortgagor and Mortgagee.—In interfering to restrain acts in the nature of waste (*c*) committed by a mortgagor or mortgagee, equity did not act upon the principles governing the common law of waste. It interfered in order that the contract between the mortgagor and mortgagee might be fairly carried out (*d*), not in order that the inheritance might be protected against the wrongful acts of a limited owner. Thus in *Usborne* v .*U.* (*e*), a tenant in fee simple, who, after mortgaging land by way of demise had remained in possession and had cut timber, was restrained by injunction from cutting more. Equity only interfered against the mortgagor, when the security by his acts might be so reduced as to render it inadequate (*f*).

If it be proved that by the cutting of timber or the opening and working of mines the security is or would be made insufficient, a mortgagor may be restrained from these acts (*g*), for he will not be allowed to prejudice the incumbrance. There is no abstract right in the mortgagee to restrain the mortgagor from cutting timber or working mines. "It must be shown to the Court that the acts complained of substantially impair the value which was the basis of the contract between the parties at the time it was entered into" (*h*).

A mortgagee in possession was never in equity allowed to dispose of any part of the inheritance, unless it appeared his security was defective (*i*). In that case he was allowed to make the most of the property, but at his own risk (*k*). Under the Conveyancing Act, 1881, s. 19 (1) (iv.), a mortgagee in possession has power to cut and sell timber and other trees ripe for cutting and not planted or left standing for shelter or ornament, or to contract for any such

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(*a*) Daniell, Ch. Pr. (ed. 1901), pp. 135, 136.

(*b*) The Lunacy Act, 1890, ss. 117, 118, 120, 123. The Settled Land Act, 1882, ss. 59—62.

(*c*) See per *Romilly*, M. R., in Millett *v.* Davey, 31 B. 470, at p. 475, where the inexactitude of the word "waste" in this relation is pointed out.

(*d*) See, e.g., Farrant *v.* Lovel, 3 Atk. 723; King *v.* Smith, 2 Ha. 239.

(*e*) Dick. 75.

(*f*) See note to Hampton *v.* Hodges, 8 V. 105.

(*g*) Harper *v.* Aplin, 54 L. T. 383; and see Blaney *v.* Mahon, 2 Eq. Cas. Abr. 758; Usborne *v.* U., supra; Farrant *v.* Lovel, supra; Hampton *v.* Hodges, supra; Humphreys *v.* Harrison, 1 J. & W. 581; King *v.* Smith, 2 Ha. 239.

(*h*) Per *Wigram*, V.-C., in King *v.* Smith, supra.

(*i*) Withrington *v.* Banks, Select Cas 30, fol ed.

(*k*) Millett *v.* Davey, 31 B. 470.

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cutting and sale, to be completed within any time not exceeding twelve months from the date of the contract.

Rent-charge.—In *Sandeman* v. *Rushden* (*a*) it was held that the owner of a rent-charge was not in the position of a mortgagee, and therefore could not obtain an injunction restraining waste by the owner of the land out of which the rent-charge issued. In that case the rent-charge was not in arrear, but the owner threatened to sell certain machinery, erected on the land in pursuance of covenants contained in the deed creating the rent-charge, which the grantor of the charge was bound to maintain. It is submitted that, though the decision may have been correct, yet the grounds assigned for it are not very satisfactory. They were in effect that the owner of a rent-charge had no common law remedy for waste, and that he was not a mortgagee. The common law of waste has, however, as above pointed out, no application in determining the action of equity in its interference with either mortgagor or mortgagee—equity acted independently of the position of the parties at common law. In interfering in favour of the mortgagee equity was merely applying a general principle, under which it had safeguarded the interests in land of many persons who received no protection at common law (*b*). It is difficult to see why this principle, applicable where a mortgage security is imperilled, should not be applied in favour of the owner of a rent-charge, under circumstances in which his charge is endangered.

Executory Devise.—It seems now to be settled that a tenant in fee, subject to an executory devise over, is in the same position in equity as a tenant for life, without impeachment for waste, *i.e.*, he is dispunishable of legal, but impeachable of equitable waste (*c*).

Executory Trusts.—Where, in an executory trust, words which would elsewhere give estates of inheritance are held to confer only estates for life with remainders, the tenants are made unimpeachable of waste, and so in cases where a strict settlement is directed. If, however, the trust, either expressly or by reference, directs or shows an intention that life estates should be given, they cannot be made unimpeachable of waste (*d*).

Ecclesiastical Waste.—A rector or vicar is in the same position

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(*a*) 61 L. J. Ch. 136.

(*b*) See, e.g., Lord *Hardwicke's* judgment in Farrant *v.* Lovel, 3 Atk. 723.

(*c*) Turner *v.* Wright, 2 De G. F. & J. 234, at p. 246; see Challis R. P., 3rd ed., p. 223.

(*d*) See supra, notes to Glenorchy *v.* Bosville, pp. 813, 814.

as an ordinary tenant for life (*a*) and has no right to fell timber except for necessary repairs to the vicarage-house, buildings, and premises (*b*), neither can he commit waste for the purpose of making a general repairing fund (*c*). He may however, perhaps, have a right to dispose of timber, and apply the proceeds in getting some other timber for repairs at a more convenient place (*d*).

And it seems that not only may the patron of a living proceed against a rector or vicar for an injunction to restrain the improper felling of timber, but notwithstanding the remarks in *Knight* v. *Mosely* (*e*) and *Holden* v. *Weekes* (*f*), he may proceed against either of them for an account of the receipts from timber improperly felled, in order that the profits may be invested for the benefit of the advowson (*g*); at any rate, it is clear that where the timber has been improperly felled, but not sold, by the rector or vicar, the patron may obtain an order from the Court that the timber may be sold, and the proceeds brought into Court (*h*).

And the ordinary may take proceedings to prevent waste by collusion between the patron and the incumbent (*i*).

Dilapidations.—An incumbent is bound to maintain the parsonage and chancel in good and substantial repair, but is not bound to do merely ornamental repairs, and each incumbent has a remedy against the prior incumbent or his representatives for default in this respect (*k*).

Mines, &c.—An incumbent cannot open and work mines (*l*), even with the consent of patron and ordinary; the consent of the Ecclesiastical Commissioners is necessary (*m*). Further, an incumbent cannot lawfully continue or authorise a tenant to work mines in the

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(*a*) See, e.g., Huntley *v.* Russell, 13 Q. B. 572, at p. 588. Cf. St. Albans (Duke of) *v.* Skipwith, infra; and see as to the effect of the statutes of Elizabeth, 13 Eliz. c. 10; 13 Eliz. c. 20; 14 Eliz. c. 11; 14 Eliz. c. 14, Ecclesiastical Commissioners *v.* Wodehouse, (1895) 1 Ch. 552, at p. 562.

(*b*) Strachy *v.* Francis, 2 Atk. 217; Marlborough (Duke of) *v.* St. John, 5 De G. & Sm. 174.

(*c*) Sowerby *v.* Fryer, 8 Eq. 417, 422.

(*d*) Ibid. And see Wither *v.* Dean of Winchester, 3 Mer. 421, 426; Knight *v.* Mosely, Amb. 176.

(*e*) Amb. 176.

(*f*) 1 John. & H. 278.

(*g*) Sowerby *v.* Fryer, 8 Eq. 423.

(*h*) Ibid.

(*i*) Holden *v.* Weekes, 1 John. & H. 278.

(*k*) Wise *v.* Metcalfe, 10 B. & C. 299; Bunbury *v.* Hewson, 3 Exch. 558; Percival *v.* Cooke, 2 C. & P. 460; Bewes, Waste, 323, 324.

(*l*) Knight *v.* Mosely, supra.

(*m*) Ecclesiastical Commissioners *v.* Wodehouse, (1895) 1 Ch. 552; correcting head-note in Marlborough *v.* St. John, supra; and explaining Holden *v.* Weekes, 1 John. & H. 278.

glebe land which have been unlawfully opened (*a*), but he may work mines already lawfully open (*b*).

Cultivation of Glebe.—The parson or vicar is not entitled to use his glebe as an absolute owner might do, but it has been suggested that he is in a somewhat better position than a tenant for life or a lessee for years (*c*). The Court will, at the instance of the patron, restrain him from waste (*c*).

Injunction.—Where any act in the nature of waste was threatened or committed, the Court would grant an injunction to maintain the *status quo*, in aid of the Ecclesiastical Court, in which it is not the practice to interfere by injunction to prevent an act being done (*d*).

The bishop or patron, the Ecclesiastical Commissioners (*e*) or churchwardens, may obtain an injunction against waste by the incumbent or others (*f*). Possibly where the Ecclesiastical Courts have full jurisdiction, the High Court may decline to interfere (*g*): at any rate, it will decline to grant a mandatory injunction in cases in which a faculty might be obtained confirming the very act which the Court is asked to remedy.

Account.—It is laid down in *Knight* v. *Mosely*, supra, and *Holden* v. *Weekes*, supra, that a patron cannot file a bill for an account, but *James*, V.-C., in *Sowerby* v. *Fryer*, supra, said that doctrine always seemed to him utterly unintelligible. Having regard to the Judicature Act, 1873, s. 24, sub-s. 7 (*h*), it is probable that such relief would now be granted (*i*).

3. "Without Impeachment of Waste."

The "special licence" mentioned in the Statute of Marlborough (*k*) is commonly expressed by this phrase (*l*). The use of these words

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(*a*) Ibid., following Huntley *v.* Russell, 13 Q. B. 572, 591; Bartlett *v.* Phillips, 4 De G. & J. 421.

(*b*) Knight *v.* Mosely, supra; Bewes, p. 329.

(*c*) Per Lord *Langdale*, in St. Albans (Duke of) *v.* Skipwith, 8 B. 354; Bewes, 328, where, however, the acts complained of were apparently ameliorating waste.

(*d*) See Marriott *v.* Tarpley, 9 Si. 279, commented upon by *Kay*, J., in Batten *v.* Gedye, 41 C. D. p. 516; see Bewes, p. 330.

(*e*) Ecclesiastical Commissioners *v.* Wodehouse, supra.

(*f*) Marriott *v.* Tarpley, supra; Hoskyns *v.* Featherstone, 2 Bro. Ch. 552; Fitzwilliam *v.* Moore, 3 Ir. Eq. R. 615; Cardinall *v.* Molyneux, 4 De G. F. & J. 117. See Seton (1901), p. 549, Form 11.

(*g*) Cf. Batten *v.* Gedye, 41 C. D. p. 517.

(*h*) See Annual Practice, 1912, Vol. II., p. 613.

(*i*) See further on this subject, Phillimore's Ecclesiastical Law (ed. 1895), Vol. II., Part 5, ch. 5.

(*k*) 52 Hen. III. c. 24.

(*l*) Woodhouse *v.* Walker, 5 Q. B. D. p. 407.

not only exempts a tenant for life from the penalties of the statutes of Marlborough and Gloucester; but also, as was determined in *Lewis Bowles' Case* (*a*), gives such a tenant as great a power to do waste and to convert it at his pleasure as a tenant in tail has. But he must execute this power during the privity of his estate and when his estate is in possession (*b*). In general, therefore, except under particular circumstances, as, for instance, where the exemption from liability to waste was made subordinate to a discretionary power in trustees to fell timber (*c*), a tenant for life *without impeachment of waste* could not be restrained in equity from committing ordinary waste; for that would be to determine that he should not make use of the property which the law allowed him. But, after the decision in *Lewis Bowles' Case*, several instances were considered, in which this very large power might be exercised contrary to *conscience, and in an unreasonable manner*, by a tenant for life; as, where *his act was to the destruction* of the thing settled, and equity interfered (*d*).

A tenant unimpeachable, being in possession, may therefore enjoy the estate to the same extent as a tenant in fee simple, save that he may not commit "equitable waste," as to which see note 4, infra, and it seems it is his duty to keep up the buildings (*e*). He may, therefore, cut timber (*f*), and even ornamental timber if it be such that the Court would have ordered to be cut (*g*), open and work mines (*h*), plough ancient meadows (*i*), and his own lessees are, as between themselves and the remaindermen, dispunishable also (*k*). The privilege is annexed to the privity of estate, and merger may destroy it; so if a lessee for years, *unimpeachable*, has the lease confirmed to him for life, he becomes chargeable for waste (*l*).

(*a*) 11 Rep. 79 b; Tudor's Real Property Cases, (1898), p. 86.

(*b*) Lewis Bowles' Case, 11 Rep. 79 b; Lady Evelyn's Case, cited 2 Swans. 172; Fleming *v.* F., cited in the principal case, 3 Atk. 756.

(*c*) Kekewich *v.* Marker, 3 Mac. & G. 311; and see Briggs *v.* Oxford, 5 De G. & Sm. 156; but cf. Lovat *v.* Leeds, 2 Dr. & Sm. 75; Saville *v.* S., 2 Atk. 458; Aspinwall *v.* Leigh, 2 Vern. 218; Bennett *v.* Wyndham, 23 B. 251.

(*d*) See Aston *v.* A., 1 Ves. Sen. 265, and Part 4, infra.

(*e*) Per *James*, L. J., *Re* Leigh, L. R. 6 Ch. at p. 892.

(*f*) Smythe *v.* S., 2 Swans. 251.

(*g*) Baker *v.* Sebright, 13 C. D. 179.

(*h*) Piers *v.* P., 1 Ves. Sen. 521; Bewes, 147.

(*i*) Tracey *v.* T., 1 Vern. 23; Piers *v.* P., 1 Ves. Sen. 521.

(*k*) Bray *v.* Tracy, W. Jones, 51.

(*l*) Lewis Bowles' Case, 11 Rep. 79 b.

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If *trustees* are made *unimpeachable for waste*, although at law they might cut timber in the same manner as a tenant for life without impeachment of waste, equity will require them to act in their trust with the same discretion as the Court itself would act (*a*).

As to exceptions to this clause "without impeachment of waste," see infra, p. 1043.

The Settled Estates Act, 1877, s. 46, requires that leases granted by tenants for life should "be not made without impeachment of waste" (*b*). In *Davies* v. *D.* (*c*), such a lease contained a covenant to repair by the lessee, but exempted him from liabilities "for fair wear and tear and damage by tempest." The lease was held void under the statute (*d*).

As to making tenants for life unimpeachable in case of executory trusts, see note "Executory trusts," supra, p. 1038.

As to the provision in the Judicature Act, 1873, s. 25, s.s. 3, as to tenants for life unimpeachable for waste, see infra, p. 1043.

4. Equitable Waste.

As has been stated, a tenant for life without impeachment of waste (see p. 1040, supra) had such an interest in the estate that he could do waste and convert its proceeds to his use to the same extent as a tenant in tail or in fee (*e*). This power being capable of great abuse, the Court of Chancery, at an early period, granted injunctions restraining tenants for life unimpeachable for waste from committing what is known as equitable waste (*f*). This kind of waste may be defined as an act of wanton spoliation or destruction affecting the individual character and amenities of the estate as originally settled (*g*).

(*a*) Downshire (Marquis of) *v.* Sandys, 6 V. 115.

(*b*) And see the Settled Land Acts, 1882, s. 6, and 1890, s. 7.

(*c*) 38 C. D. 499.

(*d*) But see Yellowly *v.* Gower, 11 Exch. 274; Nugent *v.* Cuthbert, Sugden Real Prop. p. 475; Torriano *v.* Young, 6 C. & P. 8; *Re* Cartwright, 41 C. D. 535; supra, p. 1026, and the remarks of Mr. Bewes, Bewes on Waste, p. 218.

(*e*) Lewis Bowles' Case, 11 Rep. 79b.

(*f*) Abraham *v.* Bubb, 2 Eq. Ca. Abr. 757, cited in the principal case; Williams *v.* Day, 2 Ch. Ca. 32; Aston *v.* A., 1 Ves. Sen. 265; Marker *v.* M., 9 Ha. 1; Bewes, 166; Vaizey, Settlements, 838.

(*g*) See Aston *v.* A., 1 Ves. Sen. 266; Turner *v.* Wright, 2 De G. F. & J. 234; Talbot *v.* Hope-Scott, 4 K. & J. 96; Baker *v.* Sebright, 13 C. D. p. 186; Seton (1901), pp. 549 et seq.; Pollock, Torts (Ed. 1908), p. 354.

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A malicious intent, however, is not necessary to induce the Court to act, for the tenant has no right to alter the property, although he may think the change judicious for the family (*a*). And the Court, in order to prevent what may be an act of irremediable mischief, will restrain a tenant for life from a contemplated act which may result in such injury to the property (*b*).

In some cases there is an "exception" to the clause "without impeachment of waste." For instance, in the principal case the tenant for years was unimpeachable "excepting voluntary waste;" and Lord *Hardwicke* says, "the plaintiff's father was only tenant for years, punishable for *wilful* waste, and had no present right to or interest in the timber other than the mast and shade and necessary botes," thus rendering the preceding part of the clause, "without impeachment of waste," which, standing alone, would have conferred upon him the power of felling the timber, of no effect.

See the remarks upon this case in *Vincent* v. *Spicer* (*c*), where *Romilly*, M. R., terms it "a very strong case." The facts there were briefly as follow:—Sir F. Vincent, on his marriage, settled his estate on himself for life, "without impeachment for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." It was held by his Honour, that Sir F. Vincent was entitled to cut all such timber (except ornamental), as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management (*d*).

By the Judicature Act, 1873, s. 25, s.s. 3, it is enacted as follows: "An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any *legal* right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

Equity, in cases of equitable waste, interposed to prevent the tenant for life from exercising his legal right, it being considered an unconscionable use of such right. In this instance therefore,

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(*a*) Leeds *v.* Amherst, 2 Ph. 117; Vaizey, 898.

(*b*) Baker *v.* Sebright, 13 C. D., p. 188; and see Bubb *v.* Yelverton, 10 Eq. 465; cf. Talbot *v.* Hope-Scott, 4 K. & J. 96.

(*c*) 22 B. 380.

(*d*) See Higginbotham *v.* Hawkins, L. R. 7 Ch. 676; Bewes, p. 155.

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there was a real "conflict" or "variance" between the rules of law and equity.

By the Judicature Act, 1873, s. 25, s.s. 8 (*a*), it is enacted that "A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable" (*b*). The result would seem to be that there is now no legal right in a tenant for life to commit equitable waste, and that all the Courts will interfere to prevent such waste whenever it may be "just and convenient" so to do.

Where the act has been done, an account may be ordered and damages given against the wrongdoer (*c*).

The particular acts which the Court has restrained, or in respect of which it has given a remedy to the remainderman, are:—1. The destruction of, or injury to, the mansion-house, or other buildings on the estate. 2. Cutting down timber planted or left for ornament or shelter; or cutting timber or other trees in an unhusbandlike manner, or at unseasonable times (*d*).

Buildings.—A leading authority upon this subject is *Vane* v. *Lord Barnard* (*e*). There Lord Barnard, who, under the marriage settlement of his son, was tenant for life *without impeachment of waste* of Raby Castle, with remainder to his son for life, having taken some displeasure against his son, got two hundred workmen together, and

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(*a*) Annual Practice, (1912) vol. i., pp. 807 et seq.

(*b*) See as to the discretion the Court will exercise in granting or refusing an injunction in cases of waste, Doherty *v.* Allman, 3 A. C. 709, infra, p. 1055, and p. 1056, and supra, p. 1024, note (*g*).

(*c*) Cairns' Act, 21 & 22 Vict. c. 27, s. 2; St. Law Rev. Act, 1883, ss. 3 and 5; per *Baggalay*, L. J., in Sayers *v.* Collyer, 28 C. D. 103, p. 107; *Re* R., (1906) 1 Ch. 731 (C. A.); Cowper *v.* Laidler, (1903) 2 Ch. 337; Elmore *v.* Pirrie, 57 L. T. 333; cf. Doherty *v.* Allman, 3 A. C. 709.

(*d*) Vaizey, p. 1889; Seton (1901), 550.

(*e*) 2 Vern. 738.

of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, &c., to the value of 3,000*l.* Lord *Cowper* granted an injunction to stay committing of waste by pulling down the castle, and decreed that the castle should be put into its former condition; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master was directed to see it done at the expense of Lord Barnard, and decreed the plaintiff his costs (*a*).

But where a tenant for life without *impeachment of waste* has pulled down an old mansion, and used the materials in building a better mansion-house in a more desirable position, his estate has been held not to be liable to account for the value of the materials of the old house (*b*).

Upon a similar principle Lord *Hardwicke* said, that if tenant for life without impeachment of waste pulled down farmhouses in general, he would no more scruple restraining him than he would from pulling down the mansion-house, unless he pulled down two to make into one, in order to bear the burthen but of one, it tending equally to the destruction of the thing settled; or if he should grub up a wood settled, so as to destroy the wood absolutely, he should restrain him, as it would be what is termed in *Abrahall* v. *Bubb* (*c*) *extravagant and humorsome waste* (*d*).

In *Rolt* v. *Somerville* (*e*), *Hardwicke*, C., decreed reinstatement by the defendant, husband of a tenant for life unimpeachable, of houses and outbuildings pulled down and sold.

If between a lessor and his tenant there be an affirmative covenant, e.g., to maintain buildings in their present condition and deliver them up in such condition at the end of the term, the Court, if asked to grant an injunction, will consider, before it exercises its discretion, whether by so interposing it will do more harm than good; whether the injury it is asked to restrain is an injury which, if done, cannot be remedied; whether it can be sufficiently atoned for by damages; whether the right to damages can be decided once and finally, or whether there must be a repetition of actions to recover damages from time to time; whether the effect of granting an injunction will damage the defendant more than it will benefit the plaintiff; and if it decides against the plaintiff, it may leave him to his right to damages

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(*a*) See S. C., 1 Eq. Ca. Abr. 399, 1 Salk. 161; and see Leeds *v.* Amherst, 20 B. 239; Aston *v.* A., infra; Cooke *v.* Whaley, or Winford, 1 Eq. Cas. Abr. 221, 400; Williams *v.* Day, 2 Ch. Cas. 32.

(*b*) Morris *v.* M., 3 De G. & J. 323.

(*c*) 2 Freem. 54.

(*d*) Aston *v.* A., 1 Ves. Sen. 265; Dunn *v.* Ryan, 7 Ir. R. Eq. 143.

(*e*) 2 Eq. Ca. Abr. 759; Bewes, 168.

only. But if in such a case there is a *negative* covenant, e.g., that the lessee shall not turn the buildings to any other than their present use, the Court has no discretion to exercise; all it has to do is to say by way of injunction that which the parties have said by covenant—namely, that the thing shall not be done (*a*).

But, in such a case as the one supposed, the lessor may base his action on waste as well as contract, and the Court will then consider whether there is or is not any substantial damage which would accrue to the lessor from the acts of the lessee. And, although such acts may amount technically to waste, if it thinks them trivial, or that the inheritance is benefited rather than injured by them, it will not interfere. But if they are substantially injurious, then it will interfere by injunction to restrain such acts, and will order an account of the waste done for the purpose of recompensing the sufferer (*b*).

Timber (ornamental).—Although a tenant for life without impeachment of waste, and a tenant in tail after possibility of issue extinct, may fell all the ordinary timber upon the estate, it has long been established that a Court of equity will restrain them from committing *equitable waste*, by felling timber planted or left standing for the shelter or ornament of a mansion-house or grounds (*c*).

The form of the injunction generally is against cutting "timber or other trees planted or growing, &c.," "for the ornament, protection, or shelter, &c." (*d*).

The principle upon which the Court has gone, seems to be, that if the testator, or the author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and. upon a competition between those parties, the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them

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(*a*) Doherty *v.* Allman, 3 A. C., per *Cairns*, C., pp. 720, 721, followed *Re* McIntosh, &c. Co., 61 L. J. Q. B. 164; McEacharn *v.* Colton, (1902) A. C. 104; Osborne *v.* Bradley, (1903) 2 Ch. 446, 450; Formby *v.* Barker, (1903) 2 Ch. 539, 553, and see Rose *v.* Spicer, (1911) 2 K. B. 234 and supra, p. 290.

(*b*) Doherty *v.* Allman, pp. 722, 724; see Coppinger *v.* Gubbins, 3 Jo. & Lat. 411; Jones *v.* Chappell, 20 Eq. 539; Tucker *v.* Linger, 21 C. D. p. 28.

(*c*) Rolt *v.* Somerville, 2 Eq. Ca. Abr. 759; Packington's Case, 3 Atk. 215; Strathmore *v.* Bowes, 2 Bro. Ch. 166; Chamberlyne *v.* Dummer, 1 Bro. Ch. 166, 3 Bro. Ch. 549; Bedoyère *v.* Greville-Nugent, 25 L. R. Ir. 143.

(*d*) See Seton (1901), p. 542, 543, Forms 1 and 2.

to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court (*a*). So, likewise, Sir *William Grant* has observed, "As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental" (*b*). The question is with what intent the timber was planted, or left standing, not whether it is in fact ornamental, or useful for shelter, and so expert evidence founded on inference from the appearance of the estate is admissible to show the intent of the settlor (*c*).

The fact to be determined is, that the timber was planted for ornament, or if not originally planted, was left standing for ornament *by some person having the absolute power of disposition* (*d*). But in *Bedoyère* v. *Greville-Nugent* (*e*), it was said that trees not planted or left standing *exclusively* for ornament are not necessarily excluded from the rule.

The principle has been extended from the ornament of the house to outhouses and grounds, then to plantations, vistas, avenues, and to all the rides about the estate for ten miles round (*f*); but although the protection may be afforded to rides or avenues at a considerable distance from a mansion, it will not necessarily be extended to the woods through which they pass, so as to prevent them being cut for repairs (*g*). In *Downshire* v. *Sandys* (*h*), the injunction was extended to clumps of firs on a common two miles from the house, although land belonging to other persons intervened. "If," observed Lord *Eldon*, C., "the principle has been rightly applied, it is very difficult in argument to say it cannot be applied to a common as well as in field lands, and that the contiguity or remoteness, *if de facto it was planted* (or left standing) *for ornament*, can alter the principle upon which the rule of the Court is to be applied."

(*a*) Per *Eldon*, C., in Downshire (Marquis of), *v.* Sandys, 6 V. 110.

(*b*) Mahon *v.* Stanhope, 3 Madd. 523 (n.); and see Burges *v.* Lamb, 16 V. 174; Coffin *v.* C., Jac. 70; Marker *v.* M., 9 Ha. 1, 17.

(*c*) Weld-Blundell *v.* Wolseley, (1903) 2 Ch. 664.

(*d*) Per *Eldon*, C., Wombwell *v.* Belasyse, infra; and see Mickelthwait *v.* M., 1 De G. & J. 504; and cf. Coffin *v.* C., Jac. 70, p. 71.

(*e*) 25 L. R. Ir. 143.

(*f*) Per *Eldon*, C., 6 V. 110; and see Jebb *v.* J., Johnes *v.* J., and Tamworth *v.* Ferrers, cited 6 V. 110; Williams *v.* M'Namara, 8 V. 70.

(*g*) Wombwell *v.* Belasyse, 6 V. 110 a. (n.).

(*h*) 6 V. 107.

In *Day* v. *Merry* (*a*), the principle applicable to equitable waste was extended to trees planted for the purpose of excluding objects from view.

But circumstances may render the felling of ornamental timber justifiable. "For, if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold, that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste" (*b*). So it seems that decaying timber might be cut which injured or impeded the growth of any other ornamental trees adjoining thereto (*c*). But such cutting should generally be done under the supervision of the Court (*d*).

So, likewise, ornamental timber may be felled if it be so near to a house as to be prejudicial to its healthiness, but the onus of proof will lie upon the persons felling the timber, who will be restrained from doing so on failure of proof (*e*). Again, the dedication may be limited by an allowance of the use of ornamental timber for repairs to the house (*f*).

Generally, where there is no mansion, there will be no protection to the trees (*g*).

But where, however, it is either proved, or may be inferred, that in demolishing, or after the demolition of, a mansion-house, a testator intended, designed, or wished to rebuild it, or to reside at, or erect a mansion-house, or place of residence on that estate, or intended, designed, or wished, that any devisee under his will should do so, timber, which was ornamental to the mansion-house while in existence, may be protected by the Court from being felled by a tenant for life without impeachment of waste (*h*). And in two well-known cases, the ornamental timber has been protected although the mansion-house had been pulled down: see *Wellesley* v. *W.* (*i*), and *Morris* v. *M.* (*k*).

(*a*) 16 V. 375.

(*b*) Per *Grant*, M. R., in Mahon *v.* Stanhope, 3 Madd. 523 (n.).

(*c*) Lushington *v.* Boldero, 6 Madd. 149, 150; Bedoyère *v.* Greville-Nugent, 25 L. R. Ir. 143; Ford *v.* Tynte, 2 De G. J. & S. 127, and the form of inquiry, Seton (1901), p. 544. See also Baker *v.* Sebright, 13 C. D. 179.

(*d*) See Baker *v.* Sebright, supra.

(*e*) See Campbell *v.* Allgood, 17 B. 623.

(*f*) Ford *v.* Tynte, 2 De G. J. & S. 127, 134.

(*g*) Newdigate *v.* N., 2 Cl. & Fin. 601; Bewes, p. 184.

(*h*) See the remarks of *Knight Bruce*, L. J., in Micklethwait *v.* M., 1 De G. & J. 519.

(*i*) 6 Si. 497.

(*k*) 15 Si. 505, 11 Jur. 196.

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With reference to the last cited case, *Turner*, L. J., observed, that there seem to be two grounds on which the injunction in that case was granted; that the *tenant for life* could not, by pulling down the mansion-house, entitle himself to the ornamental timber; and that if he was justified in pulling down the mansion-house by reason of the estate in trustees being unimpeachable of waste, there was an intention to be collected from the power to grant building leases, that the mansion-house should be rebuilt; and that it was upon the latter ground, too, and upon the ground of there being villas upon the estate, and the general scope of the settlement, that the case of *Wellesley* v. *W.* (*a*) seems to have proceeded (*b*).

In *Ashby* v. *Hincks* (*c*), there was no mansion-house at the date of the settlement, but one was afterwards acquired under a power of exchange. In an action by a tenant in tail to restrain a tenant, *pur autre vie*, from cutting ornamental or sheltering timber, an enquiry was ordered as in *Marker* v. *M.* (*d*), and an injunction granted on plaintiff giving an undertaking as to damages.

Saplings and Underwood.—A Court of Equity will restrain a tenant for life *without* impeachment of waste, from cutting down saplings not proper to be felled (*e*); and from cutting underwood before it is of sufficient growth (*f*); but not from felling timber, *merely because it is not full grown or proper for building;* for, as observed by *Hardwicke*, C., the reasoning of the cases of pulling down farm or mansion-houses, or felling trees planted for ornament or shelter, does not come up to this, and it would be very dangerous for the Court to use such latitude as to extend this to the taking away the profits of the estate by tenant for life to the prejudice of the remainder-man, which his estate for life without impeachment for waste gives him liberty to do (*g*). Mr. Bewes (*h*) thinks this statement is much larger than would be recognised at the present time, as it is evident that a tenant unimpeachable, may not cut timber-like trees, unless they have become timber, though he may cut down those that have become timber, though still thriving.

In equitable as in legal waste if one act of waste be proved the

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(*a*) 6 Si. 497.

(*b*) See Micklethwait *v.* M., 1 De G. & J. 529.

(*c*) 58 L. T. 557.

(*d*) 9 Ha. 1.

(*e*) O'Brien *v.* O'B., Amb. 107; Downshire *v.* Sandys, 6 V. 108; and see Coffin *v.* C., 6 Madd. 17.

(*f*) Brydges *v.* Stephens, 6 Madd. 279, and see Hole *v.* Thomas, 7 V. 589.

(*g*) Aston *v.* A., 1 Ves. Sen. 266; and see Smythe *v.* S., 2 Swans. 251, Coffin *v.* C., Jac. 72.

(*h*) Bewes, Waste, p. 181.

Court will restrain equitable waste generally (*a*), and an injunction will be granted without evidence that cutting trees will cause damage (*b*).

There does not appear to be any settled form of inquiry as to what is ornamental timber applicable to all cases, for the question to what extent ornamental timber may be cut, must, it seems, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly. For instance, in some cases a wood may have been dedicated by the absolute owner for the purpose of ornament and shelter only; in others it may have been so dedicated, subject to its being used in the first place for the purpose of repairs, or even sale; and the form of inquiry would necessarily differ in each of these cases (*c*). As to orders to restrain equitable waste by the destruction of timber planted for shelter or ornament, or of too young growth, see the forms given in Seton (1901), pp. 542—545.

Trustees.—Where there has been a trust or restriction created for the preservation of ornamental timber, the Court will endeavour to enforce it, as it is not like a trust for purposes of benevolence, as to which the objects are unlimited and no standard can be found (*d*).

Where, moreover, trustees have power to fell timber large enough to comprehend ornamental timber, the Court, it seems, would not allow them unnecessarily to execute their power, to fell ornamental timber, but would direct them to leave that and to fell the timber which was not ornamental (*e*).

5. To whom the Proceeds of Waste belong.

A. Proceeds of Legal Waste. B. Proceeds of Equitable Waste.

A. Proceeds of Legal Waste. By the common law uncontrolled by equity, where things are severed from the inheritance *by waste*, or by the act of God, as by tempest, or by a trespasser (*f*), while a tenant for life, *impeachable*, is in possession, whether they are materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of

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(*a*) Coffin *v.* C., 6 Madd. 17.

(*b*) Vaizey, 898: Bubb *v.* Yelverton, 10 Eq. 465; Baker *v.* Sebright, 13 C. D. p. 188.

(*c*) See Ford *v.* Tynte, 2 De G. J. & S. 127, 134; Seton (1901), p. 551; see also Halliwell *v.* Phillips, 4 Jur. (N. S.) 607; Wombwell *v.* Belasyse, 6 V. 110 (n).

(*d*) Marker *v.* M., 9 Ha. 1, 18, 20.

(*e*) Downshire *v.* Sandys, 6 V. 109; see Kekewich *v.* Marker, 3 Mac. & G. 311; Aspinwall *v.* Leigh, 1 Eq. Ca. Abr. 400; Bennett *v.* Wyndham, 23 B. 521.

(*f*) Bewick *v.* Whitfield, 3 P. W. 267.

inheritance *in esse*, whether in fee, or tail (*a*). And in such case an intermediate tenant for life, *unimpeachable*, cannot recover the proceeds in trover, because it seems he has no right to the timber cut before his estate came into possession (*b*).

Timber, therefore, properly so called, that is oak, ash and elm, over twenty years old, and other trees which are timber by custom (*c* when cut down by a tenant for life, impeachable, or a stranger, belongs, at law, to the first owner of the inheritance. Equity followed this rule of law (*d*): except where either (a) there was collusion between the tenant for life and the next vested remainder-man, or (b) timber was felled under an order of the Court or by a tenant for life without an order of the Court, but in proper management of the estate, and in a manner which the Court would have authorised had application been made for its sanction.

Collusion.—Where timber has been cut down by a tenant for years, or life, impeachable for waste, *in collusion* with the first owner of the inheritance, equity, as in the principal case, has interfered and has prevented such owner of the inheritance from getting any benefit by ordering the fund arising from the sale of the timber to be invested so as to follow the uses of the settlement of the land from which the timber was severed, or if, as in the principal case, a prior owner of the inheritance came into existence afterwards, it has ordered the fund to be paid to him.

Where, moreover, the tenant for life of land has in himself the next existent estate of inheritance, subject to intermediate contingent remainders, he will not be allowed to take advantage of his own wrong in cutting down timber, but the Court will preserve it for the benefit of the contingent remainder-men (*e*).

But it seems the Court will not interfere unless it is satisfied that the defendant, in his character of owner of the next existent inheritance, is colluding with himself in his character of tenant for

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(*a*) Uvedall *v.* U., 2 Roll. Abr. 119; Whitfield *v.* Bewit, 2 P. W. 240; Bewick *v.* Whitfield, 3 P. W. 267; Lewis Bowles' Case, 11 Co. 79 b.; Tudor's Real Property Cases; Seagram *v.* Knight, L. R. 2 Ch. 628; Honywood *v.* H., 18 Eq. 306.

(*b*) Per *Kay*, J., *Re* Barrington, 33 C. D. p. 527, citing Pigot *v.* Bullock, 1 V. 479, 484.

(*c*) See Honywood *v.* H., 18 Eq. p. 309; Dashwood *v.* Magniac, (1891) 3 Ch. 306.

(*d*) Whitfield *v.* Bewit, 2 P. W. 240; Garth *v.* Cotton, supra, at pp. 1008, 1014; Pigot *v.* Bullock, 1 V. 479. The statements of *Romilly*, M. R., in Bagot *v.* B., 32 B. 509 at p. 523, are plainly against authority, and see *Re* Cavendish, (1877) W. N. 198.

(*e*) Williams *v.* Bolton, 3 P. W. 268, cited in note by Mr. Cox; Aston *v.* A., 1 Ves. Sen. 396; Powlett *v.* Bolton, 3 V. 374.

life, in such a manner that if there had been two distinct persons, the Court would have interfered upon the ground of fraud and collusion. See *Birch-Wolfe* v. *Birch* (*a*), where it appeared that the tenant for life, who was also owner of the first vested estate of inheritance, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which were themselves of a trivial character. The bill was dismissed by *James*, V.-C., who observed, "It would, in my judgment, be monstrous to say that a tenant in remainder, allowing a tenant for life to cut down timber in consideration and upon condition of the tenant for life doing these things for the benefit of the estate, was guilty of any fraudulent collusion which would induce this Court to extend this somewhat extraordinary jurisdiction to him; and if there would have been no ground for the interference of this Court in the case which I have supposed of tenant for life and tenant in remainder, I cannot put the case higher when it is the same individual who is doing the same thing in his double character with regard to the estate."

In this case the executor of the deceased tenant for life admitted that he had received the proceeds of certain timber cut by his testator, and was allowed, in the account directed to be taken against him, to take credit for the sums laid out by his testator in permanent improvements (*b*).

Timber ordered by the Court to be Felled or Cut in Due Course of Management.—Where a tenant for life impeachable for waste is in possession, the Court will order trees in a state of decay, or the standing of which is injurious to other trees, but not such as are merely ripe, unless they were injuring the growth of other timber, to be felled (*c*). This is done upon the ground, that the interest of the succession requires it, and the Court will direct the interest of the proceeds to be paid to the successive owners of the estate until the owner of the first absolute estate of inheritance *or* the first owner for life, unimpeachable for waste, on the determination of the preceding estates for life (*d*), is reached and the same rule applies when the Court adopts the act of a trustee who has felled timber (*e*). In *Honywood* v. *H.* (*f*), *Jessel*, M. R., expressed

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(*a*) 9 Eq. 683, 691.

(*b*) Birch-Wolfe *v.* Birch, 9 Eq. 683.

(*c*) Seagram *v.* Knight, L. R. 2 Ch. 628, 3 Eq. 398; Hussey *v.* H., 5 Madd. 44.

(*d*) Tooker *v.* Annesley, 5 Si. 235; Waldo *v.* W. 12 Si. 107; Philips *v.* Barlow, 14 Si. 263.

(*e*) Waldo *v.* W., supra; Gent *v.* Harrison, Johns. 517, 523; Cowley *v.* Wellesley, 1 Eq. 656.

(*f*) 18 Eq. 300, at p. 311. This

the opinion, that where timber was cut under the orders of the Court, the proceeds followed the trusts of the settlement, so that the capital would vest in the person entitled to the first vested estate of inheritance. Where the cutting has been done without the authorisation of the Court, *but in due course of management*, it appears that the rule before stated is applied in equity, and if a tenancy for life unimpeachable for waste precedes the next vested estate of inheritance, the tenant for life unimpeachable will be entitled (*a*).

Where the timber has been rightly sold under the order of the Court, all the consequences of conversion must follow, and there is no equity for reconversion as between the heir and personal representatives of the owner of the inheritance becoming entitled to the capital (*b*).

By the Settled Land Act, 1882 (*c*) :

Sect. 35, s.s. 1. " Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber or any part thereof."

Sect. 35. s.s. 2. " *Three fourth parts of the net proceeds* of the sale shall be set aside as and be capital money arising under this Act, and the *other fourth part thereof* shall go as rents and profits " (*d*).

Before this Act it was necessary for a tenant for life impeachable for waste to commence an action in order to have ripe timber felled under the direction of the Court. The course, as will have been observed, was to invest the whole proceeds, and give him no part of the capital, but only the income (*e*).

" *Fruit and Profit of Soil.*"—It must be remembered in this connection that it is not waste to consume a portion of the inheritance, when such portion is evidently intended to be enjoyed by each limited owner as profit or income (*f*). Therefore, where an

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view appears to be in accordance with principle. The question to-day is of diminished importance, having regard to the Settled Land Act, 1882, s. 35.

(*a*) Lowndes *v.* Norton, 6 C. D. 139; following Gent *v.* Harrison, Johns. 517; but see and compare Seagram *v.* Knight, L. R. 2 Ch. 632.

(*b*) Hartley *v.* Pendarves, (1901) 2 Ch. 498; and see Burgess *v.* Booth, (1908) 2 Ch. 648; and see Vol. I., ante, at p. 391.

(*c*) 45 & 46 Vict. c. 38.

(*d*) See *Re* Newcastle, 31 W. R. 782; *Re* Llewellin, 37 C. D. 317.

(*e*) Supra, p. 1052.

(*f*) See Dashwood *v.* Magniac, (1891) 3 Ch. 306, passim.

equitable tenant for life under a will, *impeachable for waste*, cut timber, and each year took the proceeds of sale, it was held that the proceeds belonged to her, as it was clearly the intention of the testator that the timber growing on the estate should be enjoyed as fruit and profit of the soil (*a*). So the produce of the sale of underwood-timber cut periodically, and of gravel where the pits had been worked before, ought to be paid by the trustees to the tenant for life, though impeachable for waste, as part of the income of the estate (*b*).

B. Proceeds of Equitable Waste. Ornamental Timber.—Where a tenant for life, unimpeachable for waste, or his assignees in bankruptcy, wrongfully fell ornamental timber, there is a certain conflict of authority as to the manner in which the proceeds should be dealt with. The author of the waste can take no benefit from his wrong, but whether the proceeds (subject to a direction to accumulate during the life of the tenant committing the waste) should be held upon the trusts of the settlement, or belong to the owner of the next vested estate of inheritance is not free from doubt. In *Butler* v. *Kynnersley* (*c*) *Lyndhurst, C.*, held that the proceeds of ornamental timber belonged to the person who at the time of the wrongful cutting was entitled to the next vested estate of inheritance, considering that in this matter there was no distinction between legal and equitable waste (*d*). On the other hand, in *Honywood* v. *H.* (*e*), *Jessel*, M. R., after noticing the decision in *Butler* v. *Kynnersley* (supra), said that modern decisions (*f*) had settled the law the other way, and that in the case of the commission of equitable waste the proceeds are invested, and the rule laid down where timber is felled under the order of the Court by a tenant impeachable for waste is followed, so that the income is given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take the money. Sect. 25. (3) of the Judicature Act, 1873 (*g*), takes from the tenant for life, unimpeachable for waste, the legal right to commit equitable waste. This section has not been judicially construed. It would

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(*a*) Ibid.

(*b*) Cowley *v.* Wellesley, 1 Eq. 656; and see Harris *v.* Evans, 20 W. R. 999 (cutting of turf).

(*c*) Otherwise Ormonde *v.* Kynnersley, 8 L. J. Ch. 67; 33 R. R. 180.

(*d*) See Rolt *v.* Somerville, 2 Eq. Cas. Abr. 759; but cf. the form of order in Wellesley *v.* W. 6 Si. 497.

(*e*) 18 Eq. 300, at p. 311.

(*f*) See form of order in Wellesley *v.* W., 6 Si. 497; Lushington *v.* Boldero, 15 B. 1; Leeds (Duke of) *v.* Amherst (Earl of), 2 Ph. 117, 125.

(*g*) See above, p. 1043.

appear that equitable waste is now to be deemed legal waste. If full effect is given to this provision it would appear that the owner of the next vested estate of inheritance is entitled to the proceeds of equitable waste.

An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber (*a*). But it does not follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision (*b*).

Windfalls.—A tenant for life is entitled to have the benefit arising from the sale of all such trees thrown down by the wind *as he would be entitled to cut himself* (*c*). But *timber* goes, as has been stated, to the first owner of the inheritance *in esse* (*d*).

With regard to a windfall of larch trees (which are not timber) the Court appears to dispose of the proceeds arising from the sale thereof in such a manner as will be just and equitable to all parties interested in a settled estate (*e*).

6. Remedies in respect of Waste.

The remedies for waste at law were by the writ of waste (*f*), by an action on the case for damages, by trover, or by an action for money had and received for the produce of the sale (*g*). In *Petre* v. *Ferrers* (*h*), a reversioner recovered in detinue or trover an altar stone and relics removed from a part of the property demised to a tenant by the trustees of a settlement.

In cases of waste, however, resort was generally had to Courts of equity, not only because, previous to 17 & 18 Vict. c. 125, s. 79, they had exclusive jurisdiction by injunction to interfere to prevent the threatened commission of waste, or to forbid its continuance,

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(*a*) Baker *v.* Sebright, 13 C. D. 179.

(*b*) Ibid.

(*c*) Bateman *v.* Hotchkin, 31 B. 486; Bagot *v.* B., 32 B. 509, 518.

(*d*) Honywood *v.* H., 18 Eq. 306.

(*e*) See *Re* Harrison, 28 C. D. 220; cf. *Re* Ainslie, 30 C. D. 485; Bewes, 206.

(*f*) Abolished by 3 & 4 Will. 4, c. 27, s. 36.

(*g*) Seagram *v.* Knight, L. R. 2 Ch. 632.

(*h*) 65 L. T. 568.

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and had alone full power to take accounts, but also because the law was defective and afforded no remedy in some cases of what was termed legal waste, and in other cases it took no cognizance whatever of what was called equitable waste (*a*).

By R. S. C., 1883, Order XVI. r. 37. it is provided that "In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest."

We have seen that under the Judicature Act, 1873, s. 25, s.s. 8 (supra, p. 1044), all the Courts can now grant an injunction to prevent *threatened or apprehended waste*, if they think it "just and convenient" so to do (*b*). In *Browne* v. *Duffy* (*c*) an interim order was granted *ex parte*, after writ issued, where serious waste endangering buildings was being committed, and the Courts now have full power to grant an injunction or damages (*d*), or the restoration of the particular thing may be ordered: see *Petre* v. *Ferrers* (supra). Any person with sufficient estate in reversion or remainder can institute proceedings (*e*), e.g., trustees to preserve contingent remainders (*f*), a tenant for life in remainder (*g*), a remainderman although there is an intermediate life estate, a jointress (*h*), a contingent executory devisee (*i*), a ground landlord against an under-lessee (*k*), and probably a receiver, even without waiting for an order giving leave, if the case is urgent (*l*).

But no injunction will be granted when the damage is trivial (*m*) or where the estate and interest of the person wasting has terminated before action (*n*).

The Court has granted an injunction to restrain equitable waste

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(*a*) See supra, note 1, pp. 1026, 1027.

(*b*) See for the general principles as to granting injunctions against waste, the judgment of *Kindersley*, V.-C., in Lowndes *v.* Bettle, 33 L. J. Ch. 451; Doherty *v.* Allman, 3 A. C. 709; Kehoe *v.* Lansdowne, (1893) A. C. 451, and the cases on this section in the Annual Practice, Order 50, r. 6, and cf. Seton (1901), pp. 549-555.

(*c*) 24 L. R. Ir. 13.

(*d*) See Sayers *v.* Collyer, 28 C. D. p. 108; *Re* R., (1906) 1 Ch. 730 (C. A.); Sarao *v.* Noel, 15 Q. B. D. 549; Jud. Act, 1873, s. 24, ss. 7.

(*e*) The following instances are taken from Bewes, p. 340.

(*f*) Garth *v.* Cotton, l.c.; Lansdowne *v.* L., 1 Madd. 116.

(*g*) Birch-Wolfe *v.* Birch, 9 Eq. 683.

(*h*) Lady Evelyn's Case, 2 Swans. 172 (n.).

(*i*) Robinson *v.* Litton, 3 Atk. 209.

(*k*) Farrant *v.* Lovel, 3 Atk. 723.

(*l*) Nangle *v.* Fingall (Lord), 1 Hog. 142; Kerr on Receivers, (1900) p. 199.

(*m*) See the judgment of *Cairns*, C., in Doherty *v.* Allman, 3 A. C. pp. 720, 721.

(*n*) Birch-Wolfe *v.* Birch, 9 Eq. 683; Elias *v.* Griffith, 8 C. D. p. 531, affirmed 4 A. C. 454.

irrespective of the question whether or not any damage would be occasioned to the inheritance by the threatened cutting (*a*), for the remainderman has a right to ask the Court to prevent damage to him which may prove irremediable (*b*).

Account.—Generally speaking, before the Judicature Act, 1873, no account was granted in equity unless the Court could also grant an injunction, except in cases in which there was no legal remedy. But now every remedy necessary for doing complete justice in an action in any Division of the High Court of Justice is provided by the Judicature Act, 1873, and each Division of that Court may, if it thinks fit, direct an account and grant damages, with or without an injunction (*c*).

Where an account of equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported upon the general principle that where a wrong had been committed the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of the damage (*d*).

Where ornamental timber has been actually felled by a tenant for life unimpeachable for waste, and the reversioner claims damage for such waste, the amount can only be measured by the damage done to the inheritance (*e*).

Action against Legal Personal Representatives of Waster.—An action of waste does not lie at the *common law* against an executor for waste committed by his testator. No action for waste—permissive or voluntary—as such, lies against the executor of a tenant for life, for "*actio personalis moritur cum persona*" (*f*). The executor was, however, liable at law where the proceeds of the waste had come into the hands of his testator who had committed the waste (*g*),

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(*a*) Bubb *v.* Yelverton, 10 Eq. 465.

(*b*) Baker *v.* Sebright, 13 C. D. p. 188.

(*c*) See Judicature Act, 1873, ss. 24, 25, and notes thereon in the Annual Practice, 1911. See also R. S. C. Order 15, and Newry *v.* Kilmorey, 24 L. T. 15, where an account was ordered before the preliminary question as to whether certain trees were ornamental had been tried: Bewes, p. 354.

(*d*) Leeds *v.* Amherst, 20 B. 239; as to inquiries and accounts in cases of mines, see Seton (1901), p. 545, Form 6.

(*e*) Bubb *v.* Yelverton, 10 Eq. 465.

(*f*) Williams' Executors (1905), pp. 1352, 1357; Hambly *v.* Trott, Cowp. 371; Turner *v.* Buck, 22 Vin. Abr. p. 523, pl. 9; Phillips *v.* Homfray, 24 C. D. 439; *Re* Cartwright, 41 C. D. 532.

(*g*) Williams' Executors (1905), pp. 1358, 1359; Hambly *v.* Trott, supra; Powell *v.* Rees, 7 A. & E. 426; Phillips *v.* Homfray, supra.

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and an account would lie in equity against the executor (*a*). But if there is a duty not to waste imposed by the instrument which creates the estate, the right of action which at common law would have died with the person is continued by 3 & 4 Will. 4, c. 42, s. 2, against the executor, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor shall have taken upon himself the administration of the estate and effects of such person" (*b*). Also, where there has been an injury to the plaintiff caused by the breach of an express or implied obligation, then the representative of such person will be liable on an *assumpsit*, and the maxim above cited will not apply (*c*).

Statutes of Limitation.—Where a tenant impeachable fells timber, the act being tortious, the remainderman having the inheritance might either, as has been stated, have brought an action of trover for the trees, which became his property from the moment they were felled (*d*) (despite the existence of an intermediate estate of freehold (*e*)), or an action for money had and received for the produce of the sale, or he might have instituted a suit in equity for an injunction and an account. The Statute of Limitations (*f*) would, however, if the owner of the inheritance were not under disabilities, begin to run from the time when the timber was felled, and after the expiration of six years his remedy would be barred (*g*).

If, however, the owner of the inheritance were an infant, time would only begin to run from the day he attained twenty-one years of age (*h*), and if the tenant for life who had committed waste became his administrator, the running of the statute would be suspended during the administration (*i*).

A claim in equity by a subsequent tenant for life against the estate of a deceased tenant for life who was also owner of the first

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(*a*) Winchester (Bishop of) *v.* Knight, 1 P. W. 406; Powell *v.* Aiken, 4 K. & J. 352; Lansdowne *v.* L., 1 Madd. 116 (equitable waste); Garth *v.* Cotton, supra.

(*b*) Woodhouse *v.* Walker, 5 Q. B. D. 404.

(*c*) See judgment of *Cotton*, L.J., Batthyany *v.* Walford, 36 C. D. 279. Cf. Blackmore *v.* White, (1899) 1 Q. B. 293; Galbraith *v.* Poynton, (1905) 2 K. B. 258 (cases as to permissive waste by copyhold tenant for life).

(*d*) Whitfield *v.* Bewit, 2 P. W. 239.

(*e*) Pigot *v.* Bullock, 1 V. 479.

(*f*) 21 Jac. 1, c. 16, 3 & 4 Will. 4, c. 27, 37 & 38 Vict. c. 57; see Dashwood *v.* Magniac, (1891) 3 Ch. p. 386.

(*g*) Seagram *v.* Knight, L. R. 2 Ch. 628; Higginbotham *v.* Hawkins, L. R. 7 Ch. 676; Dashwood *v.* Magniac, supra.

(*h*) Seagram *v.* Knight, supra.

(*i*) Ibid.

vested estate of inheritance, for acts of waste committed by him when tenant for life, only arises at his death, because there was nobody before that time entitled to bring an action in respect of the wrong; but the claim will be barred by the Statute of Limitations if not made within six years from that date (*a*).

It has been held that where *equitable waste* had been committed by a tenant for life, time does not begin to run against the tenant in tail in remainder until he comes into possession upon the death of the tenant for life, and that the statutory rule which now gives to him twelve years from the time when his title accrues in possession for bringing an action or suit for the property, is applicable to a claim for compensation for equitable waste as well as to a claim to the land itself (*b*). But this does not apply to legal waste (*c*).

It seems, however, that where a tenant for life impeachable for waste fells timber without authority, and invests the produce of the timber, and treats it as a trust fund, then a trust will arise; he will have constituted himself a trustee for the persons entitled to the estate, and no time will be a bar to the right of recovery against him (*d*).

After long delay in taking proceedings against a tenant for life for the waste, the Court will endeavour to deal liberally towards him (*e*).

Where no Statute of Limitation applies, directly or by analogy, equity refuses to act if the demand is stale and the plaintiff has been guilty of laches (*f*).

(*a*) Birch-Wolfe *v.* Birch, 9 Eq. 683; Dashwood *v.* Magniac, (1891) 3 Ch. p. 386.

(*b*) Leeds (Duke of) *v.* Amherst, 2 Ph. 117; and see Harcourt *v.* White, 28 B. 303, in which *Romilly*, M. R., appears to have considered that a bill for an account by a tenant for life in remainder could be brought at any time within twenty years after the falling in of the first life estate. The case was actually decided on the ground that the plaintiff was disentitled to relief by his acquiescence and delay. As to whether a bill of this character is sustainable at all by a tenant for life in remainder, see Birch-Wolfe *v.* Birch, 9 Eq. 683, and cases there cited; and see Darby & Bosanquet, 2nd edit., p. 416.

(*c*) See Seagram *v.* Knight, supra; Simpson *v.* S., 3 L. R. Ir. 65; Morris *v.* M., 3 De G. & J. 323; Dashwood *v.* Magniac, (1891) 3 Ch. p. 387.

(*d*) Seagram *v.* Knight, 3 Eq. 398, at p. 402.

(*e*) Bagot *v.* B., 32 B. 509.

(*f*) Harcourt *v.* White, 28 B. 303; and see further as to acquiescence, Leeds (Duke of) *v.* Amherst, 2 Ph. 117, 123, 124, 125; Gresley *v.* Mousley, 10 W. R. 222; Browne *v.* McClintock, 6 H. L. Cas. 456; Parrott *v.* Palmer, 3 My. & K. 643; Bewes, 359.

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